CONDUCT UNBECOMING:

Pitfalls in the President's Military Commissions

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Introduction

More than a year ago, a major American newspaper detailed how a series of policy directives by the Bush administration had effectively created a "parallel" system of justice in America, in which terrorist suspects could "be investigated, jailed, interrogated, tried and punished without legal protections guaranteed by the ordinary system."[1] The ACLU believes that this "parallel" system of justice fails to provide the safeguards necessary to ensure due process.

These White House initiatives include the "enemy combatant" designation for American citizens, the holding of suspected terrorists without charge as material witnesses, the mass detentions at Guantánamo Bay and a system of military tribunals authorized unilaterally by the president.

All of these initiatives share one discouraging trait: an unwillingness by the Bush administration to trust basic checks and balances on government power, like those that the American legal system demands to protect the innocent from false arrest, prosecution, conviction or execution.

Now, with an announcement by the Defense Department that it will begin trying detainees in these newly created military commissions, this inferior legal system seems set to start operating in earnest.

Pursuant to a Military Order signed by the president shortly after the tragic attacks of Sept. 11, 2001, the Department of Defense has formalized the White House plan to try certain non-citizens alleged to be enemy combatants in military commissions, where they will not enjoy the basic due process protections accorded under the Uniform Code of Military Justice or required by international law.

The military, with the president as its commander in chief, will have sole authority to appoint the judges, prosecutors and defense counsels for these commissions. Indeed, the Department of Defense appears to be the only government body that can hear any appeal – civilian courts wouldn't even enter the equation. Attorney-client privilege is weakened; evidence — even evidence of innocence — could be withheld from the proceedings under the vaguely defined guise of "national security" and the courts are so unusual that the basic rules of procedure could be changed midstream during the tribunal.

These military commissions have not been congressionally reviewed or authorized. Thus, the rules governing their use could be changed at the whim of the president. President Bush, with a stroke of his pen, could begin to use the commissions to try non-citizens on American soil for crimes unrelated to 9/11. The president could even decide – as did President Roosevelt in World War II – to subject American citizens to

these proceedings. It is not far-fetched to imagine that U.S. citizens Jose Padilla and Yasser Esam Hamdi, who have already been designated as enemy combatants, could be tried by such commissions.

What is at stake is the integrity of the very notion of due process, the presumption of innocence and the promise of a fair trial. The White House and only the White House created this inferior system of trial and punishment. The military can only be expected to comport itself with the honor and integrity that comes with the uniform. The procedural pitfalls in these commissions, though, are just too numerous to expect that any of those charged with crimes could get a fair trial. Excessive power will inevitably be used excessively. We must provide appropriate bulwarks against abuse.

These and other concerns are elaborated at length in the following report. For more information on the Bush administration's inferior system of justice, please visit www.aclu.org/safeandfree.

Stacking the Deck

On Feb. 24, 2004, the Defense Department announced that it was going forward with military trials for two alleged Al Qaeda leaders who were captured in Afghanistan and are currently being detained at a military base in Guantánamo Bay, Cuba. Unfortunately, the rules that the Defense Department will use for military commissions are seriously flawed, denying basic and fundamental rights to the accused. These rules call into question the fairness of any resulting verdict of military commission trials.

These military commission trials have been long delayed. On Nov. 13, 2001, President Bush issued a Military Order that permitted the indefinite detention and potential trial by military commission of non-citizens suspected of involvement in terrorism.[2] The Military Order produced a firestorm of criticism from across the political spectrum. Conservative columnist William Safire said that the order would establish "Soviet-style" tribunals because it failed to guarantee many basic rights that are protected both under the American Constitution and international law.

When the final rules were approved in July 2003, it became clear that the criticism was justified. According to the rules, the Defense Department chooses the military officers that serve as adjudicator of fact and law, and chooses the military defense counsel as well. The Defense Department chooses the people who will hear any appeal. The government can listen in on the conversations the accused has with his attorney.[3] The prosecution can use secret evidence against the accused, and the accused has no way to compel the government to produce evidence or witnesses showing his innocence. The government has the power to change the rules in the middle of the trial, including the elements of the offense of which he is accused so it would not have to prove things that it could not prove. At the end of the trial, if acquitted, the accused could still be detained indefinitely. If convicted, he could be put to death with no outside review whatsoever.

