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Military Tribunals and Constitutionality: Why International Terrorists Should Be Tried by the UN

David L. Martin and Megan Landen

Although many U.S. officials believe that foreign terrorists should be tried in American military tribunals, proceeding with these specially commissioned trials will rob defendants of basic legal rights and significantly harm global perceptions of the United States.

According to President Bush, America is fighting against “the most evil kinds of people” in its war on terrorism. Because of the extreme threat terrorists pose to our security, special military tribunals have been commissioned to prosecute non-U.S. citizens accused of terrorist activities. Unlike international criminal courts, which allow for an open-court process, these tribunals are closed to the public. Critics of the administration’s legal tactics have labeled the special tribunals “kangaroo courts” because due process of law and widely accepted rules of evidence are absent. But the Bush Administration claims that the extreme danger posed by terrorists warrants the use of military tribunals, which “would be more efficient [than criminal courts] and make it easier for prosecutors to convict the guilty.” The Bush Administration ignores the lack of legal rights given to defendants in such trials, focusing rather on the lost opportunity that would result if suspected

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terrorist operatives were not tried in military tribunals. For the Bush Administration, the danger in the new war on terrorism has escalated to the point that granting internationally recognized POW rights to captured rank-and-file members of the Taliban is less important than ensuring a quick conviction. Although many U.S. officials believe that foreign terrorists should be tried in American military tribunals instead of by an international body such as the UN or the ICC, proceeding with these specially commissioned trials will rob defendants of basic legal rights and significantly harm global perceptions of the United States.

MILITARY TRIBUNAL PROCEDURES

While many of the rules concerning the tribunals have changed since President Bush first announced their establishment in 2001, sufficient levels of due process for the trials have not yet been provided. Although the tribunals now allow for the accused to be presumed innocent, the regular rules of evidence do not apply. Hearsay and secondhand evidence will be allowed at the trials, and the accused will not be entitled to see evidence brought against them. 4 Although proponents of the tribunals justify this absence of basic legal rights by pointing out that the tribunals are for non-U.S. citizens only, denying due process to defendants because of their citizenship is an affront to the Constitution and shows a lack of concern for international defendant rights such as revealing to the accused the evidence against him or her. 5

In addition to violations about revealing evidence to the accused, placing limits on who can receive a fair and timely trial directly conflicts with many of the founding principles of this country. The Declaration of Independence states clearly that there are certain self-evident truths, "that all men are created equal; that they are endowed by their Creator with certain unalienable rights." This

5 Cohn, sec. A, 21.
includes the right to be presumed innocent and have due process of law. In the nineteenth century, historian Charles W. Penrose in a public address made this statement regarding the importance of those founding rights:

In the Declaration of Independence it is laid down that there are certain rights that cannot be alienated, that are natural, that are inherent, that are not imparted by governments. . . . An act of any individual or any government which [sic] infringes upon these natural rights is wrong in and of itself.6

Regardless of religious affiliation or political sentiment, these rights, especially the right to a fair trial, must be provided to everyone, even to our enemies. Failing to stand up for the civil rights and liberties of people in all nations endangers not only the rights of the minority but also the rights of the majority.

LACK OF INDEPENDENT REVIEW

These specially commissioned military tribunals also deny the accused a fair trial because they disallow an independent appeals process. Because the Supreme Court will not have habeas corpus review power, those convicted of terrorist acts will not be allowed to appeal the tribunal’s decision in an independent court.7 This lack of an independent appeals process in the commissions is stirring up human rights groups. Jamie Fellner, a spokeswoman for Human Rights Watch, said, “Not to have an independent court of appeals and then to have the president have the final say undercuts whatever fairness [the Bush Administration] sought to provide at the trial level.”8

Supporters of the tribunals are anxious for the trials to be held outside of the United States, which would keep control of the process in the military chain of command. This reticence to have any control outside of the U.S. military is alarming. Having such exclusive regulation over these trials causes Americans and the world to lose confidence in them. Because President Bush also has final review of the cases, he acts as the initial prosecutor and final judge, which contributes to the evidence that these tribunals are far from non-partisan and fair.

