Pentagon plans military tribunals for Guantánamo prisoners

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Deputy Defense Secretary Paul Wolfowitz, in a July 7 order, established a "Combatant Status Review Tribunal" to hold summary hearings for 594 men from 40 countries who have been imprisoned for as long as two-and-a-half years at the Guantánamo Bay Naval Base in Cuba.

The action responds to two Supreme Court rulings issued June 28: *Rasul v. Bush*, in which a majority of justices ruled that the Guantánamo prisoners can challenge the legality of their confinement by filing habeas corpus petitions in US courts, and *Hamdi v. Rumsfeld*, a fractured decision mandating that prisoners detained by the Bush administration as "enemy combatants" in the "war on terror" must be given some form of due process, including a hearing before a "neutral party." (See "The meaning of the US Supreme Court rulings on 'enemy combatants'")

While widely presented as a defeat for the Bush administration, the controlling four-justice plurality opinion of Associate Justice Sandra Day O'Connor in *Hamdi* included provisions inimical to constitutionally guaranteed civil liberties. O'Connor accepted the Bush administration's position that its open-ended and, for practical purposes, perpetual "war on terror" gives the president and the executive branch sweeping powers to jail anyone they accuse of being an "enemy combatant," including US citizens. The ruling accepted the administration's position that such "enemy combatants" are not entitled to the protections either of the Geneva Conventions on prisoners of war or the full due process rights accorded to criminal defendants in the US courts.

O'Connor suggested that military tribunals might be acceptable forums for hearing habeas corpus challenges from those being held as "enemy combatants," including Hamdi, who is a US citizen, and further declared that the burden of proof in such hearings could rest with the prisoners rather than the government.

Neither of the June 28 rulings mandated the release of any of the prisoners being held as "enemy combatants," and O'Connor in her opinion left it up to the executive branch to fashion a procedure that would satisfy the Court's requirement for a truncated form of due process.

Taking advantage of the leeway provided in O'Connor's opinion, Wolfowitz issued an order to hold tribunals solely to determine whether the Guantánamo detainees are "enemy combatants," with provisions that fall far short of any legitimate definition of due process. (The order can be read at http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf)

The Alice-in-Wonderland character of the tribunals established by Wolfowitz's order is revealed in its opening paragraph, which states that "each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." Thus the order defines the tribunals in a manner highly prejudicial to the claims of the petitioners. In effect, it declares them to be a forum to uphold the determination already made by the government.

Wolfowitz appointed Secretary of the Navy Gordon England as the "implementing authority." England has no history of military service. He joined the Bush cabinet in 2001 after a career as a high level executive with General Dynamics Corporation, a leading defense contractor for the Pentagon.

England, in turn, announced at a July 9 news conference that James McGarrah, a rear admiral in the Navy Reserve, will serve as the "convening authority." McGarrah will appoint three tribunals, each consisting of three military officers. Only one of the three officers is required to be a "judge advocate," i.e., a military officer with legal training.

There is little about these tribunals that distinguishes them from the procedures of the English Star Chamber or any of the other great judicial travesties in world history. One could start with the fact that the tribunals will be held in secret. According to England, the Department of Defense will not even release the names and nationalities of the detainees.

Detainees will not be given access to lawyers for advice or representation. Instead, McGarrah—who is already functioning as the judge and prosecutor—will appoint non-lawyers from the military to serve as the prisoners' "personal representatives." England explained why: lawyers are required by professional ethics to maintain client confidences, and "We want all the facts to come forward, so we don't want client privilege where some data is not discussed."

The detainees are not assured of access to all the evidence against them. A detainee's "personal representative" will be

allowed access only to "reasonably available information" that the Department of Defense deems relevant. Only information not "classified" can be shared with the detainee himself.

Detainees will be allowed to call witnesses only if their request is deemed "reasonable" by the tribunal and the witnesses are determined to be "reasonably available." England said at last week's press conference that he doubted many such requests for witnesses would be granted, because Guantánamo lacks "hotels," "restaurants" and "commercial air travel."

Instead, the detainees would have to present written statements from witnesses, "preferably under oath." How they are supposed to collect affidavits from their Guantánamo cells and without access to lawyers is not clear.

Wolfowitz's order specifically relieves the tribunals of any obligation to follow accepted rules of evidence. "Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it."

Presumably, this "helpful information" will include confessions and other dubious statements extracted from Guantánamo prisoners by the illegal and abusive interrogation techniques to which they have been subjected for more than two years. (See "Former prisoners demand release of Guantánamo Bay videotapes")

There has been virtually no protest from the American media or the so-called liberal establishment over this plan to place the detainees at the mercy of the very same military authorities whose use of interrogation methods that conform to the definition of torture under international law has been amply exposed over the past several months.

The tribunals will ignore the "presumption of innocence" at the foundation of Anglo-American law. Instead, Wolfowitz's order states that the detainee is presumed to be an "enemy combatant" and has the obligation to prove the military wrong. The burden of proof to uphold the military's classification is the low "preponderance of the evidence" standard used in the US for civil damages cases like automobile accidents, rather than the standard of proof "beyond a reasonable doubt" necessary to convict someone of a crime.

Detainees are not even guaranteed the right to attend their own hearings. Wolfowitz's order allows their exclusion for "matters that would compromise national security if held in the presence of the detainee."

Finally, it is not even clear whether all the Guantánamo prisoners will have the right to participate in these kangaroo court proceedings. Wolfowitz's order is restricted on its face "to foreign nationals held as enemy combatants *in the control of the Department of Defense*" at Guantánamo Bay. (Emphasis added). This prescription excludes prisoners of the CIA and other US agencies. There have already been media reports of detainees being taken "off the books" of the Department of Defense and transferred to the nominal custody of the CIA to avoid bringing them before the tribunals.

England said that the tribunals will hear cases from as many as four detainees a day, six days a week. He estimated that all six hundred cases will be resolved within four months.

It appears that the cases are being be rushed through the tribunals to enable the Bush administration to respond to habeas corpus petitions filed by family members and others for the Guantánamo detainees with the claim that the prisoners have already received their "due process."

Criticism of Wolfowitz's order by advocates for the detainees was immediate and strident. In a press statement released from its London headquarters on July 8, Amnesty International charged that its provisions "show contempt for basic human rights standards." Amnesty International spokesperson Alistair Hodgett added, "It really is a bizarre suggestion that this is in any way a fair process to determine the freedom or detention of an individual."

Rachel Meeropol of the Center for Constitutional Rights, the legal foundation which filed several Guantánamo detainee habeas corpus petitions and successfully argued them to the Supreme Court, called the proposed procedures "inadequate and illegal."

Not among the critics, however, were the editorial writers for the erstwhile liberals of the *Washington Post*. A July 9 editorial stated, "There is only one big problem with the order the Pentagon issued this week establishing military tribunals to hear challenges to its detentions at Guantánamo Bay, Cuba: It comes 2 1/2 years too late."

Apparently untroubled by "a presumption in favor of the government's evidence" for a man facing a virtual life sentence, with "a 'representative' but not a lawyer," and the likelihood that "in most cases, the hearings may validate the detention decisions made more than two years ago," the *Post* praised Wolfowitz's order as going "a long way toward solving Guantánamo's legal problems."

Also notably absent from the ranks of the critics were the nominal opponents of the Bush administration within the Democratic Party, further exposing the fact that the attacks on democratic rights will deepen regardless of which major party wins the November presidential election.