Under no stretch of the imagination can such proceedings be considered "full and fair trials," as the president promised in his Military Order.[4] No matter how the Defense Department tries to dress them up,[5] these military commissions cannot provide justice in the eyes of the world. Six people have already been designated to face these unfair tribunals in Guantánamo Bay, Cuba, and two have now been charged. Hundreds of other Guantánamo detainees could also face them. They could also be used to try other suspects, including those arrested in the United States.

The commissions violate fundamental fair trial guarantees:

- **Trials will lack independence and there is no appeal outside the chain of command.** Political appointees at the Defense Department will have control over who sits on a military commission and appoint the chief prosecutor and chief defense counsel. Likewise, these appointees will determine who sits on the review panel of military officers that provides the only appeal. The decisions of the review panel are only recommendations and in some cases can be overturned by the secretary of defense or the president. Judicial review appears to be foreclosed, whether by direct appeal or by petition for a writ of habeas corpus.

- **Prosecutors can keep evidence – even evidence of innocence – from the accused.** Secret evidence rules allow the prosecution to submit evidence to the commission without revealing that evidence to the accused. Defense lawyers may be given only a summary of evidence, and, in some cases, the summary may be provided only to the military lawyer. Evidence that is not used at trial – even if it may establish the defendant's innocence – does not have to be shared with the defense at all. Evidence may be kept secret on "national security" grounds even if it does not involve any classified information.

- **Defendants have no right to compel the attendance of witnesses.** Defendants do not have the power to require the commission to subpoena witnesses or documents, even if such evidence is crucial to the defendant's case.

- **Trials can take place in secret and attorneys are barred from speaking to the press without permission.** Any portion of a trial – or all of it – can be closed to the press for "national security" reasons, whether or not any classified information would be disclosed during the session. Defense attorneys are required to submit to Defense Department censorship of any comments to the press about their cases.

- **There are severe limits on the accused's right to an attorney.** Attorney-client communications can be monitored, and defense attorneys can be forced to reveal confidences for "national security" reasons. Defense lawyers are barred from brokering common defense arrangements, which are often critical to trial strategy, among defendants. The chief defense counsel, who oversees military defense lawyers, has no obligation to keep information in the hands of the defense confidential.

- **Trial rules – including the definitions of crimes – can be changed at any time, even during a trial, by military officials.** The rules for the trial, including those for monitoring attorney-client conversations and determining the elements the prosecution must provide to establish guilt for various offenses, are not binding on the commission and can be changed at any time.

- **Defendants have no right to a speedy trial – or even a trial at all – but can be held indefinitely without charge.** There is no time limit for bringing any detainee held as an alleged enemy combatant before a commission to face charges, or before any other military or judicial forum that could resolve factual or legal disputes about whether the detainee has done anything to warrant further imprisonment. Guilty verdicts in all but capital cases can be imposed even if one third of the military officers on the commission believe the defendant is innocent.

- **Defendants can continue to be detained even if acquitted of all charges.** Even an acquittal on all charges does not obligate the government to release a detainee, so long as the "war on terrorism" is ongoing.

- **Commission rules are so broad that they may extend to non-citizens accused of civilian crimes.** While the Defense Department says it is planning to use commissions to try persons detained abroad and held in Guantánamo Bay, Cuba, the rules allow much broader use. Military commissions could be used domestically – as has already been suggested with respect to some defendants currently in civilian terrorism trials. The rules define crimes of terrorism so broadly that military trials could also be used to prosecute non-citizens for isolated acts.

Why the Guantánamo Military Commission Trials Cannot Provide Justice

No independence, no review, and no outside appeal. The procedures outlined for military commissions fail to provide for an impartial and independent tribunal, nor are the military commissions subject to any meaningful outside check on their authority. The military commissions are an entirely closed system, subject to the control of the president or secretary of defense, with no appeal allowed to any civilian court.

