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The Suspension of Habeas Corpus in America

Obama: a President Who Places Himself Above the Law.

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Global Research, June 08, 2013
Mondialisation.ca (French) & Global Research 5 November 2012

Region: USA
Theme: Law and Justice

Far from having broken with his Republican predecessor, Democratic President Barack Obama has now reinforced the law of exception that he criticised when he was a senator. It is now possible to deprive United States citizens of their fundamental rights because they have taken part in armed action against their own country, but also when they take a political position favourable to those who use military action to resist the Empire. Worse – Barack Obama has added to the law John Yoo's "Unitary Executive theory," which puts an end to the principles of the separation of powers as defined by Montesquieu. The security policy of the United States President now escapes all control.

The Presidential elections, and the game of a possible changeover between Democrats and Republicans, cannot hide a marked tendency towards mutation in the form of the United States executive, regardless of the colour of the Presidential ticket. And it seems that the most significant change in the law has taken place under President Obama.

Barack Obama was elected by evoking a future based on respect for the fundamental rights of individuals and nations. But assessment of his presidency reveals an entirely different picture. The visible aspects of this, such as the failure to close down Guantánamo Bay, the maintenance of exceptional military tribunals or the practice of torture in Afghanistan, are only the tip of the iceberg. These elements only allow us to note the continuity between the Bush and Obama administrations. However, there has been such reinforcement of the previous political structure that the form of the state has now changed, creating a hitherto unseen modification of the relation between the authorities and the citizens of the United States.

The possibility of treating US citizens as foreign 'terrorists' has been a constant objective of the government executive since the attacks of 9/11. By the new prerogative which has been awarded him by the National Defense Authorization Act – that of being able to nullify Habeas Corpus for US citizens and not just for foreign nationals – the Obama administration has achieved what the previous government had only planned but never instituted.

End of Habeas Corpus for foreigners

The Patriot Act, which became effective on the 26th October 2001, already authorised indefinite detention without indictment for foreigners suspected of having links to terrorist organisations.

In order to finally bring these prisoners to justice, special tribunals and military commissions were created by Presidential decree, the Military Order of 13th November 2001 [1]. This

executive act enables the trial, by these military tribunals, of foreigners suspected of being in contact with Al Qaeda, or having “committed, prepared or helped to devise acts of international terrorism against the USA”.

The state of war was invoked to justify the institution of these laws, which are so harmful to liberty that they even violate the Military Code itself. These tribunals were set up to judge foreigners suspected of terrorism, and no proof which could invalidate such charges is admissible by either civil or military tribunals.

By voting for the Military Commissions Act [2], in September 2006, the Congress chambers legitimised the military commissions. The law considerably extends the notion of “illegal enemy combatant”, which no longer describes only foreigners captured on the field of battle, but also foreigners or US citizens who have never left their country of origin. While US citizens indicted on the basis of this notion of illegal enemy combatant must be deferred before civil courts, it is not the case for foreigners, who may be judged by military commissions.

In these exceptional courts, defendants do not have the right to choose their own lawyer – instead, the defense lawyer will be a military person designated by the President, who also designates the military judges and determines the degree of “physical coercion” that can be applied to the prisoner. The lawyer also has no access to evidentiary elements of the case which may be classified as “secret”.

Inscription of the ’enemy’ in criminal law

The Military Commissions Act introduces the notion of enemy into criminal law. It gives the President of the United States the power to so designate not only his own citizens, but also any nationals of countries with which the USA is not at war. A person may be prosecuted as an “illegal enemy combatant” not on the basis of proof, but simply because they have been labelled as such by the executive of the United States. Integrated in the law, the charge no longer refers only to a state of emergency, like the Military Order of 2001, but becomes permanent. The inscription of this anomie into the law establishes the exception as a constant. It mutates the judicial and political order by creating a purely subjective law which is at the entire discretion of the executive.

On the 28th October 2009, President Obama signed the Military Commissions Act of 2009 [3] which amended the Military Commissions Act of 2006. The reform was formally necessary for the new administration, because in 2006, Barack Obama was one of 34 senators who opposed the old legislation.

The new law no longer mentions ’illegal enemy combatants’, but “hostile non-protected enemies”. However, the main thrust remains – the inscription of the notion of ’enemy’ into criminal law, and thus the fusion of criminal and military law. But the term “belligerent”, which characterises the notion of ’enemy’, widens the field of incrimination. It no longer concerns only combatants, but also “persons who are engaged in conflict against the USA”. The new definition also applies not only to people captured on or near a field of battle, but also to any individuals who act or even express solidarity with those opposing the US armed forces, or even simply the aggressive policies of the US government.

