

November 19, 2001

**SECTION:** NATIONAL; Pg. 13

**LENGTH:** 1341 words

**HEADLINE:** When the **Pentagon Runs the Courtroom**

Bush's directive confers extraordinary power on Rumsfeld to punish terrorists, but its outlines remain vague.

**BYLINE:** By Vanessa Blum

**BODY:**

In the weeks following Sept. 11, former Deputy Solicitor General Philip Lacovara was among those urging the Bush administration to consider using military tribunals to try suspected terrorists.

But last week Lacovara said he was surprised at how far the Bush administration had gone.

"The order basically says the president can designate anybody in certain categories to go before a military tribunal," said Lacovara, now a partner in the D.C. office of Chicago's Mayer, Brown & Platt. "I think even those of us supportive of the concept of a military tribunal think it makes sense to confine its jurisdiction to the leaders of terrorist organizations."

Lacovara is not the only one wondering if the deck is stacked a little too forcefully against defendants. "These are extreme circumstances, and I think the president's action is not unreasonable," says former Secretary of the Army Togo West Jr., a lawyer at D.C.'s Covington & Burling. "On the other hand, it is a little surprising they would settle on less than a unanimous vote to impose the death penalty."

Opponents are more direct in their criticism.

"Our society has grown to a point where we shouldn't be afraid of putting those responsible through a criminal trial for the world to see," says former Marine judge advocate and prominent military defense lawyer Charles Gittins. "My concern about the executive order is that it basically leaves it up to the accuser whether suspects will get due process, and then it strips away any opportunity to challenge the proceeding in federal court."

Whether to treat alleged terrorists as conventional criminal suspects or as war criminals

has been one of the stickiest questions facing top administration lawyers since Sept. 11.

Last week, the Bush administration began to deliver its answer. In a Nov. 13 executive order, the president authorized non-U.S. citizens charged with terrorism to be tried by military tribunals without the protections guaranteed to criminal defendants in American courts.

"Given the danger to the safety of the United States," the order states, "it is not practicable to apply in military commissions . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases."

Instead, suspects will be tried by a panel of commissioned military officers; prosecutors will be permitted to introduce evidence not ordinarily admitted in court, such as hearsay and evidence obtained through illegal searches; and suspects will have no right to judicial review. Little if any of the proceedings are expected to be open to the public.

"This is an answer to the problem of trying to fit the square peg of international terrorism into the round hole of a criminal trial. It's a regime tailor-made for dealing with these kinds of circumstances," says George Terwilliger III, former deputy attorney general and among a handful of former government lawyers urging administration officials to consider military tribunals. "It would be absurd to afford international mass murderers the protections of the U.S. Constitution."

But critics question whether plucking the seldom-used military tribunal out of the annals of wartime history and applying it in a contemporary setting is wise-or even legal.

While precedent for the use of military tribunals dates back to the Revolutionary War, one has not actually been convened since World War II.

Meanwhile, the U.S. military justice system and international criminal justice system have both undergone significant changes.

The proposal drew outcries from civil libertarians, members of Congress, and others who say trying suspected terrorists outside the criminal justice process violates the Constitution.

The plan also set off a wave of speculation within the military community as to just how a tribunal will function.

"There's a great deal of leeway in this order, and I expect it will be refined a lot," says West. "If we ever use it, I hope the secretary of defense will be very careful to make sure the proceeding is not only fair in actuality but also creates the perception of fairness for people looking at it from the outside."

The order, drafted to maintain maximum flexibility, leaves many critical questions unanswered. Among them: where the military tribunals will be held; how members of the

commission and attorneys will be selected; and what burden of proof the prosecution will have to meet for a conviction.

Another undecided issue is whether any portion of the proceeding will be open to the public.

At a Nov. 15 press briefing, Defense Secretary Donald Rumsfeld said a team of Defense Department lawyers led by General Counsel William Haynes II is fleshing out the details.

"It is not something we want to deal with on an ad hoc basis as it happens," Rumsfeld said. "I am approaching it in a very measured and conservative way."

Senior military lawyers say they have received no indication on whether judge advocates will be involved in the proceeding as prosecuting or defense attorneys.

"It's too early to say how the presidential order will be implemented," says Col. Craig Smith, chief of the military justice division in the Air Force.

The order, written with little or no congressional input, hands broad authority to the president and the secretary of defense.

According to the executive order, the military tribunal can be used to try any suspect who is not an American citizen and has been identified by Bush as a member of al Qaeda, participated in acts of terrorism against the United States, or harbored terrorists. It makes no difference whether the individual is arrested within the United States or overseas.

Defendants will be represented by counsel, but potential defense attorneys are likely to be selected or scrutinized by the government because much of the evidence against their client will be classified information.

The normal rules of evidence-which would exclude evidence obtained through illegal means or hearsay-have been replaced with more relaxed instructions that the commission should hear all evidence of "probative value to a reasonable person."

And unlike U.S. jury trials, which require unanimous verdicts, a military commission will require only a two-thirds vote to determine guilt. A two-thirds vote of the commission is also required for sentencing, even for imposing sentences of life imprisonment or death.

In contrast, general court martial proceedings-the military's rough equivalent to felony trials-require a three-fourths vote for life imprisonment and a unanimous vote to impose the death penalty.

"Basically this doesn't look like a court martial at all," says Gittins, the former Marine judge advocate.

Decisions reached by a military commission, according to the executive order, will not be

reviewable by any court or international tribunal. Only the president or secretary of defense can review or overturn a tribunal's decision.

While the order does not explicitly suspend the writ of habeas corpus, which allows prisoners to turn to the judiciary for relief, it states that "the individual shall not be privileged to seek any remedy. . . in any court of the United States, or any state thereof."

Legal experts say the president's authority to set aside judicial review for alleged terrorists is certain to be challenged in court. The Constitution states that the president can suspend the writ of habeas corpus only in "cases of rebellion or invasion."

"It goes farther than I would have thought," says Lacovara. "Although the term *habeas corpus* is not used, it lays the framework for arguing that the president has invoked his power under the Constitution to suspend the writ of habeas corpus."

In general the rules set out by Bush mirror those used nearly 60 years ago in the 1942 military trial of eight Nazi saboteurs. In that case, all eight defendants were found guilty by a "reasonable man" standard. The Supreme Court agreed to hear the case, but ultimately deemed that the military tribunal was "lawfully constituted."