The appointing authority, who has now been appointed by the secretary of defense, will have ultimate control over the entire military commission proceeding, including the appointing of commissioners, the review panel and the ultimate disposition of the case.[6] While Secretary Rumsfeld has designated Maj. Gen. John D. Altenburg, Jr., a distinguished retired military lawyer, as the appointing authority, putting this degree of power into the hands of a political appointee simply does not offer any guarantee of impartiality or independence and violates basic principles of American justice and international law. The procedure violates fundamental due process protected by the Fifth Amendment, as well as the specific requirement of the Third Geneva Convention (article 106) that defendants tried in military tribunals must have access to appeals "in the same manner as the members of the Armed Forces of the Detaining Power."[7]

The appointing authority will appoint commissioners "from time to time," meaning that commissioners can be hand-selected to try specific cases. Even more alarming, the procedures outlined could permit direct interference in the conduct of commissions by the appointing authority itself. The order allows for interlocutory appeals (apparently including by the prosecution) to the appointing authority.

The review procedures do not offer a real appeal. The appointing authority controls selection of review panels, which may be appointed for specific cases, and the secretary of defense has the power, in some cases, to set aside the review panel's recommendations."[8] These provisions render illusory the order's guarantee of an appeal, a requirement under American justice and international law. There is no appeal to any body – even an administrative panel – outside the military command structure. The sentence of a military commission becomes final when it is affirmed by the secretary of defense. Punishment – which could include execution – can be carried out with no outside review whatsoever. Judicial review appears to be specifically foreclosed by the rules, whether by direct appeal or by petition for a writ of habeas corpus.

By contrast, courts-martial under the Uniform Code of Military Justice permit a direct appeal to the Court of Appeals for the Armed Forces, a civilian Article I court that is not subject to any control by the Defense Department. Review by the Supreme Court of the United States is available by petition for a writ of certiorari.

Although the court-stripping language of the rules appears to be absolute,[9] government lawyers have said that a federal court would have jurisdiction in a habeas corpus proceeding to consider whether a particular defendant is constitutionally subject to trial by military commission, but only if the trial takes place on United States soil.[10] However, the Defense Department has made clear that it plans to conduct military commissions in Guantánamo Bay, Cuba, and the Justice Department is contending in consolidated cases that will be heard shortly in the Supreme Court that federal courts lack any jurisdiction to consider the habeas challenges of prisoners in Guantánamo.[11]

The military lawyers assigned to the defense by the office charged with administering the commissions have taken the very unusual step of filing a brief amicus curiae with the Supreme Court in a habeas corpus challenge by detainees at the camp in Guantánamo Bay, Cuba. Their brief does not tackle the issue of federal jurisdiction in Guantánamo generally, but does urge civilian review of any trials that take place in Guantánamo, and urges the Supreme Court to preserve such review.

Secret evidence. Again, contrary to public assurances that the Defense Department is committed to ensuring the right of an accused to confront the prosecution's evidence, the military commissions have been carefully crafted to ensure that the accused will see only evidence that the government allows to be seen.

The rules permit evidence to be withheld from the defendant, and from the defendant's civilian lawyer, when necessary to protect against the disclosure of material that has been classified, as well as "classifiable" material – that is, material that is unclassified but that the government later decides meets the standard for classification. While the rules require civilian lawyers to be cleared to see classified material, a cleared lawyer does not have a right to see the material, even if he possesses sufficient clearance to view it. Under the order, even the defendant's military lawyer may not be entitled to view the withheld evidence, but may instead be required to attempt a defense – with no ability to consult with his or her client – on the basis of a heavily redacted summary.

Finally, even if the evidence is neither classified nor "classifiable" – because the government cannot meet its own standards for classification – evidence may still be withheld from the defendant for unspecified "national security" reasons. All of this information is called "protected information" and must be handled according to special procedures.

Evidence could be withheld even if it is potentially exculpatory – that is, even if it could tend to show that the defendant is innocent. The rules do contain a general requirement that the prosecution "shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the accused,"[12] but this provision is made subordinate to requirements to keep secret "protected information."[13] If the exculpatory "protected information" is in the government's possession, but is not used at trial, the government has no obligation to reveal it, even in summary form, to anyone – not the defendant, not the civilian lawyer and not the military lawyer.

