

Yoo Defends Detainee Measures as 'Rules of War'

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STEVE INSKEEP, host: President Bush is preparing to sign new legislation on treatment of detainees at Guantanamo. And even with all the news of this legislation, it can be hard to understand just how the U.S. will be treating detainees.

I want to make sure I understand a distinction here. And perhaps we've been confused in how we interpret the law or how we've been reporting the law, even over the last few days.

Mr. JOHN YOO (Former Bush Administration Lawyer; Author): Also there've been a lot of changes in the law just in the last few minutes.

INSKEEP: John Yoo says Congress made alterations to the bill almost until it was passed last week. Yoo is a former Bush administration lawyer who wrote influential memos on detainees. And now, he has written a book about his experiences. So we asked him to explain how one controversial part of the new rules would work. It is the decision to limit the right of habeas corpus - that means limiting some detainees' rights to go to challenge their detentions in court.

Well, Mr. Yoo, let's start with a hypothetical, if we can. Say that you're the one who has been arrested by the U.S. government, and you're declared an enemy combatant. They feel you've given some money or committed an act somewhere. What recourse is open to you if you disagree with them?

Mr. YOO: If you're a citizen, I think you can go right to federal court. You have a right to seek habeas review...

INSKEEP: You're in court...

Mr. YOO: ...in federal...

INSKEEP: And you're a citizen, of course.

Mr. YOO: If you're a citizen, yes.

INSKEEP: So you can - if you're able to get word out to someone, you can get a lawyer?

Mr. YOO: Yes.

INSKEEP: If the government grabs you and calls you, John Yoo, an enemy combatant and you try to challenge it in federal court and that challenge takes several months or years, can the government hold you that entire time?

Mr. YOO: Yes, they can. Just in the way that if you're prosecuted for a criminal case and...

INSKEEP: Although, if you're being prosecuted, you might have a chance to post bail. Can you post bail?

Mr. YOO: Well, you might have a choice to post bail, but the courts could often deny it. And they often do if you're dangerous.

INSKEEP: Can you...

Mr. YOO: Or if you're a flight risk.

INSKEEP: ...can you post bail if you're an enemy combatant, according to the government and you're challenging it?

Mr. YOO: No, you can't.

INSKEEP: So they can hold you for a while?

Mr. YOO: Yeah, they would hold you during the course of your challenge.

INSKEEP: Now, you can challenge your status in court. But if you lose that, are you entitled to a trial as a U.S. citizen?

Mr. YOO: No. And that's something that the court made - Supreme Court - made clear two years ago, is that if you are an enemy combatant, there is no constitutional requirement that you get a criminal trial. You can be held until hostilities are over.

INSKEEP: Now, what if you're a non-citizen? What happens then? The same scenario - the government has some suspicious about you. They think you've done something. They arrest you. They say you're an enemy combatant, you disagree - what can you do?

Mr. YOO: Well, first, according to the law passed by Congress last week, I'd have the right to go to what's called a combatant status review tribunal, which is set up by the Defense Department. Or I'd have a hearing where I could challenge the evidence against me that I'm an enemy combatant. And then...

INSKEEP: Wait. Let me stop you for a second. When you go to that hearing, do you get a lawyer?

Mr. YOO: I believe you don't get a lawyer. You have representation from an officer, but not necessarily one who's a military lawyer.

INSKEEP: And when you say you could challenge your detention, how would you gather your evidence to show that you're not an enemy combatant?

Mr. YOO: Well, first you could tell your own story. And also I think you would have the ability to see unclassified evidence against you and to challenge it.

INSKEEP: You said unclassified evidence, so classified evidence that the government says we have evidence against you and we can't share it with you. That's the end of the story?

Mr. YOO: I believe so. I believe that classified evidence is not provided to the defendants. It's not even provided under the military commissions or often in civilian trials, even for terrorism or spying.

INSKEEP: Now these combatant status review tribunals - they've been held for quite sometime. In fact, some transcripts of some of these tribunals have been released. And honestly, they seem rather perfunctory. A military officer gets up and says we think this guy's a terrorist. We arrested him in Afghanistan. The guy is allowed to stand up and try to say something. The military officers who were never named make their decision and the guy's sent back to his cell.

