After Supreme Court ruling against military commissions

White House, Congress seek to legalize kangaroo courts, torture

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White House officials and congressional leaders have begun intensive discussions on how to evade the Supreme Court's June 29 ruling in the *Hamdan* case, which struck down the Bush administration's military commissions for prisoners at the Guantánamo Bay detention camp and said that the prisoners were entitled to humane treatment under Article Three of the Geneva Conventions.

At Senate and House committee hearings this week, Justice Department and Pentagon officials urged Congress to pass legislation that simply ratifies the military tribunals as they were established under an executive order issued by Bush four years ago. At the same time, leading senators held talks at the White House on the procedures to be employed at the tribunals, which would include hearing evidence obtained from "coercive interrogation," a euphemism for torture.

As in all its efforts in the so-called war on terror, the Bush administration says one thing and does the opposite. Officially, the White House has publicly submitted to the authority of the Supreme Court, accepting the 5-3 decision in *Hamdan*.

The most publicized gesture in this direction came in a memorandum sent out by Deputy Defense Secretary Gordon England to all US military commands on July 7, and released to the media on July 11. The memo reports the high court's ruling that "that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al-Qaeda" and that the "military commission procedures" ordered by Bush were not consistent with that article.

Also on July 11, in response to press questions about the Pentagon memo, the White House released a statement that Bush would withdraw part of the executive order he signed in early 2002 declaring that the Geneva Conventions did not apply to suspected Al Qaeda detainees. The statement said: "As a result of the Supreme Court decision, that portion of the order no longer applies. The Supreme Court has clarified what the law is, and the executive branch will comply."

But what the administration gave with one hand it took back with the other. At a hearing before the Senate Judiciary Committee Tuesday, two high-ranking officials suggested that the *Hamdan* decision was wrong and that Congress could effectively negate it by adopting legislation to authorize the same military tribunals that Bush established by decree, with the same procedures rigged to ensure conviction: hearsay testimony, the use of testimony extracted through torture, and provisions to withhold evidence from prisoners and their lawyers, and even to bar prisoners from attending their own trials.

Steven Bradbury, acting assistant attorney general in the Justice Department's Office of Legal Counsel, and Daniel Dell'Orto, principal deputy general counsel for the Department of Defense, adopted a hard-line stance against any suggestion that the Supreme Court decision required a legal process for prisoners at Guantánamo and other prisons that was substantially different from the military tribunals ordered by Bush.

They flatly rejected suggestions that military court-martial procedures could be adopted instead, with Bradbury calling them "wholly inappropriate for the current circumstances and ... infeasible for the trial of these alien enemy combatants."

A court martial is hardly a model of legal fairness—the jury, for instance, consists of military officers selected by the high command, meaning that the prosecution chooses the jury (and also exercises command authority over them). But a court martial does provide significantly more due process than the kangaroo courts proposed by Bush, including a ban on testimony obtained through coercion or torture, and a requirement that the defendant be allowed to confront his accusers and challenge the evidence against him.

Bradbury told the Senate panel that Article 3 of the Geneva Conventions was "inherently vague" and could be interpreted to sanction current US government practices. He also indicated that Article 3 would have no effect on the notorious policy of "rendition," in which prisoners captured by the military or CIA are flown to third countries where they can be imprisoned and interrogated without reference to US laws banning torture and requiring legal due process.

Before the House Armed Services Committee the next day, the same two officials found wide sympathy from House Republicans for legislation authorizing the military tribunals in exactly the form prescribed by Bush. Candace Miller, a Republican from Michigan, suggested, "We could just ratify what the executive branch and the DOD [Department of Defense] have done and move on." She called the *Hamdan* decision "incredibly counterintuitive."

"That would be a very desirable way to proceed," responded Dell'Orto. He added, "I don't want a soldier when he kicks down a door in a hut in Afghanistan searching for Osama bin Laden to have to worry about . . . whether he's got to advise them of some rights before he takes a statement. I don't want him to have to worry about filling out some form that is going to support the chain of custody when he picks up a laptop computer that has the contact information for all manner of cells around the world, while he's still looking over his shoulder to see whether there's not an enemy coming in after him."

This caricature has been cited endlessly in recent days by right-wing politicians and media pundits, but it has nothing to do with Article Three of the Geneva Conventions, which requires, among other things, that detainees "shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." It also requires that prisoners be tried and punished, not by ad hoc tribunals such as Bush proposes, but "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Dell'Orto again rejected the use of courts martial, citing the extensive procedural requirements of the Uniform Code of Military Justice. He said that to safeguard national security, it would be necessary to amend 73 of the rules of evidence and 145 out of 150 articles in the code overall, effectively "gutting" it.