The rules certainly assume that many cases will rely substantially on evidence the defendant will have no ability to confront. The result will be a

serious risk of wrongful convictions. While the evidence may be provided – in whole or in part – to cleared defense counsel, defense counsel will simply not be able, in many cases, to test the veracity of the evidence without consulting with his or her client. Information that intelligence officers may regard as reliable, and which would appear entirely credible on its face, can fall apart when the accused is able to explain that the information is the result of personal bias, mistake or rivalry within a family, clan or religious group. Cleared counsel who cannot discuss the evidence with a defendant are unable to provide this essential check on what is often little more than rumor or innuendo, but which may be given unwarranted credibility as "classified" information.

The rules are dramatically different from those required for trials in either Article III federal courts or courts-martial under the Uniform Code of Military Justice (UCMJ). Ordinary civilian and military trials have special procedures to safeguard classified information from inappropriate disclosure, but they do not allow the withholding of basic information from the defendant. Most importantly, the government may only redact classified information or substitute a summary for classified information where (1) *in a civilian trial*, the court finds that the summary "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information,"[14] or (2) *in a military trial*, the military judge finds that the classified information is "relevant and necessary to an element of the offense or a legally cognizable defense" and that its disclosure is "necessary to afford the accused a fair trial."[15] If the government's summary does not meet the test, the court is required to dismiss the case or impose another appropriate sanction.[16] By contrast, the military commission rules provide no such standard for summaries of classified information, nor do they say that the court must dismiss the case if the government does not meet the standard.

The military commission rules fly in the face of President Bush's campaign promise to end the use of secret evidence against Arabs and Muslims, even in civil immigration hearings. Instead of ending secret evidence, the rules would explicitly permit, for the first time in American history, the use of evidence not revealed to the accused or his civilian lawyer to establish guilt in a criminal proceeding. Secret evidence could be used even if the accused faces the death penalty.

No right to compel attendance of witnesses to aid the defense. The rules specifically grant the chief prosecutor's office the authority to issue subpoenas for witnesses or to produce documents. The chief defense counsel's office is given no right to subpoena witnesses. In both ordinary civilian and military trials, the right to compel attendance of witnesses and production of documents and other evidence to aid the defense is guaranteed and absolutely basic to a fair trial. While the prosecution bears the burden of proof, the defense must still be able to obtain witnesses and documents that cast doubt on the reliability of the prosecution's evidence, as well as to establish elements of an affirmative defense for which the defense bears the burden of proof.

These safeguards are respected in trials in Article III courts. For example, in the case of Zacarias Moussaoui the government is seeking a death sentence for Moussaoui as an alleged conspirator in the Sept. 11 attacks, and has also charged Moussaoui with other terrorism offenses that do not carry the death penalty. The government refuses to allow the defense to call a top Al Qaeda official for questioning who reportedly would testify that Moussaoui was not involved in the Sept. 11 conspiracy. Because Moussaoui faces trial in a court that respects the right of the defense to call adverse witnesses, the judge has dismissed the death penalty charges, allowing the government's

case to go forward without reference to charges about which evidence may exist that could refute the government's case. In a military commission, by contrast, the government could seek to put Moussaoui to death with no ability for the defense to present evidence that is at the heart of its case.

Secret trials; gag orders. The rules allow the government to hold any trial session – or even the entire trial – in secret, without the ability of family members, the press or members of the victims' families to attend or observe the trial proceedings. The sessions may be closed for reasons of "national security" even if no classified information would be revealed. Defense lawyers – including civilian defense lawyers – may speak to the press "regarding cases and other matters related to the military commissions" only with the approval of Defense Department officials.[17]

When military commissions were first announced, opponents often described the commissions as "secret military tribunals," raising the specter of hooded military judges issuing death sentences in the dark of night. Defenders argued that commissions would generally be open to the public. Under the rules, the commissions will only hold open trials when the government chooses to do so, and no one – not even civilian defense lawyers – can discuss what is happening in the commissions without Defense Department approval.

Interference with right to counsel. The chief defense counsel is selected by the appointing authority, who will then select military lawyers as defense counsel.

The chief defense counsel is not bound by rules of confidentiality. Communications between lawyers and clients may be monitored without any finding by the commission (or other quasi-judicial authority) that the communications involve any abuse of the lawyer-client relationship. Defense lawyers are unlikely, to say the least, to develop the trust and confidence necessary to a successful attorney-client relationship when the detainee knows that anything he says to his lawyer may be monitored by the government.

