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## **U.S. Cites Exception in Torture Ban**

McCain Law May Not Apply to Cuba Prison

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Bush administration lawyers, fighting a claim of torture by a Guantanamo Bay detainee, yesterday argued that the new law that bans cruel, inhuman or degrading treatment of detainees in U.S. custody does not apply to people held at the military prison.

In federal court yesterday and in legal filings, Justice Department lawyers contended that a detainee at Guantanamo Bay, Cuba, cannot use legislation drafted by Sen. John McCain (R-Ariz.) to challenge treatment that the detainee's lawyers described as "systematic torture."

Government lawyers have argued that another portion of that same law, the Detainee Treatment Act of 2005, removes general access to U.S. courts for all Guantanamo Bay captives. Therefore, they said, Mohammed Bawazir, a Yemeni national held since May 2002, cannot claim protection under the anti-torture provisions.

Bawazir's attorneys contend that "extremely painful" new tactics used by the government to force-feed him and end his hunger strike amount to torture.

U.S. District Judge Gladys Kessler said in a hearing yesterday that she found allegations of aggressive U.S. military tactics used to break the detainee hunger strike "extremely disturbing" and possibly against U.S. and international law. But Justice Department lawyers argued that even if the tactics were considered in violation of McCain's language, detainees at Guantanamo Bay would have no recourse to challenge them in court.

In Bawazir's case, the government claims that it had to forcefully intervene in a hunger strike that was causing his weight to drop dangerously. In January, officials strapped Bawazir into a special chair, put a larger tube than they had previously used through his nose and kept him restrained for nearly two hours at a time to make sure he did not purge the food he was being given, the government and Bawazir's attorneys said.

Richard Murphy Jr., Bawazir's attorney, said his client gave in to the new techniques and began eating solid food days after the first use of the restraint chair. Murphy said the military deliberately made the process painful and embarrassing, noting that Bawazir soiled himself because of the approach.

Kessler said getting to the root of the allegations is an "urgent matter."

"These allegations . . . describe disgusting treatment that, if proven, is treatment that is cruel, profoundly disturbing and violative of" U.S. and foreign treaties banning torture, Kessler told the government's lawyers. She said she needs more information, but made clear she is considering banning the use of larger nasal-gastric tubes and the restraint chair.

In court filings, the Justice Department lawyers argued that language in the law written by Sens. Lindsey O. Graham (R-S.C.) and Carl M. Levin (D-Mich.) gives Guantanamo Bay detainees access to the courts only to appeal their enemy combatant status determinations and convictions by military commissions.

"Unfortunately, I think the government's right; it's a correct reading of the law," said Tom Malinowski, Washington advocacy director for Human Rights Watch. "The law says you can't torture detainees at Guantanamo, but it also says you can't enforce that law in the courts."

Thomas Wilner, a lawyer representing several detainees at Guantanamo, agreed that the law cannot be enforced. "This is what Guantanamo was about to begin with, a place to keep detainees out of the U.S. precisely so they can say they can't go to court," Wilner said.

A spokeswoman for McCain's office did not respond to questions yesterday.

Murphy told the judge that the military's claims that it switched tactics to protect Bawazir should not be believed. He noted that on Jan. 11 -- days after President Bush signed the law -- the Defense Department made the identical health determination for about 20 other detainees, all of whom had been engaged in the hunger strike.

Guantanamo Bay officials deny that the tactics constitute torture. They wrote in sworn statements that they are necessary efforts to ensure detainee health. Maj. Gen. Jay W. Hood, the facility's commander, wrote that Bawazir's claims of abuse are "patently false."

"In short, he is a trained al Qaida terrorist, who has been taught to claim torture, abuse, and medical mistreatment if captured," Hood wrote. He added that Bawazir allegedly went to Afghanistan to train for jihad and ultimately fought with the Taliban against U.S. troops.

Navy Capt. Stephen G. Hooker, who runs the prison's detention hospital, noted that the hunger strike began on Aug. 8, reached a peak of 131 participants on Sept. 11, and dropped to 84 on Christmas Day. After use of the restraint chair began, only five captives continued not eating.

Hooker wrote that he suspected Bawazir was purging his food after feedings. Bawazir weighed 130 pounds in late 2002, according to Hooker, but 97 pounds on the day he was first strapped to the chair. As of Sunday, his weight was back to 137 pounds, the government said.

Kessler noted with irritation that Hood and Hooker made largely general claims about the group of detainees on the hunger strike in defending the switch to the new force-feeding procedures used on Bawazir.

"I know it's a sad day when a federal judge has to ask a DOJ attorney this, but I'm asking you -- why should I believe them?" Kessler asked Justice Department attorney Terry Henry.

Henry said he would attempt to gather more information from the officials but said there was no legal basis for the court to intervene. Bawazir's weight is back to normal, his health is "robust" and he is no longer on a hunger strike, Henry said.