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“Senator McCain’s Compromise: Unconscionable Military Trials”

Is America looking for a way to create martyrs and push more angry recruits into Al Qaeda’s bloody embrace? If so, our solution is at hand: put prisoners at Guantanamo to death, after running them through the so-called trials by military commission now jointly proposed by President Bush and Senator John McCain.

Until a few days ago, it appeared that Senator McCain, together with Senators John Warner and Lindsay Graham, might stand up to the President. They proposed an alternative bill for military commission trials that cured many of the defects of the President’s bill.

But political pressure on the three Republicans was intense. Their party fears losing control of Congress in November, and the President’s strategy for electoral salvation is to run against Al Qaeda. Moreover, McCain plans to run for President in 2008. Dimming his party’s electoral odds – not to mention being accused of coddling Al Qaeda – could ruin his chances in Republican primaries.

There was reason to worry, then, when a deal with the White House was announced late last week. The three Republicans claimed victory. They had salvaged America’s honor and preserved the Geneva Conventions intact. Americans in the military would no longer have to worry, claimed the Senators, about setting a negative example that could be used by our enemies to justify mistreating Americans captured in the future.

McCain and his colleagues did manage to win two key concessions. First, no defendant can be convicted in military commission trials on the basis of evidence he has not seen. Second, in addition to excluding evidence obtained by torture, no statement taken by means of “cruel, unusual or inhumane” interrogation methods will be admissible in evidence – *if* the statement was taken since last December.

The problem is that nearly all statements military prosecutors will likely offer in evidence at Guantanamo were already taken *before* last December. Many were induced by inhumane or degrading means that government lawyers argue fell short of outright torture. For example, interrogators unmuzzled snarling dogs against naked prisoners, who were hung from the wrists for hours on end in extreme cold, while deprived of regular sleep cycles by being awakened every 15 minutes for weeks at a stretch.

Americans would rightly protest if our service members were subjected to the same mistreatment by their captors, and even more if any resulting statements were used to sentence them to death.

Yet that is precisely what the Bush-McCain compromise would allow. So long as a military judge finds that the statement is reliable and probative and its admission serves the interests of justice, statements taken before last December may be admitted even if they were taken by “cruel, unusual or inhumane” interrogation methods.

This McCain concession is made even worse because the compromise bill also allows admission of hearsay. Prepare, then, for the following scenario: Key evidence against an Al Qaeda leader on trial is a statement taken from another Al Qaeda prisoner. That prisoner refuses to testify in court. Military prosecutors then call his CIA interrogator to present the prisoner’s statement. The statement was obtained after interrogators subjected him to cruel, unusual and inhumane treatment.

No matter: his statement comes in. And even though the prisoner may have lied simply to stop his tormentors, the Al Qaeda leader on trial has no way to cross examine him. Again, no matter: the US military officers sitting in judgment are free to rely on the un-cross examined, hearsay statement, taken under inhumane duress, to convict and sentence their enemy to death.

After such a mockery of a trial, what credibility will any resulting conviction and execution have in the world at large, let alone in the Muslim world? What is our goal? If we aim to do and to show justice, we will have failed.

On the other hand, if our aim is simply to demonstrate our power to kill people we capture, we will have descended to the law of the jungle, a law according to whose rules Al Qaeda – and the new Al Qaeda recruits we will have provoked -- can play.

These are not the only grave deficiencies in the Bush-McCain bill. It offends against the rule of law and centuries of Anglo-American legal tradition by eliminating the writ of *habeas corpus* for prisoners at Guantanamo. For prisoners convicted by military commission, it sets up an appeal procedure that bypasses ordinary military appeals courts, while it hamstring appeals in civilian courts with a very narrow scope of review.

It also retroactively repeals our law that made violations of Common Article 3 of the Geneva Conventions – insofar as it prohibits “humiliating and degrading” interrogation techniques – prosecutable as war crimes. And it prohibits any judge from relying on the Geneva Conventions as a source of right for prisoners.

In short, if we want to lower America’s standing in the world to a new low, enacting the Bush-McCain bill for military trials is a sure way to do it.

There is no time for Congress to debate, let alone to fix, the bill’s many defects in the few remaining days before the electoral recess. Our prisoners have been waiting years for trials; let them wait a little longer. There is no good reason – aside from election eve politics – to rush this bill into law. Congress should defer any action until after November. There will then be time for serious thought, not so much about what this bill will do to Al Qaeda, as about what it will do to America.

Doug Cassel’s commentaries are broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.