Joint defense agreements are barred. These agreements permit two or more defendants to waive conflicts of interest in order to mount a common defense and are a common tactic in criminal cases.

Defense lawyers are required to agree to report to the government if they learn, in the course of their representation, of information they "reasonably believe is likely to result in . . . significant impairment of national security" – a standard that is overbroad. This standard alters the normal rules of representation, which forbids lawyers from reporting confidential information unless it is necessary to prevent a serious crime.

Military lawyers are the only guaranteed defense counsel for a defendant. While civilian lawyers are allowed, they must be approved by the government and obtain a security clearance. Only United States citizens will be permitted as defense lawyers.

Defendants (or their families) will be required to pay for any civilian counsel and expenses – including the expense of any security investigation required for their lawyers to obtain a security clearance. Defense lawyers who volunteer to assist detainees without compensation will have to defray their own expenses.

Trial rules – including elements of crimes – can be changed at any time. The military commission rules are not statutes approved by Congress or even regulations that have been subject to the normal notice-and-comment procedures. Rather, they are documents drafted by the Defense Department's general counsel's office. Nothing prevents the office from chang-

ing the rules at any time – even during a trial. Indeed, the rules specifically provide that none of the rules "create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies and other entities, its officers or employees, or any other person."[18] As a result, even if the government violates its own rules, the defendant is not entitled to a remedy.

For example, the current rules governing monitoring of attorney-client conversations require notice and impose a "firewall" that is supposed to separate such intelligence-gathering from the prosecution. However, if the government violates that rule, by monitoring without notice or by disclosing information to the prosecution team, the defendant has no right to any sanction – such as an order for a new trial or an order excluding certain evidence as tainted by the illegal monitoring – to correct the government's misconduct.

Even the document that defines the elements of crimes specifically provides that it seeks only to "declar[e] existing law."[19] The elements of crimes are drafted broadly, apparently to maximize the discretion of the prosecution. Even these broad elements, however, are not binding on the commission, which determines both the facts and the law – including the law of war. As a result, the rules that require the prosecution to prove its case – including each element of the crime – beyond a reasonable doubt, could be made illusory by a decision that "law of war" does not actually require proof of a particular element that the rules now say must be proven beyond a reasonable doubt.

Indefinite detention, even for those who are acquitted. The rules do not forbid the continued indefinite detention without charge or trial of any kind of non-citizen detainees. Indeed, comments of Department officials interpreting the rules make clear that this problem has been exacerbated, not corrected. The rules not only fail to require any detained persons to be charged within a specific time period – or ever – but officials have also said that they would allow continued detention of those who have been acquitted of all charges by a military commission so long as the "war on terrorism" is ongoing.[20]

Detention without charge is a serious deprivation of liberty and is, in general, simply not allowed under the American Constitution. In addition, Article 9 of the ICCPR expressly forbids indefinite detention without charge. It is not enough that the government suspects that individuals may be dangerous or may engage in criminal activity if released. When permitted at all, civil detention requires at a minimum a special justification and strict procedural safeguards to ensure individualized determinations of dangerousness under a strict burden of proof.[21] The rules provide for a presumption of innocence, but make that presumption a false promise by failing to require a speedy trial or even a trial at all. If a trial is held, continued detention may render a "not guilty" verdict meaningless.

On March 3, 2004, the Defense Department announced a set of draft rules to implement a system of "periodic review" for the Guantánamo detainees. The proposed rules, however, amount to nothing more than a fig leaf of process on what is still a fundamentally lawless policy.[22]

Under these circumstances, indefinite detention frustrates the entire purpose of providing for otherwise "full and fair" trials. Even if every other deficiency in the rules for military commissions were adequately addressed, this deficiency would render the procedure grossly unfair and a basic violation of both American norms of justice and international standards.

