Written by **Thomas R. Eddlem** on June 30, 2009

Obama Will Soon Propose Indefinite Detention Without Trial

The model legislation is based upon President Barack Obama's admission on May 21 that he would continue to detain suspects picked up in the "war on terror" indefinitely without trial, as President Bush had done. During a speech at the National Archives, Obama said of reviewing Guantanamo detainees:

> But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States.… They can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.

The Brookings model legislation fits Obama's criteron that the indefinite-detention policy not be "based simply on what I or the executive branch decide alone," and it supposedly has "fair procedures." However, the Brookings proposal would guarantee neither fairness nor compatibility with the U.S. Constitution.

The U.S. Constitution's Fifth Amendment requires that anyone detained by the U.S. government be granted a trial under either the criminal justice system or the military justice system (which today is represented by the Uniform Code of Military Justice):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law.

And the Sixth Amendment further guarantees all persons a trial by jury:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Note that both amendments use language that speak of all "persons," rather than "citizens." A popular error is that the U.S. Constitution applies only to U.S. citizens. The language of the Constitution is actually designed to limit the rights of the government, rather than to grant rights to individuals (which the Founding Fathers would have argued had been given by God to all men). Ironically, this mistaken argument that the U.S. Constitution applies only to American citizens has been made mostly by supporters of the neoconservative Bush administration, which also claimed the power to detain American citizens indefinitely without trial — and did detain some American citizens without trial until forced to try them by the courts.

The Brookings Institution introduces its "model legislation" with the statement that "a consensus is beginning to emerge in the public and political spheres concerning the non-criminal detention of terrorist suspects." Whenever leftist "think-tanks" start talking about "consensus" with neoconservatives (they don't view constitutionalists as being in the mainstream), watch out for your rights. The authors admit that "the developing consensus still has many dissenters," which is another way of saying that it's not a consensus, if you understand that the word "consensus" means unanimity of opinion.

The Brookings Institution's "consensus" proposal is based on certain assumptions — that the Fifth and Sixth Amendments to the U.S. Constitution need to be scrapped, and that detainees cannot be tried under either the U.S. military court-martial system (which allows for classified intelligence to remain classified) or the civilian criminal justice system:

> In addressing the design elements of a detention law, rather than arguing for one, we necessarily take as given several assumptions that many readers may still regard as premature. First, we assume that the laws of war do not offer an adequate legal framework for the detention of terrorist suspects.... Second, we assume that reliance solely on domestic criminal law to incapacitate transnational terrorists is untenable.

If the underlying assumptions of a proposal are that the methods allowable under the Constitution are not workable, you can safely assume that the proposal is fraught with danger to liberty. In sum, the Brookings proposal would work this way:

> Once the president identifies a non-U.S. person whom he reasonably believes poses an imperative threat to security, a term whose definition we discuss at length below, he may detain that person for up to 14 days before seeking judicial authorization for further detention [See Section 3(a)]. This initial period of detention will both allow the executive branch to disrupt terrorist activity and to gather evidence and consult with U.S. and foreign intelligence services for purposes of justifying longer-term detention. In the 14-day period, the president is entitled to hold the individual without publicly disclosing his apprehension. While controversial, this grace period is designed to allow for the apprehension of associates or other actions that might be frustrated

> should news of the capture leak out to confederates.
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> If the president seeks to continue to detain the individual beyond the initial 14-day period, he must petition the federal District Court for the District of Columbia to issue a detention order under the authority the model law grants it [See Section 3(d)]. If the district court approves the president's petition, the court issues an order authorizing the president to detain the individual for up to six months [See Section 4(e)]. This process may be repeated every six months until the president or the court determines that the individual no longer meets the criteria established in the law, or until the president transfers the individual for trial, release, or to foreign custody.

The Brookings proposal does have some improvements over the Military Commissions kangaroo courts that the Bush administration pushed through Congress, in that it guarantees detainees the same privileges afforded prisoners of war under the Geneva Conventions and does provide periodic judicial review. But in general, the proposal would eliminate or curtail most of the rights of the accused guaranteed by the U.S. Constitution:

• **No jury trial:** Jury trial rights, either in the form of civilian juries under the criminal system or in the form of military court-martial jury, are denied outright.

• **Lowered standard of proof for guilt:** The standard of evidence for conviction is lowered to "a preponderance of the evidence" from "beyond a reasonable doubt" in both criminal and military courts-martial.

• **Unreliable hearsay evidence allowed:** "The rules concerning the admissibility of evidence in civil or criminal trials shall not apply to the presentation and consideration of information at any evidentiary hearing under this section. To the maximum extent allowable under the Constitution, the District Court may consider any reliable and probative evidence, including hearsay from military, intelligence, and law enforcement sources that the District Court determines would be probative to a reasonable person. If any hearsay evidence is admitted, the covered individual shall be entitled to offer evidence impeaching the credibility of the declarant."

• **Trial in absentia acceptable:** "The District Court shall not require the presence of a covered individual detained outside the United States for the purpose of any proceeding under this section."

• **Presumption the government is correct:** "The District Court shall give deference to the identification of an organization [as terrorist] by the Director of National Intelligence "

• **Secret evidence in the trial:** "Classified information shall be protected and is privileged from disclosure to the covered individual [defendant] in proceedings "

According to press reports, President Obama is considering announcing this — or a similar plan — by executive order, even though the Brookings authors seek to have it enacted by the legislative process in order to give it the phony air of legitimacy. The Associated Press announced on June 27 that an executive order would avoid the process getting "bogged down" in legislation: "Under the proposal, detainees considered too dangerous to prosecute or release would be kept in confinement in the U.S. or possibly overseas, two administration officials said Friday. Otherwise, the White House could get bogged down for months seeking agreement with Congress on a new legal detention system."

While there are a few Americans who will take false comfort in the legislation in that it nominally prohibits the detention of American citizens (and legal immigrants) without trial, thoughtful analysts will be thoroughly alarmed by the proposal. Regardless of how President Obama chooses to adopt this

(or a similar proposal), whether by executive order or through the legislative process, the key danger to American citizens is that such proposals reject outright explicit provisions of the U.S. Constitution and the Bill of Rights as a legal force. Without the backing of the Fifth and Sixth Amendments, such a legislative prohibition against detaining U.S. citizens becomes a precedent for the next assault on civil liberties. Once Americans have accepted that their government is no longer limited by the U.S. Constitution, then any kind of subsequent assault on civil liberties becomes possible … and even likely.

Photo: AP Images