

A LOOK AT THE BUSH MILITARY COMMISSION PLAN FOR TERRORISTS AND THE APPEARANCE OF FAIRNESS

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(Original Text in English)

“It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹

One of the least publicly analyzed aspects of President Bush’s response to terrorism is his Military Commission Plan for the trial of suspected terrorists (hereinafter “the Plan” or “the Bush Plan”). The Plan basically provides for a tribunal of seven U.S. military officers to try suspected terrorists using rules, procedures, standards of proof, and the presumption of innocence that are similar to American civilian criminal trials and US military courts-martial. The Plan, however, details two notable exceptions to the trial procedures used in US military and civilian courts: 1) the rules of evidence are relaxed; and 2) there is no judicial appeal allowed to any court (civilian or military). Any appeal from a verdict of a Military Commission will be reviewed sequentially by an approving authority, then to a Board of Review (consisting of three U.S. military officers), then to the Secretary of Defense, and finally to President Bush for final review. No court review is envisioned, nor provided for in the Plan.

Criticism of this Plan has focused on three main areas:

- 1) Concerns about “judicial independence” since a military commission or tribunal not U. S. civilian courts would be used;
- 2) Worry that the relaxing of the rules of evidence would lead to an unfair trial;
- 3) Shock that no Court would review the verdict of the Military Commission, which may include the possible verdict of death.

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¹ Lord Chief Justice Hewart of England, as quoted in *Rex v Sussex Justices*, 1923.

This criticism may be viewed as understandable by some, however further analysis may show that the Bush Plan perhaps is a sound one for the post 9/11 world ---if it is carried out with sensitivity to the above listed criticism and with transparency to the world press during the course of any proceedings under the Plan. In my view it is a sound one because, in such a time of national emergency, such a plan is needed to insure secure and safe justice. Additionally this Plan would provide swift justice—a positive attribute for the trial of a suspected terrorist in the present war against terrorism.

Swift justice is needed to resolve guilt or innocence of a suspected terrorist in the present circumstances. Giving a suspected terrorist a lengthy “OJ Simpson” type trial in a functioning US Court already burdened with a existing heavy backlog of criminal and civil cases is not the type of trial needed for this type of crisis situation. Moreover concerns over the safety of the fact-finders (the “jury”) in a terrorist trial may have properly been one of the reasons a military tribunal was selected over the option of a U.S. civilian court with a judge and jury and a large number of court personnel. Protection of a military commission operating on an U.S. military base would be understandably easier and safer. Also the necessity to protect sensitive, classified evidence makes the option of a military tribunal undoubtedly more attractive.

Answering the criticism about the independence of the military commission is not as difficult as it may seem. This concern has been particularly expressed by many of the countries with a history of military-dominated governments and is perhaps rooted in past experience with military trials in these countries. However, America has a good record using military commissions in time of a special need for fair and independent justice. In fact, the first trial in America by an American tribunal was one using a military commission for Thomas Hickey, a member of General Washington’s staff who was accused of a plot to poison General Washington. The trial was conducted in New York City the month before the Declaration of Independence. General Washington then in command of a rebel army, for obvious reasons, did not want to bring Hickey to a British court for justice. An American tribunal of 13 officers was used at this critical time since only British Courts were available in America.

There were other historic uses of military commissions by America that are helpful to analyze. With regard to the independence of the American military officers sitting on a commission under President Bush’s plan, one should look at the conviction rates at the post World War II military