Potential for second-class justice system far removed from war crimes trials for Al Qaeda leaders detained in Guantánamo. While the first two detainees to face charges in military commissions are alleged leaders of the Al Qaeda terrorist network accused of war crimes, the commissions could be used in any "international terrorism" case – even against persons arrested in the United States and who are not alleged to have anything to do with Al Qaeda. In so allowing, the rules violate the basic limitations on the use of military tribunals to punish violations of the law of war imposed both by the American Constitution and international law.[23]

Those subject to the military commissions are not limited to persons captured abroad in the course of military operations, now detained at Guantánamo Bay, Cuba, but could include persons arrested either in the United States or abroad by ordinary civilian police. Likewise, rules do not limit trial by military commission to members of specific organizations, such as Al Qaeda, who were involved in the Sept. 11, 2001 attacks on the United States and who are at least arguably within the Congress's authorization of military force resolution, cited as authority by the Military Order establishing the tribunals. Pub. L. No. 107-40.[24]

Finally, the rules explicitly define elements of offenses for "violations of the law of war" and "other offenses triable by military commission." The rules define "other offenses" to include hijacking or putting in danger a vessel or aircraft, terrorism, murder by an "unprivileged belligerent," destruction of property by an "unprivileged belligerent," "aiding the enemy," "spying" and offenses related to the military commissions themselves including perjury and obstruction of justice. These crimes are defined broadly.

While the commission rules do require any offense – including "other offenses" – to have taken place "in the context of and associated with armed conflict," the rules then define armed conflict so broadly as to render this limit on military commissions liable to severe mission creep. Armed conflict is specifically defined not to require "a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force." Instead, a "single hostile act or attempted act" may be enough, so long as the attack "is tantamount to an attack by an armed force."

Certainly a significant terrorist attack (or attempt), such as the bombing of the federal building in Oklahoma City, would be enough to satisfy the requirements of the rules. The rules could then be used to substitute military commissions – a second-class form of justice, inferior to both regular civilian and regular criminal trials – for any prosecution in the "context" or "associated" with the hostile act. The only safeguard against application of the order to other offenses that ought to be within the criminal justice system is the goodwill of the president and other administration officials. In a society committed to human rights under law, that result is plainly unacceptable.

The government insists it has the power to hold American citizens as "enemy combatants" even though it has limited military commission trials to non-citizens. As a result, American citizens who are held as "enemy combatants" may not receive a trial at all, even under the flawed military commission system. However, expanding the jurisdictional scope of military commissions to include United States citizens would not be an appropriate response to this concern. Rather, the exclusion of American citizens from the scope of the military commissions

casts doubt on whether such commissions are really needed at all.

Indeed, the government's decisions in the case of John Walker Lindh, an American citizen accused of terrorism offenses for his association with Al Qaeda and the Taliban, amply demonstrates that criminal courts remain a viable option for terrorism cases. Instead of amending the president's order to make it applicable to citizens, the government chose to proceed in federal district court. The Lindh case shows that federal district courts can be used to try Al Qaeda and Taliban prisoners, and casts serious doubts on the government's assertions that such courts cannot be used in such cases because of concerns about security or safeguarding classified information.

The deficiencies outlined above make it clear that trials by military commissions will not meet fundamental standards of justice, let alone the additional "super due process" required by the Constitution for decisions to impose the death penalty.

Challenges to the Military Commissions

Career military lawyers appointed by the Department of Defense to represent detainees who face prosecutions before military commissions have added their voices to those who are saying the commissions cannot provide full and fair justice. According to Major Michael D. Mori, who was assigned to defend an Australian detainee who is yet to be charged, "The military commissions will not provide a full and fair trial. The commission process has been created and controlled by those with a vested interest only in convictions."[25] Lt. Col. Philip Sundel, whose Yemini client now faces conspiracy charges, will attempt to challenge the whole process, saying, "it does not have the checks and balances built into it that guarantee a fair, impartial and independent process."[26]

Major Mori and other military counsel assigned to the defense have also filed an unusual brief in a Supreme Court habeas corpus case brought by detainees at Guantánamo Bay. The brief opposes the government's position that the federal courts lack jurisdiction over Guantánamo Bay in all cases and urges civilian review of military commission trials.[27]

The flawed rules governing military commissions have accompanied a process for choosing potential defendants that appears at least as flawed, and clearly subject to political interference. After repeated, lengthy delays, the Defense Department initially announced on July 3, 2003 that President Bush had designed six defendants to face military commission trials. Protests from the United Kingdom – including from Prime Minister Tony Blair – and from the Australian government, led to conditions being placed on the trials of British and Australian defendants – including that the defendants would not face the death penalty and would serve sentences in their home countries.[28] These arrangements certainly make clear that political considerations will have a substantial effect on one's treatment in the military commission system.

