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Obama Proposes Swift Execution of Alleged 9/11 Conspirators

by Andy Worthington

In a leak that seems designed to gauge public opinion — and that of lawyers and other relevant parties around the world — anonymous officials in the Obama administration have told the *New York Times* about a proposal, in draft legislation to be submitted to Congress, which, as the *Times* put it, "would clear the way for detainees facing the death penalty [in Guantánamo] to plead guilty without a full trial."

Such a statement can only set alarm bells ringing, of course, as it clearly refers to the five alleged co-conspirators in the 9/11 attacks — Khalid Sheikh Mohammedt, Ramzi bin al-Shibh, Mustafa al-Hawsawi, Ali Abdul Aziz Ali and Walid bin Attash — and it indicates that, in order to avoid having to disclose distressing details of the torture to which these men were subjected, during their long years in secret CIA prisons, the Obama administration is wondering if allowing them to fulfill their stated aim of pleading guilty and becoming martyrs might be an effective way to dispose of what is probably the thorniest problem inherited from the government of George W. Bush.

It's tempting to take this view, of course, because the Obama administration has already demonstrated its unwillingness to thoroughly repudiate its predecessor's brutally innovative approach to detention and trials in terrorist cases; firstly by announcing its intention to revive the system of trials by Military Commission (the much-criticized "terror courts," conceived by Dick Cheney and his legal counsel David Addington, which were mired in incompetence and corruption throughout their seven-year history), and secondly by proposing to push for legislation authorizing the use of "preventive detention" for 50 to 100 of the remaining 239 prisoners. As I explained in an article three weeks ago, "Fundamentally, Guantánamo is a prison that was founded on the presumption that the Bush administration's 'new paradigm' [in the 'war on terror'] justified 'preventive detention' for life," and "to even entertain the prospect that a third category of justice (beyond guilt and innocence) can be conjured out of thin air without fatally undermining the principles on which the United States was founded is to enter perilous territory indeed."

These are not the only proposals put forward by the administration to facilitate the closure of Guantánamo by January 2010, as Obama promised on taking office. In fact, one prisoner — Ahmed Khalfan Ghailani, allegedly involved in the African embassy bombings in 1998 — has already been put forward for trial in a federal court in New York, demonstrating that the administration is capable of trusting the federal courts to successfully prosecute cases related to terrorism, as they have done on over a hundred occasions in the last 15 years (PDF). As I also explained in my article three weeks ago, I regarded the decision to charge Ghailani in a federal court "as a clear indication that trials in the U.S. court system are the only legitimate way forward, and that setting up a two-tier system — of federal courts on the one hand, and military commissions on the other — appears to be nothing but a recipe for disaster."

However, the leaked proposal to allow guilty pleas that could lead to swift executions has been raised specifically in connection with the military cmmissions, and it should be noted that, although it appears to be designed primarily to circumvent all mention of torture while reaching a verdict that the government thinks is appropriate, it is not quite as cynical as this analysis suggests.

Essentially, the question of whether guilty pleas are acceptable in the commissions was raised last year, during pre-trial hearings for the alleged 9/11 co-conspirators, when, as the *Times* described it, military prosecutors sought "to clarify what they view[ed] as an oversight in the 2006 law that created the commissions." This oversight — based, it should be noted, on the Bush administration's determination to fashion a legal system that was based neither on the federal court system nor on precedents in the military's own judicial system — centered on the fact that the Military Commissions Act of 2006 "did not make clear if guilty pleas would be permitted in capital cases," and the problem is that federal courts permit guilty pleas in capital cases, but the military's own judicial system, on which the military commissions are modeled, do not. As the *Times* explained, "Partly to assure fairness when execution is possible, court-martial prosecutors are required to prove guilt in a trial even against service members who want to plead guilty."

In December, when Khalid Sheikh Mohammed and his co-defendants announced that they wanted to plead guilty, all parties discovered that the Military Commissions Act had failed to provide clear rules determining the appropriate response. Military prosecutors argued that the men should be allowed to make a guilty plea, because Congress had a "clear intent" to allow them to do so, while their defense teams countered by stating that the trial should follow U.S. military law, and that therefore guilty pleas were not allowed.

In response to these conflicting opinions, the judge, Col. Stephen Henley, pointedly asked, "Can an accused plead guilty to a capital offense at a military commission?" and ordered both sides to provide written submissions, but, as the *Times* noted, he has not yet made a decision about how to proceed.