Several Senate Republicans, including Judiciary Committee Chairman Arlen Specter of Pennsylvania, John McCain of Arizona, and Lindsey Graham of South Carolina—who is also an appeals court judge in the Air Force Reserve—have postured as advocates of due process and opponents of torture. Graham had a series of well-publicized clashes with Bradbury and Dell'Orto at Tuesday's Judiciary Committee hearing.

But Graham is simply providing political cover for the administration, seeking to help extricate it from the political disaster of Guantánamo while continuing to detain, abuse and torture prisoners at will. This was evident in an interview with the *New York Times* published July 13, in which he suggested that Congress's task was "giving definition" to Article 3, whose provisions on the treatment of prisoners needed to be "reined in."

According to the *Times*, Graham warned that the literal application of Article 3 "would make death penalty crimes of current interrogation techniques, including keeping detainees awake and forcing them to sit in extremely hot or cold cells—methods he referred to as 'things that are not torture but are aggressive.'"

"What we need to do is take the ruling of Hamdan and define it so that people will not be unfairly prosecuted because they didn't know what was in bounds or not," Graham told the newspaper.

Graham, Bradbury and Dell'Orto have each suggested that the language drafted by McCain for an amendment on the treatment of detainees adopted last December—and rejected by Bush in a signing statement attached to the bill—would be preferable to the direct application of the Geneva Convention language. "Common Article Three with its language goes well beyond the McCain standard," Graham told the *Times*.

Bradbury emphasized in his testimony the necessity to use evidence extracted from prisoners using a variety of coercive techniques including those, like waterboarding, which are flatly condemned as torture under international law. "We do not use as evidence in military commissions evidence that is determined to have been obtained through torture," he claimed, "But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I don't think you can make an absolute rule."

Some press reports have provided details of the deviations demanded by the Bush administration from the text of Article 3, including dropping the prohibition of "outrages upon personal dignity," which would apply to nearly every prisoner held at Guantánamo Bay and the Bagram prison in Afghanistan.

Senate Democrats have lined up behind Republican "critics" of the Bush administration like Graham and McCain. Rather than defending the *Hamdan* decision and its clear delineation of constitutional and democratic principles, they have joined in the search for a more effective way to continue the Bush administration's policy of indefinite detention and abuse, by putting it on a sounder legal footing.

Senator Charles Schumer of New York, in a television interview Sunday, summed up the bipartisan consensus in support of the "war on terror," saying, "The issue we believe is most pressing is not the balance between security and liberty, where on issues like this the parties are relatively close, but on competence. They just don't do it right, wherever they go. By their stubbornness and refusal to work with Congress, they've made us worse off in Guantánamo today."

In a memo to Senate Democrats, Minority Leader Harry Reid suggested that the principal failing of Bush's military commissions was not that they were anti-democratic and rigged, but that they haven't tried or convicted any of the Guantánamo prisoners. "Bush Republicans, despite the tough talk, have failed to come up with a working system to keep America safe," he wrote.

An increasingly common theme in the discussions on Capitol Hill and in the media is the possibility that US leaders could face war crimes prosecutions as a result of the principles laid down in the Hamdan decision. Since the Supreme Court ruled that the Geneva Conventions apply with the force of law, and violation of the Geneva Conventions is by definition a war crime, this fear is by no means misplaced. The war criminals are looking over their shoulders with some concern.

In addition to Graham's warning that Article 3 would make current US interrogation techniques "death penalty crimes," another top Republican senator, Intelligence Committee Chairman Pat Roberts, suggested that Congress should "clarify" the language of the Geneva Convention against inhumane treatment of prisoners. Otherwise, he claimed, interrogators who obtained information leading to the killing last month of Abu Musab al-Zarqawi in Iraq "could conceivably be held accountable" for war crimes.

Roberts's suggestion is an attempt to stampede public opinion into supporting repudiation of the Geneva Conventions with the claim that rank-and-file soldiers could be subject to criminal prosecution. What is taken far more seriously in ruling circles, however, is the prospect that the decision-makers in the "war on terror" could ultimately face an international tribunal.

The *Wall Street Journal* spelled this out in its editorial July 13 denouncing the Pentagon memorandum accepting Article 3 as the basis for the treatment of alleged Al Qaeda prisoners. Denouncing both the Supreme Court majority and the Pentagon's public acquiescence to court authority, the *Journal* complained, "we can't recall another situation in which Presidential power was so freely handed away... the Bush Administration should have thought carefully about Hamdan and interpreted it as narrowly as possible."

Then the newspaper warned, "Already, in the wake of this reversal, the Bush Administration's critics are talking about the 'illegality' of its previous failure to abide by Geneva rules. We'll predict that it won't be very long until some European magistrate indicts Donald Rumsfeld or National Security Adviser Stephen Hadley or some other US official for 'war crimes' for this failure. The Pentagon's new memo won't be much of a defense." To forestall that possibility, the *Journal* argued, Congress should pass a law repudiating the application of Article 3 of the Geneva Conventions to the United States.