Meanwhile, while not directly relevant, the government's case against a Muslim chaplain at Guantánamo Bay, whom the government initially accused of espionage and aiding the enemy, appears to be collapsing. The treatment of this defendant raises disturbing questions about the professionalism of operations at Guantánamo Bay. This defendant, who is an American citizen, faces justice before a regular court-martial,

not a military commission.[29] The collapse of the government's case against this American defendant raises questions about whether the government's case against detainee defendants might similarly collapse if exposed to the scrutiny of a court whose rules are not deliberately slanted in favor of the prosecution.

Conclusion

The rules for military commissions do not meet the president's requirement of providing "full and fair" trials. They do not guarantee fundamental rights protected by the American Constitution and international law. The military commission orders make clear that military tribunals cannot provide a fair, impartial and independent trial, and that instead, regular criminal courts (or, where military jurisdiction is proper, such as for prisoners of war or other non-citizen fighters detained on a traditional battlefield, regularly constituted courts-martial) should be used to prosecute terrorism offenses.

The new rules are not just different from the rules for trials in federal courts, or for courts-martial under the Uniform Code of Military Justice. In every case, the differences tilt the balance of justice towards the prosecution and away from the accused.

There is no precedent for establishing such a second-class system of justice. While the United States has used military commissions to try accused war criminals and others in past wars, these commissions closely followed the procedures for courts-martial of the day. Establishment of an entirely separate, and starkly unequal, system of courts for non-citizens is without any antecedent in American history.

Endnotes

[1] Charles Lane, "In Terror War, 2nd Track for Suspects," *Washington Post,* Dec. 1, 2002.

[2] Military Order of Nov. 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002).

[3] Modifications to the original attorney-client monitoring rule issued in July 2004 were made early this year. The new rules continue to allow monitoring at the government's discretion but require notice of any monitoring and impose a "firewall" that is supposed to ensure that any information obtained from monitoring is used for intelligence purposes only and is not be shared with the prosecution.

[4] Alberto R. Gonzalez, "Martial Justice, Full and Fair," *New York Times,* Nov. 30, 2001 (op-ed). Judge Gonzalez is counsel to the president.

[5] In response to the criticism that greeted the president's military order, administration officials said a new order setting forth procedures for military trials would clarify the procedures the tribunals would apply and would protect the rights that had not been outlined in the original order. The new order was issued in March 2002 and enumerated, in general terms, a number of rights – such as the presumption of innocence, proof beyond a reasonable doubt and a requirement of unanimous verdicts for the death penalty – that had not been included in the president's original order. While human rights and civil liberties groups welcomed these improvements, they still concluded that the order suffered from fundamental flaws, such as the lack of judicial review or any other independent review procedure. The ACLU analyzed this order and laid out both the improvements from the original plan and the continuing fundamental flaws of the commissions in an interested persons memorandum, available at http://archive.aclu.org/congress/l041602c.html. For the next year, the Defense Department drafted a series of detailed military commission orders. In July 2003, the Department issued final rules for the commissions. Military Commission Order No. 1 (March 2002) and Military Commission Instructions Nos. 1 through 8 (July 2003) have been published together at 68 Fed. Reg. 39,374 (July 1, 2003) and will be codified at 32 C.F.R. pt. 9.

[6] Military Commission Order No. 1, at § 2 and § 4(A)(1).

[7] This requirement applies not only to prisoners of war and but also to any other person accused of "grave breaches" of the Geneva Convention (i.e., those accused of war crimes). See art. 129 (Third Geneva Convention), and art. 146 (Fourth Geneva Convention).

[8] "The review panel is empowered to dismiss charges, order further proceedings, or reduce a sentence in two types of cases. If the review panel decides that a 'material error of law' has occurred, the Appointing Authority must refer the case to a military commission for further proceedings consistent with the review panel's conclusions. If the review panel recommends that a verdict should be disallowed or a sentence reduced, but does not find a 'material error of law,' its recommendations are forwarded to the secretary of defense who may approve or disapprove the review panel's decisions."