However, while this provides a context for the Obama administration's deliberations, lawyers are unimpressed by the nuances, and have seized on the leaked proposal as an indication that the administration is only concerned with securing guilty verdicts via the least problematical route. Denny LeBoeuf, a lawyer for the ACLU who works on issues relating to Guantánamo and the death penalty, told the *Times* that "Requiring prosecutors to reveal what they know about detainees and how they know it would cast light both on the interrogation techniques used against the men and the acts of terrorism for which they are facing death." LaBoeuf asked, "Don't we have an interest as a society in a trial that examines the evidence and provides some reliable picture of what went on?" David Glazier, a law professor in Los Angeles, who has studied the commissions, explained, "This unfortunately strikes me as an effort to get rid of the problem in the easiest way possible, which is to have those people plead guilty and presumably be executed. But I think it's going to lack international credibility."

Both made valid points about openness and international credibility. As David Seth asked in a Daily Kos article on Saturday, "How does dispensing with a full, albeit difficult trial for prosecutors and avoiding inquiries about extensive torture benefit the detainees? How does it assure that their guilty pleas are knowing, intelligent and voluntary?" Moreover, as the website Moon of Alabama explained, "military law forbids death penalties based solely on guilty pleas for two good reasons: the guilty plea could be coerced, [and it] could be a way for people who are not guilty to commit a form of suicide" (as happened in the case of the Beatrice Six , four of whom "falsely confessed in a rape and murder case and were later exonerated through DNA analysis").

These fears are especially true in the cases of two of the men. Lawyers for Ramzi bin al-Shibh have long claimed that they have doubts about his mental health. Noting, during a pre-trial hearing last September, that his medications include "a psychotropic drug prescribed to persons with schizophrenia," his lawyers stated that he "might not be competent to stand trial or able to participate in his own defense," and lawyers for Mustafa al-Hawsawi have claimed that his involvement in the rush to martyrdom is not voluntary because he has been bullied by Mohammed and at least two other co-defendants.

In addition, David Glazier's comments about "international credibility" only scratch the surface of what would undoubtedly be ferocious opposition to a trial that was perceived as providing a short-cut to convenient executions — even, for a moment, leaving aside other complaints that, if the men are guilty, then it would be far better to imprison them for life than to kill them, which, if their statements are to be believed, is the twisted "martyrdom" they seek.

However, what is most disappointing about the leaked proposal is a suggestion in the *Times* article that what is motivating the administration more than any other factor is the fear that establishing a case against these men in a conventional trial in a federal court might result in the Justice Department's inability to mount an effective case against one of them. As the *Times* described it, "Officials involved in the process said that lawyers reviewing the case have said that

federal-court charges against four of the men might be possible, but that the evidence might be too weak for a federal court case against one of the five, Walid Bin Attash."

As David Seth explained,

Usually, when "the evidence might be too weak for a federal court case" the prosecution recognizes that it cannot meet its burden of proof and it dismisses the charges. If the prosecution doesn't dismiss the charges, it's up to a jury or a judge to find the accused not guilty. And then? And then the accused goes free. Not so in Gitmo. Evidently in Gitmo, somebody who might be released because the case is "too weak for a federal court case" instead gets to plead guilty and be executed.

Seth added, "And to think that I was worried that those with weak cases would be 'preventively detained' forever and ever. Even that would be better than coerced guilty pleas followed by execution."

Sadly, I think that this analysis is accurate, and I can only hope that the leaking of the proposal — which has already provided yet another example of the administration's inability to act decisively to undo the crimes of the Bush years — is intended to test the waters, and that the feedback will so overwhelmingly negative that the government will accept that, in cleaning up its inherited mess, justice must not only be pursued without cutting corners, but must also be seen to be done, and must also involve an acceptance that the men it is dealing with are criminals — not "warriors" who stand somehow outside the law — and that, as in any criminal case, it is possible that not every prosecution will be successful.

If senior officials need any further reminders about the importance of operating within the bounds of the law, they should recall that one of the reasons that Col. Morris Davis, the former chief prosecutor of the commissions, resigned in October 2007 was the following exchange with William J. Haynes II, the Pentagon's chief counsel, which took place in August 2005.

According to Col. Davis, Haynes "said these trials will be the Nuremberg of our time" — a reference to the 1945 trials of Nazi leaders, "considered the model of procedural rights in the prosecution of war crimes," as an article in the *Nation* described them. Col. Davis replied that he had noted that there had been some acquittals at Nuremberg, which had "lent great credibility to the proceedings," and added, "I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process. At which point, his eyes got wide and he said, 'Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions.'"

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