Mr. YOO: Well, it's not a criminal trial. You know, this is part of the way the rules of war have worked for a long time. You know, the military proceedings to determine if you're enemy combatant usually don't require as much proof. You know, the point of the war is not to collect evidence and solve crimes. It's

to fight and defeat the enemy. So I think this sort of flexible process reflects the demands and the nature of warfare.

INSKEEP: So the government says you're an enemy combatant. You disagree, you're a non-citizen. You've gone through one of these combatant status review tribunals. Odds are that you lost there. One thing that you can do is get a lawyer on the outside, or your family can try to get a lawyer on the outside and fight your case through the federal court in Washington. While that appeals process goes on, you remain on Guantanamo Bay.

What else can happen, legally?

Mr. YOO: That's about it. And that's a big change that actually was created by the bill that Congress passed last week. Before the bill, there were hundreds of habeas corpus petitions in the federal court system by people held at Guantanamo Bay - challenging their detention, challenging the conditions of the detention, the nature of the camp, and everything. And, at the end of 2005, Congress tried to remove those cases from the federal court and only partially succeeded. And then, in this law again, last week Congress, I think more clearly and definitively said we're not going to let any more of these kinds of suits go forward.

INSKEEP: If you're an enemy combatant, who decides if you ever get a full-blown trial, a military commissioned trial, as it's been called?

Mr. YOO: That's ultimately up to the president. I think it's still up to the president and the secretary of defense who's going to be tried by military commission.

INSKEEP: The government will decide that when it's in the government's best interest, a trial will be held. And when it's not, the person will be held without a trial.

Mr. YOO: That's right.

INSKEEP: Do you think it's inevitable that some people who are innocent are going to end up in this system, spending years and years at Guantanamo Bay?

Mr. YOO: There's no perfect system. I agree, Steve, there's always the chance that there will be people who are detained who are not enemy combatants. The same is true of our criminal justice system. We are, you know, there's no doubt that we have people in the criminal justice system who are innocent. That's why we have all these processes. That's why we have all these appeals levels, is to try to correct any mistakes that were made and prevent errors.

INSKEEP: You said there's always the chance. I mean, isn't it...

Mr. YOO: Yes.

INSKEEP: ...a certainty, especially given that some cases have already been found to be almost indisputably cases of people who were innocent being held at Guantanamo for a long time, or held elsewhere.

Mr. YOO: Yeah, I would say, look, in wartime there's always going to be people who might be picked up. There's also the case in wartime that you have mistaken targets attacked and people killed by accident. But my only point is that you also have that in a criminal justice system. No system is going to be perfect.

INSKEEP: Do you, as a lawyer who's worked for the Bush administration and

obviously thought about these issues, think that this law does everything possible to prevent error?

Mr. YOO: Well, I think we could probably do a lot more, but it would be a lot more expensive. I think what we have here is something that's very close to the civilian system.

INSKEEP: Are you saying it'd be too expensive to give habeas corpus protection to non-citizens?

Mr. YOO: Yeah. I think that's what Congress decided when it passed this law last week, is that you could have the possibility of hundreds and hundreds of habeas corpus proceedings, and they do impose a cost. They impose a cost on our judicial system. They impose a cost on our government, on our military. Think about - you'd have to pull witnesses in from abroad. You have the cost of potentially releasing classified information. All this process does have a cost on our system. It's not free.

INSKEEP: John Yoo is author of *War by Other Means*, which is out this week. Mr. Yoo, thanks very much.

Mr. YOO: Thanks, Steve, for having me.

(Soundbite of music)

INSKEEP: So that's one perspective on a key part of the rules President Bush is preparing to sign. You can give your perspective by submitting comments at npr.org. We will post some of them and put selections on the air.

DEBORAH AMOS, host:

There's one more piece of detainee news that we're following this morning. The U.S. government has cleared 120 detainees for release from Guantanamo. They're not considered threats, but they can't leave because they have nowhere to go.

Some could be tortured in their home countries. Others were residents of countries that no longer want them.

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