

Bush seeks to extend Guantánamo procedures to American citizens

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In draft legislation prepared in response to last month's Supreme Court decision against the use of military tribunals for US prisoners at Guantánamo Bay, the Bush administration proposes to extend the practice of indefinite detention and summary trial by military commissions to include American citizens.

According to press accounts Friday, based on leaks from those with access to the draft, the bill would essentially legalize the military tribunals in the form decreed by Bush in 2001, with only minor changes, while for the first time making US citizens as well as foreign nationals subject to such summary proceedings.

The tribunals, commissions of active-duty military personnel under orders of the president as commander-in-chief, would have the power to impose death sentences based on secret evidence and in proceedings from which the defendants could be excluded whenever military judges decided this was "necessary to protect national security."

The *Washington Post* reported that the draft legislation had initially reaffirmed the 2001 Bush order that limited the jurisdiction of the military commissions to "alien enemy combatants." This language was crossed out, the newspaper said, and replaced by language giving the commissions authority to try anyone "engaged in hostilities against the United States or its coalition partners," regardless of nationality.

When American John Walker Lindh was captured in Afghanistan in 2001, where he served as a member of the Taliban-controlled armed forces, he was not taken to Guantánamo because he was a US citizen. His case was tried in federal court, which provided him greater legal protections, ultimately making it necessary for the Bush administration to accept a plea bargain and a 20-year prison term rather than seek a death sentence. If the proposed draft legislation had been in effect, Lindh could have faced a military tribunal.

Other provisions in the draft legislation would permit the use of hearsay evidence, eliminate the right to a speedy trial (essentially sanctioning indefinite detention without a trial), and permit the use of classified evidence that would be provided to defendants only in summary form. Defendants and their civilian attorneys could be excluded from the proceedings at the discretion of the judge, with the prisoner represented only by a military attorney who, as a serving officer, must obey presidential authority.

Instead of a unanimous jury verdict, a two-thirds majority would suffice for conviction, and unanimity for the death penalty, which would have to be confirmed as well by the president. As in the current system, outlawed by the Supreme Court's *Hamdan* decision, prisoners could be detained, even if acquitted, until "the cessation of hostilities." Given the Bush administration's expansive definition of the "war on terror," this means indefinitely.

According to language in the draft legislation quoted by the *New York Times*, the measure rejects a system based on courts martial as "not practicable in trying enemy combatants," in part because such proceedings would exclude "hearsay evidence determined to be probative and reliable."

Evidence obtained through torture would not be admissible, but this prohibition is largely gutted by a provision that military judges may accept testimony obtained through "coercive interrogation," a label which the Bush administration uses to describe methods, such as water-boarding, that the rest of the world regards as torture.

The bill was drafted without consulting with lawyers from the Judge Advocate-General (JAG) corps, because these career military prosecutors and judges have insisted on using the court martial system as a basis for trying prisoners, and on upholding the applicability of the Geneva Conventions to all prisoners captured by the US

military. The JAGs, as well as the military defense lawyers who fought and won the *Hamdan* case, have warned that by carving out an exception to the Geneva Conventions, the US government would endanger American soldiers captured in current and future wars.

In addition to overturning Bush's 2001 order for military commissions, the *Hamdan* decision upheld the applicability of Common Article Three of the Geneva Conventions to all prisoners captured by the US government, whether they are recognized as POWs or treated as "illegal combatants." Common Article Three bans "outrages upon personal dignity, in particular humiliating and degrading treatment" of detainees, a description that would apply to nearly every prisoner held at Guantánamo Bay, Abu Ghraib, Bagram air base in Afghanistan, and secret CIA-run prisons elsewhere.

The legislation drafted by the White House would effectively override that element of the high court decision, by declaring that the Geneva Conventions "are not a source of judicially enforceable individual rights." This means that individual prisoners would lose the right to file lawsuits against the violation of their rights, limiting such standing to governments. There are few governments that would risk a conflict with the Bush administration by filing a US court challenge on behalf of prisoners labeled as "terrorists."

Congressional approval of the bill in the specific form drafted by acting assistant attorney general Steven G. Bradbury is uncertain, but one key senator, Republican Lindsey Graham of South Carolina, called it "a good start." Graham, himself a member of JAG corps in the reserves, said he supported the use of hearsay evidence and the exclusion of prisoners from their trials, so long as these actions were subject to appeal.

The draft legislation also seeks to forestall another anticipated consequence of the *Hamdan* decision: that US officials could face legal liability for war crimes charges because they authorized the violation of the Geneva Accords. Under the 1996 War Crimes Act, violations of the Geneva Conventions are crimes against the United States and the perpetrators can be subject to the death penalty if prisoners die as a result of their actions.

The 1996 law was drafted by a right-wing Republican and passed by the Republican-controlled Congress to pander to the POW-MIA (prisoner of war-missing in action) lobby in the US. It initially targeted Vietnamese government officials deemed responsible for the torture and death of American prisoners during the Vietnam War. By an irony of history, this law could now subject high

Bush administration officials—Bush himself, Cheney, Rumsfeld, Rice and others—to criminal sanctions for the deaths of prisoners held by the US government in Iraq, Afghanistan and elsewhere.

As the *Washington Post* summed up the matter in a front-page analysis published July 28, "An obscure law approved by a Republican-controlled Congress a decade ago has made the Bush administration nervous that officials and troops involved in handling detainee matters might be accused of committing war crimes, and prosecuted at some point in US courts." The newspaper reported that Attorney General Alberto Gonzales has spoken privately to congressional leaders about the need for "protections" against such an eventuality.

The bill seeks to solve the problem by declaring that a law passed last year on humane treatment of US detainees—drafted by Senator John McCain and added to a military appropriations bill over White House opposition—would "fully satisfy" the requirements of Common Article Three.

The bill would also provide that the 1996 War Crimes Act applies only to violations of the Geneva Conventions as interpreted by the US government, not the international community, effectively gutting the conventions as an instrument of international law.

Given that the decision to prosecute rests with the US Department of Justice, headed by Bush crony Gonzales, there is no possibility that any Bush administration official will soon face charges for violation of the War Crimes Act. But the concern over their legal vulnerability is nonetheless real. The war criminals in the White House and Pentagon are well aware of the mass opposition to the war in Iraq, both internationally and increasingly in the United States, and they are looking nervously over their shoulders.



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