The end of Habeas Corpus for US citizens

The National Defense Authorization Act [4] signed by President Obama on the 31st December 2011 authorises the indefinite detention, without trial or indictement, of any US citizens designated as enemies by the executive. The individuals concerned are not only those who have been captured on the field of battle, but also those who have never left the United States or participated in any military action. The law concerns any person designated by the administration as "a member of Al-Qaeda or the Taliban, and who takes part in hostile action against the United States", but also anyone who "substantially supports these organisations". This formula enables an extensive and flexible use of the law. For example, it would enable the government to lash out at any civil defence organisations who seek to protect the constitutional rights of US citizens who have been designated by the executive as enemies of the USA.

Primacy of values over the law

By signing this document, Obama has declared that his administration will not authorise the unlimited military detention without trial of US citizens, stating that this possibility would not be contrary to US law, but only to "American values". It is in the name of these values that he will refrain from using the opportunity offered by the law, but not because this form of imprisonment would be unconstitutional. He confirms that the National Defense Authorization Act does not in fact provide any new prerogatives. The President has had these extraordinary powers since the 14th September 2001, when Congress adopted a resolution stipulating: "that the President is authorised to use all necessary and appropriate force against nations, organisations or persons who have planned, authorised, committed or assisted the terrorist attacks of the 11th September 2001…." So, in opposition to the framework of the text, he aligns himself with G. Bush's statement that the agreement enabling the President to engage force offers him unlimited authority, in space and time, to act against any potential aggressor, and not only those implicated in the attacks of 9/11.

The authorisation itself is preceded by a foreword stating: "it is recognised that the President has the authority under the Constitution to dissuade and defend against acts of international terrorism against the United States". G. Bush regularly used this phrase to justify the violations of constitutional rights of US citizens. President Obama has adopted the same interpretation in order to deny the innovative nature of a law which enables him to do away with Habeas Corpus for any US citizen.

A President who places himself above the law

Here, primacy no longer resides in the legal text, but in presidential initiative. It's entirely at his own discretion that Obama may choose to refrain from using the authorisation, conferred by the law, to imprison US citizens indefinitely and without indictment. In the same way, he opposes the obligation for military detention of foreign terrorists. Speaking of this, he confirms that his administration will "interpret and apply the clauses described below in such a way as to preserve the flexibility upon which our security depends, and to maintain the values on which this country is founded". Thus he has deliberately side-stepped the rule that once he has signed a text of law, the President will apply it loyally. Obama has reversed the restrictive character of the legal text in favour of Presidential freedom. In the same way, the concept of "American values" takes precedence over the law.

If the National Defense Authorization Act only serves to ratify the prerogatives already possessed by the executive, the problem only concerns the modalities of implementation.

The President must not be limited in the fight against terrorism. For Obama, the disputed articles are unconstitutional, not because they concentrate power in his hands, but because they limit his field of action. The contested clauses institute military detention, which limits the required action "flexibility" on the part of the administration – for example, the possibility of detaining foreign prisoners in CIA camps. The articles in question would "contravene the principle of the separation of powers."

A reversal of the principle of separation of powers

Obama has reversed the method of organisation which was handed down by the Age of Enlightenment. For Montesquieu [5], the objective was to prevent the concentration of political power in a single authority. In order to do this, the powers balance and limit each other. Obama, on the contrary, has opened a breach in the exercise of state power in such a way that the legal authorities can no longer exercise control over the power of the executive. The separation of powers has been abandoned in favour of an absence of limits for Presidential action. This form of organisation is valid for a nation in a state of open war, whose existence is threatened by an external power. The Bush or Obama administrations consider that the authorisation granted by Congress in 2001 for the use of force against the authors of the 9/11 attacks is the equivalent of a declaration of war, like those which were voted during the Second World War. The field of application is however much wider, since the authorisation of 2001 permits the use of force not only against other nations, but also against organisations or even simple individuals.

The National Defense Authorization Act operates a mutation of the legal notion of hostility. Its declared aim is conflict against non-specified adversaries who do not threaten the integrity of the national territory. The struggle against terrorism provides a constantly renewed image of the enemy. It declares a permanent state of war, unbounded by frontiers, which blurs the distinction between interior and exterior, since it does not distinguish between US citizens and soldiers of a foreign power. The political and legal structure, built from this new and asymmetric war, reverses the form of the rule of law. The law is no longer a reduction of the exception, but its continual extension.

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