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White House Will Reverse Policy, Ban Evidence Elicited by Torture

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WASHINGTON -- The Bush administration will bar statements made under torture from its Guantanamo Bay military courts, reversing a White House decision in July that could have allowed such evidence to convict suspected terrorists held at the U.S. naval base in Cuba.

The new rule, expected to be issued this week, comes before Supreme Court arguments next Tuesday over the legality of the special courts, known as military commissions, which President Bush authorized after the Sept. 11, 2001, terrorist attacks to prosecute non-U.S. citizens for war crimes.

A Defense Department spokeswoman said the regulation had been approved but not yet publicly released by the Pentagon's general counsel, who oversees the commission system.

The move could help the commissions survive Supreme Court review, because government lawyers can argue that the special courts comply with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The treaty, which the U.S. ratified in 1994, requires member countries to exclude statements taken under torture from "any proceeding." Lawyers for Salim Hamdan, the Guantanamo defendant challenging the commissions before the high court, argue that the commissions are illegal in part because they could consider statements taken under torture, and Mr. Hamdan, who admits serving as Osama bin Laden's driver, in an affidavit says American interrogators in Afghanistan threatened him "with death, torture or prison when I did not know the answers to their questions."

But the new rule undercuts a principal feature of the commissions -- that they could weigh any evidence members deemed "probative," rather than apply exclusionary rules that deny consideration of evidence for reasons other than eliciting the truth. Such rules limit prosecutors in civilian courts and courts-martial in favor of other goals, for instance deterring police misconduct by denying prosecutors the benefit of evidence taken through illegal means.

The Pentagon didn't provide a final version of the rule, and questions remain over its implementation.

Marine Col. Dwight Sullivan, who heads the office of military lawyers appointed to represent Guantanamo defendants, said he hadn't been notified of the coming instruction. Central to its effect, he said, would be "who has the burden of proof" regarding allegations of torture -- the defense to prove it happened, or the prosecution to show it didn't. Commission rules still would permit hearsay statements, which, even with the change, could "be a mechanism to launder tortured evidence," Col. Sullivan said.

The military commissions are panels of at least four military officers, one of whom is a lawyer. Although the Pentagon has flown journalists to Guantanamo to attend public sessions where the commissions have heard preliminary matters, it has withheld the names of panel members other than their presiding officers and given them the power to act in secret, excluding the defendant as well as the press, when they conclude sensitive information is at issue.

The pending rule follows a pattern in which the Bush administration has unveiled changes in counterterrorism policies, nodding to critics, shortly before the high court was to hear challenges

to them. In 2004, ahead of the first Guantanamo cases to reach the Supreme Court, the administration set up a hearing process to review whether prisoners there were properly classified as "enemy combatants." That system remains in litigation.

U.S. officials long have insisted that they neither torture prisoners nor send them to third countries that do. But many current and former prisoners maintain that they were tortured, and some have described beatings, psychological abuse and sensory deprivation at the hands of U.S. personnel or those of allied countries. One Guantanamo defendant maintains he confessed after U.S. authorities sent him to Morocco, where an interrogator cut his chest and genitals with a scalpel.

The military commissions were conceived in the days after Sept. 11 as an efficient way to dispatch foreign terrorists unburdened by the procedural rules that govern civilian courts. Although the president's November 2001 order authorizing the commissions provided that trials be "full and fair," the administration declined to adopt a rule specifically excluding evidence gained by torture.

Commission trials, however, have been delayed by challenges in federal court and disarray within the government, where some military and civilian officials have questioned the wisdom of the plan or pressed for procedural safeguards that mirror those afforded U.S. personnel facing courts-martial.

According to officials familiar with the matter, senior administration lawyers last year rejected a proposal to explicitly bar evidence taken through torture. Soon after a July appeals-court opinion upheld the commissions -- the ruling now under Supreme Court review -- officials met at the White House to consider procedural changes.

Some policy makers, including State Department Legal Adviser John Bellinger, Deputy Defense Secretary Gordon England and the Pentagon's then-deputy assistant secretary for detainee affairs, Matthew Waxman, had been urging a ban on the use of evidence from torture. The Justice and State departments advised that such a rule effectively was required by the Torture Convention, officials said.

Others, including David Addington, then counsel and now chief of staff to Vice President Cheney, and Pentagon General Counsel William J. Haynes II, successfully opposed such a rule, arguing that commission members themselves should be free to decide how to deal with evidence allegedly gained through torture, officials said.

That remained the rule through the latest commission proceedings -- preliminary hearings held at Guantanamo earlier this month -- where commissions spokeswoman Maj. Jane Boomer told reporters that "hypothetically" tortured statements could be admitted because no rule specifically barred them.

But in recent weeks, Mr. Haynes, whose nomination to a federal appeals court has been stalled by Senate Democrats critical of prisoner treatment policies, reconsidered the matter, the Defense Department spokeswoman said.

"The president has been clear in stating that the U.S. does not condone torture. The Department of Defense of course abides by that admonition, and had believed that a specific commission rule was unnecessary and would erroneously suggest that torture had actually occurred," the spokeswoman said in a statement. "Nevertheless, to eliminate any doubt" that the Torture Convention applies to the commissions, Mr. Haynes "has issued a formal instruction that bars prosecutors from offering as evidence any statement obtained as a result of torture, and bars commissions from admitting such evidence against an accused."

Ten Guantanamo prisoners currently are charged with war crimes that could bring life sentences, and some have alleged that their confessions were tortured out of them or speculated that they

were implicated by other prisoners who may have been tortured to produce statements helpful to prosecutors. The Defense Department spokeswoman said, however, that "we understand that none of the evidence the prosecution intends to offer in the 10 cases currently referred to trial was obtained through conduct that could reasonably be considered torture."