The Bush Administration's denial of an outside appeals process indicates that the commissions are set up for a predetermined outcome. The main disadvantage of having an outside appeals process, at least from the perspective of the Bush Administration, is that tribunal decisions could be reversed. On the other hand, having an appeals process outside of the military chain of command would lend greater legitimacy to the tribunals. But, for decision makers, the costs of not punishing guilty terrorists are greater than the costs of losing legitimacy. This cost-benefit analysis indicates that the commissions are set up for a predetermined outcome: to avoid the risk of letting guilty terrorists go free.

Other precautions that have been established to minimize the possibility of releasing potential terrorists include detaining prisoners indefinitely, even after their acquittal. Prisoners who are found innocent could remain in U.S. custody for the duration of the War on Terrorism, which might last several years or more. During that time, prisoners are denied visitors and kept without criminal charges or knowledge of how long they will be held. There have already been twenty attempted suicides by the prisoners. Holding someone after acquittal is a grievous offence that is likely to foster antagonism towards the U.S. in both our friends and enemies.

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9 Ibid.
10 Haines, 23.
International law and precedent suggest that fairness dictates detaining only those prisoners who will be tried in the near future, thus giving them their legal right to a speedy trial. The rest of the prisoners should be released to their home countries.

**Constitutionality and Legal Precedent**

Like the judicial branch, the legislative branch has been left out of the prosecution of those charged with committing acts of international terrorism. Many in Congress are critical of the executive branch’s attempt to handle this situation alone. They want to be involved in determining the rules for the tribunals. Republican Senate Judiciary Committee member Arlen Specter said, “Since the Constitution empowers the Congress to establish courts with exclusive jurisdiction over military offenses, some consultation with leadership would [be] appropriate.” He further commented that the administration is not discussing the commission with any member of the Senate Judiciary Committee. This desire to avoid outside influence indicates that the executive branch has gone too far in this power-grab. Even during times of extreme crisis, Congress and the courts have historically played critical roles in establishing the appropriate balance between national security and civil rights.

These military tribunals will resemble the special military commissions in which German saboteurs were secretly “executed in relatively rapid order” during the World War II. The commissions were also used at that time to convict General Yamashita, a Japanese general who historians now believe was innocent. The conviction of General Yamashita, which took place in 1946, was the last time the commissions were used. Military commissions have a history of concentrating more on judicial efficiency, or coming to a

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13 Seelye, “Pentagon Says Acquittals.”
14 Spencer, 6.
15 Ibid.
quick verdict, than on fairness. America has apologized for secret tribunals in the past and will risk the possibility of reaching hasty verdicts if it continues to use them to try foreign citizens.

The dearth of legal rights afforded to defendants in these military tribunals can be seen in many other areas. Shockingly, the tribunals include a plan to monitor attorney-client conversations. This measure, as well as closing the trials to outsiders when necessary, is done “to protect national security.” In addition, al Qaeda and Taliban forces are being held indefinitely at Guantanamo Bay. They are denied access to lawyers and consular officials of their home countries, which are rights promised to POWs as established by the Geneva Convention. The Red Cross regards these prisoners as POWs, as does much of the international community. U.S. officials, however, refuse prisoners the status of POW because it would grant them additional rights. In some respects, the prisoners are in political limbo: they are neither POWs nor convicted terrorists. Their status lies tensely between these two positions. In this current situation, prisoners are deprived of almost every legal right.

In addition, members of the military tribunals, whom Defense Secretary Donald H. Rumsfeld will personally select, are unlikely to be impartial. Secretary Rumsfeld will likely choose tribunal members that favor easy convictions. The concept of hand selecting judges is foreign to U.S. law, in which judges in civil and criminal cases are assigned randomly to ensure fairness and impartiality.