[9] Section 7(b)(2) of the Military Order of Nov. 13, 2001 (which governs all subsequent orders) provides: The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

[10] Alberto R. Gonzalez, "Martial Justice, Full and Fair," *New York Times* (op-ed), Nov. 30, 2001.

[11] The cases, which have been consolidated and will be heard together, are Rasul v. Bush, No. 03-334 and Al Odah v. United States, No. 03-343. Briefs that have been filed in the cases have been made available online by the Jenner & Block law firm at http://www.jenner.com/news/news_item.asp?id=12520724

[12] Military Commission Instruction No. 8, at § 7(B).

[13] All of the subsequent military orders are made subordinate to Military Commission Order No. 1, which contains the requirements for "protected information."

[14] Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3 § 5(c)(1).

[15] Manual of Courts-Martial, Military Rules of Evidence at § 505(i)(4)(B), (E) (2002).

[16] See 18 U.S.C. app. 3 § 5(e); MRE at § 505(i)(4)(E).

[17] Military Commission Instruction No. 4.

[18] Military Commission Instruction No.1, at § 6.

[19] Military Commission Instruction No. 2, at § 3(A).

[20] Katherine Q. Seelye, "Pentagon Says Acquittals May Not Free Detainees," *New York Times,* March 22, 2002.

[21] See Zadvydas v. Davis, 121 S. Ct. 2491, 2498-99 (2001).

[22] If the government wants to describe the Guantánamo detainees as "enemy combatants," as it once again does in these draft rules, then it must treat them as POWs in accordance with the Geneva Conventions. It has not done so in the past and apparently has no intention of doing so in the future. Even more significantly, it must repatriate the detainees when the "war" is over. Instead, the government is substituting a process of periodic review that will enable it to detain any individual whom the government regards as a continuing "threat" for the rest of the detainee's life. There is no precedent for that result in the law of war, or in our notions of due process.

Furthermore, there are serious problems with the periodic review process that the government has proposed, even assuming that the concept has some validity. The burden is on the detainee to prove that he is not a threat, the proceedings are non-adversarial (which presumably means that the government's witnesses are not subject to cross-examination), there is no provision for the detainee to subpoena witnesses or evidence in his behalf (other than a submission from his next of kin), the hearing panel's conclusion is only a recommendation that can be ignored by the political appointee who oversees the process and there is no opportunity for review outside the Defense Department.

[23] Ex Parte Milligan sets forth the basic rule that military tribunals cannot be used against civilians accused of crime, even when characterized as violations of the "law of war," where there is no emergency situation that prevents "the courts [from being] open, and in the proper and unobstructed exercise of their jurisdiction." 71 U.S. at 127. Ex Parte Quirin, 317 U.S. 1 (1942) permitted a military commission to be used also, during a time of declared war, against German soldiers who were out of uniform but were "unlawful belligerents" who were "acting under the direction of the armed forces of the enemy." Id. at 37. Likewise, article 4 of the ICCPR only permits derogation from normal standards of justice in times of "public emergency which threatens the life of the nation and which is officially proclaimed," a standard not met here.

[24] We do not believe that Congress's use of force resolution authorized military tribunals. However, since the president's Military Order relies on that resolution, we must insist that the resolution's limitations be respected.

[25] Neil Lewis, "Lawyer Says Cuba Detainees Face Unfair System," *New York Times,* Jan. 22, 2004.

[26] Neil Lewis, "U.S. Charges Two at Guantánamo With Conspiracy," *New York Times,* Feb. 25, 2004.

[27] Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions As Amici Curiae, Odah v. United States, No. 03-343, filed Jan. 14, 2004.

[28] John Mintz, "Deals Reported Afoot for Detainees, but Lawyers Question Pacts for Clients Without Access to Counsel," *Washington Post,* Dec. 6, 2003, p. A6.

[29] John Mintz, "Guantánamo Bay Spy Cases Evaporate; Chaplain, Arabic Translator Now Face Only Lesser Charges," *Washington Post,* Jan. 25, 2004.


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