Pentagon rules for military tribunals violate constitutional rights

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After a four-month delay, US Secretary of Defense Donald Rumsfeld issued an order March 21 specifying the procedures for the military tribunals that will try alleged terrorists captured in Afghanistan. The rules are clearly designed to guarantee convictions that are unreviewable by any judicial authority in or outside the United States.

US media coverage and statements by US officials—including congressmen who criticized the initial Bush proposal for tribunals issued last year—suggest that the Pentagon rules represent a significant improvement over the initial plan. But the procedure remains fundamentally unfair, and Pentagon spokesmen indicated that prisoners could be detained indefinitely, even if they are acquitted, at the discretion of the president.

Pentagon general counsel William J. Haynes II said, "If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge but may not necessarily automatically be released. When somebody's trying to kill you or your people, and you capture them, you can hold them. We are within our rights, and I don't think anyone disputes it, that we may hold enemy combatants for the duration of the conflict. And the conflict is still going and we don't see an end in sight right now." Since the "war on terrorism" was declared by the US government, and only the US will determine when it is over, the detention of prisoners will also be at the will of the government.

There has been an outcry from sections of the legal profession over this prospect. Don Rehkopf, co-chairman of the military law committee of the National Association of Criminal Defense Lawyers (NACDL), told the press: "They create a tribunal that they say is fair, but then they can say, 'We don't like the results and the hell with it, we're going to hold you anyway.' This is a follow-on to their policy of holding people indefinitely before you charge them." Rehkopf added, "If I came out of the woods after 20 years and saw these rules, I'd think Adolf Hitler or Joseph Stalin wrote them."

Haynes claimed that the Bush administration was announcing the rules for the tribunals without allowing any time for public comment from groups like the NACDL and the American Bar Association, because of "the need to move decisively and expeditiously in the ongoing war against terrorism." At the same time, US military officials suggested that no trials would be held until the summer, or possibly not even until 2003, because of the need to accumulate and sort through evidence and conduct interrogations of prisoners.

The new rules reverse or diminish some of the more flagrant violations of due process called for in the initial Bush plan. A defendant will be advised of charges sufficiently in advance of trial to prepare a defense; he must, for the most part, receive evidence to be used against him, as well as exculpatory evidence; and can use legal process to obtain evidence and witnesses. The presumption of innocence will apply, as well as the usual criminal standard of proof beyond a reasonable doubt. The accused cannot be forced to testify. Unanimous rather than majority vote of seven military commissioners (judges) will be required to impose the death penalty.

Bush issued his executive order to provide for military tribunals last November 13, authorizing the military detention of any non-US citizen he determines to be a past or present member of Al Qaeda, or otherwise involved with or harboring international terrorist activity. The order further directed trial of such persons by military tribunal for any violation of the law of war, and other unspecified "applicable laws."

Bush's initial order precluded review by any independent court or tribunal. It specified that it was not "practicable" to apply the usual rules of criminal law and evidence in the tribunal, so evidence would be admissible if it has "probative value to a reasonable person," an exceptionally loose standard for a threat to personal liberty, let alone one's life. Convictions and sentencing required only a two-thirds vote of military judges rather than unanimity.

The tribunals were widely derided internationally as kangaroo courts ignoring US constitutional and international norms designed to ensure fundamental fairness of criminal proceedings. The procedures were revised over the next four months in order to deflect this criticism, while preserving the essential purpose: giving the US chief executive unprecedented and arbitrary power to arrest, try, imprison and sentence prisoners captured in the course of the "war on terrorism."

Rumsfeld's rules permit defense cross-examination of witnesses, the principal historical means of determining the truth in Anglo-American trial jurisprudence. But witnesses need not testify under oath. Most troubling, the commissioners can consider sworn or unsworn written witness statements. In other words, a witness need not even testify in person, depriving the defense of any cross-examination opportunity.

Written statements are easily manufactured and falsified, presenting a huge risk of prosecutorial abuse. This provision alone casts doubt on whether the US military intends to acknowledge any meaningful check on its intention to convict those the president alleges have a connection to terrorists. No requirement of authentication of documents or physical evidence appears in the rules.

In substance, there is an absence of any real limit on what evidence may be admitted. The tribunal still may admit single, double or even triple hearsay, opinion and other dubious evidence. Again, none of this can be effectively tested by cross-examination.