United Nations War Crimes Tribunal

Because of the unfairness of the military tribunals proposed by the Bush Administration, people both in the United States and abroad have clamored for the trials to be held by the UN. The


Nuremberg trials established a precedent of judicial fairness at the international level. These trials handed down verdicts against over 185 high-ranking Nazis in thirteen unprecedented and often highly contentious cases. In the first of these cases, eight judges participated, two each from France, England, Russia, and the United States. During the other twelve cases—all of which were highly disputed—only American judges participated. Having an international panel gave legitimacy to the first set of trials. That legitimacy was not present in the others. 20 The United States would gain legitimacy by turning over the prisoners to an international criminal court, because international courts are seen as impartial and as protective of individual rights.

These trials could be carried out in a similar manner to a UN war crimes tribunal that is prosecuting Slobodan Milosevic, an indicted war criminal charged with genocide and crimes against humanity in Bosnia and Kosovo. Global perceptions of the trial are positive. Many people have heard of the atrocities that took place in the former Yugoslavia and are glad that Milosevic can come to trial before an international court.

Recently the Bush Administration agreed to allow some current and former U.S. officials to testify against Milosevic at his trial in The Hague, Netherlands. The appearance of American officials at the tribunal could set an important legal precedent. They would be the highest-ranking U.S. officials to ever testify before an international war crimes tribunal. 21 This lends legitimacy to the international trials and shows that the Bush Administration itself is warming up to the UN war crimes tribunal, which already receives unquestioned support from every other prominent country.

Many people in Europe and the United States have asked that a UN war crimes tribunal try foreign terrorists, especially al Qaeda and Taliban forces. The reasons for such a trial include guaranteeing

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fairness, needing to impress upon the world the danger of the radicalism of al Qaeda's philosophy, and exposing Bin Laden and his lieutenants before they gain martyr status. A UN criminal tribunal would contain many judicial essentials that the military tribunals lack: due process of law, openness of proceedings, reasonable rules of evidence, an independent appeals process, the release of acquitted prisoners and those who will not stand trial, the right to have counsel from one's own country, clear and prompt notice of the charges, and an impartial commission. From this list one can see the potential benefits of trying captured al Qaeda and Taliban forces. Not only would it bring justice to those who use terrorism to meet their political agenda, it would do so while maintaining an honorable reputation for being fair and impartial, equally affording the rights of humanity to all.

In some respects, it is not just the al Qaeda and Taliban forces that are on trial, it is also the United States itself. The United States has often been accused of trying to run a one-man show. Especially in this war on terrorism, we often ignore the opinions of our close European allies, disregarding their advice because of security concerns. How friends and foes will relate to the United States in the future, how other countries try U.S. citizens accused of terrorism, and how the United States will eventually reduce international terrorism significantly hinge upon whether or not we decide to use military tribunals to try foreign terrorists.

**Future Negative Impact**

Relations between America and Europe regarding American military involvement in European affairs are quite brittle. Many countries already feel that they have to fight against the increasing trend toward United States unilateralism. One result of the war on terrorism has been to "[confirm] that Washington calls the shots; it has also pushed Europeans to name their differences from the

22 Robertson, "Kangaroo Courts."
superpower." Any strongly unilateral moves made by America in the current political scene could result in a rebellion of sorts by the major European players. By insisting on conducting military tribunals independent from the rest of the world, the United States is at risk of losing many valuable allies and legitimacy in the eyes of our European supporters.

Most politicians know that both an ideal policy and an actual policy exist. They also know that some policies can in reality be much closer to the ideal. This is the case with military tribunals and criminal courts. While the criminal courts may not be devoid of problems, the problems associated with them are of a lesser evil, so to speak, than those associated with the military tribunals. In all likelihood, the military tribunals established by President Bush will take place despite criticism from both local and foreign sources. It is crucial that the tribunals are implemented as fairly as possible, giving each accused party due process of law. Even international persons charged with heinous crimes have the right to be presumed innocent, fairly defended, dealt with in a timely manner, and released if no charges are being filed. The implementation of such highly contested rules will affect long-range global perceptions, international allies, and opinions about the legitimacy of the United States. The most significant reason behind utilizing international criminal courts was put forth eloquently by Robert E. Hirshon, president of the American Bar Association: "We continue to stand firm in our resolve that all involved in the atrocities of September 11 be brought to justice. But we need to do it in a way that respects core American values of due process and fundamental fairness."