Rumsfeld's rules require the assignment of a military officer to a

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defendant as counsel. The ranks of such military defense counsel are normally dominated by higher-ranking officers, and even when willing to serve their clients' interests, are often inexperienced. Imposing uniformed counsel on alleged enemy combatants will almost inevitably chill attorney-client communication, a prerequisite to an effective defense.

A defendant can hire additional civilian counsel at his own expense. But that is an unlikely prospect for those detained at Camp X-Ray, who have little in the way of financial resources. Any funds for private attorneys can easily be challenged and seized by the government, labeled as terrorist in origin. Finally, a civilian attorney qualifies as counsel only if eligible to US information of a level SECRET or higher. This presents a huge potential for disqualifying most experienced defense counsel.

The right to effective counsel of the defendant's choice in criminal cases is enshrined in the US Constitution and is internationally recognized as a fundamental prerequisite of a fair trial. The tribunal rules are designed to permit the opposite result.

Proceedings are to be open to the "maximum extent practicable." Yet according to the rules such open proceedings "may include" the press and public and "public release of transcripts at the appropriate time"—all "at the discretion" of the president. In other words, open does not necessarily mean public. This threatens to make a mockery of the US constitutional requirement of a public trial, which is also recognized by international law as necessary to a fair trial.

Proceedings will not be open if they involve arguably classified or secret information, witness safety, intelligence or law enforcement sources or methods. The result is that evidence of the most dubious reliability generally will invoke the greatest secrecy. The accused and civilian counsel can be excluded from *ex parte* or in chambers review of such material, but not military defense counsel.

Especially given the Bush administration's amply displayed penchant for secrecy, if not scorn for the public's right to know, the rules' vaguely announced preference for "open" trial is hollow. It is also a marked contrast to the openness of the Nazi and Japanese war crimes trials following World War II, which the Bush administration likes to reference as historical support for its tribunals.

Bush's original military order vests exclusive jurisdiction in the military tribunals over any individual subject to the order for offenses. Such persons are not "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."

Rumsfeld's rules dutifully only provide for review of conviction and sentencing by a "Review Panel" comprised of three military officers. Civilians may be commissioned to serve on the panel. There is no provision for briefing or oral argument before the panel. The president, or the secretary of defense, if designated, will serve as the final reviewing authority.

This review mechanism thus adds nothing to the fairness of the process, especially in this politically charged context. Instead it insures that the appeal decision will be made by higher-ranking military officers who are still subject to military and presidential control.

In contrast, under the US Uniform Code of Military Justice, which applies to courts martial of US military personnel, verdicts are not final until they have been reviewed by a civilian Court of Appeals for the Armed Forces.

The US Constitution and international law recognize independent impartial judges who are not beholden to any side as the bedrock of any credible system of justice. They must be the ones to make the basic decisions, or at least review them. Without independent review to monitor them, the supposed protections provided in Rumsfeld's rules—the presumption of innocence, guilt beyond a reasonable doubt, even outside counsel—mean little or nothing.

The wrongs of King George described in the US Declaration of Independence included that "[h]e has affected to render the Military independent of and superior to the Civil power." For that reason, the Constitution gave Congress power over the military, and to "define and punish ... Offences against the Law of Nations."

Creation of these tribunals violates the constitutional separation of powers, usurping congressional power to create military tribunals, and the authority of the judicial to try offenses and review convictions. They are of dubious constitutionality, even under the US Supreme Court cases that permitted war crime tribunals against Nazi spy saboteurs and German and Japanese war criminals.

President Bush has in effect created his own separate court and prison system. The initial decision to designate someone as a terrorist and apprehend them is his. It is Bush's decision whether or not to prosecute. Everyone in the tribunal process, including the prosecutor, is subordinate to the president as the commander in chief. Police, prosecutor, required defense counsel, judge and the jury are all rolled into one entity, subject to one man. That same man decides what procedural and evidentiary safeguards are afforded the accused. This is not a system designed to ferret out the truth or produce justice, nor hardly what the framers of the US Constitution had in mind.

As conservative George Washington University constitutional law professor Jonathon Turley has correctly concluded, "These rules leave the president in a role more reminiscent of a Caesar than a civil servant."

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