

Copyright 2001 The New York Times Company
The New York Times

December 13, 2001, Thursday, Late Edition - Final

SECTION: Section B; Page 6; Column 1; National Desk

LENGTH: 784 words

HEADLINE: A NATION CHALLENGED: THE TRIBUNALS;
Justice Department Decision to Forgo Tribunal Bypasses Pentagon

BYLINE: By Katharine Q. Seelye

DATELINE: WASHINGTON, Dec. 12

BODY:

Top Pentagon officials said today that they were not consulted by Attorney General John Ashcroft in his decision to go to federal court rather than seek a military tribunal to try Zacarias Moussaoui in connection with the Sept. 11 terrorist attacks.

Several Senate Democrats said they were surprised at the lack of consultation, adding that Mr. Moussaoui appeared to be a perfect candidate for a military tribunal and that they were baffled about why no tribunal had been sought. "The glove fits so perfectly here," Senator Carl Levin, the Michigan Democrat who is chairman of the Armed Services Committee, said after a hearing this morning in which Pentagon officials discussed the tribunals and said they were not consulted on the suspect's fate.

"That was a decision made by the Justice Department," said Paul D. Wolfowitz, deputy secretary of defense, at the hearing.

Asked if he had been involved in the decision, Mr. Wolfowitz said: "I was not personally. I don't believe we were as a department either."

William J. Haynes II, the Pentagon counsel who is overseeing the drafting of regulations for military tribunals, confirmed Mr. Wolfowitz's statement. "No, we were not involved," he said.

The fact that the Justice Department did not talk with the Pentagon about how to handle a major case that had been perceived as a likely test case for a military tribunal is significant because it suggests what Senator John W. Warner, Republican of Virginia, referred to as potential "frictions" between the departments.

Senator Joseph I. Lieberman, Democrat of Connecticut and a member of the Armed Services Committee, said of the Justice Department's action: "It's wrong not to have consulted the Department of Defense because we're at war. And Moussaoui is a war

criminal."

He said he was concerned that sending Mr. Moussaoui to federal court might set a precedent that would be hard to break if other noncitizens are arrested in the United States. "What greater violation of the laws of war could there be than to have been a co-conspirator in the attacks that resulted in the death of 4,000 Americans here on our soil?" Mr. Lieberman asked. He called Mr. Moussaoui "a big fish" who might "get away" under the tougher rules in federal court.

Susan Dryden, a spokeswoman for the Justice Department, said: "The ultimate decision is up to the president. We're taking action we believe is in the best interest of the nation."

In interviews later, law professors said the lack of consultation reflected the Justice Department's confidence that it could convict Mr. Moussaoui on conspiracy charges.

Philip B. Heymann, a former deputy attorney general who now teaches at Harvard Law School, said there was no real reason for the Justice Department to consult the Pentagon.

"If I were the president," he said, "and this case came to me from Ashcroft, I'd say, 'Do you think you can get a conviction?' I'd much rather try the American courts than take all the suspicion that will come from a military tribunal. And if Ashcroft says, 'We can handle this,' I'd say, 'You go do it.' I wouldn't have been very much interested in anything the Defense Department would say."

Scott L. Silliman, an Air Force lawyer for 25 years who is a law professor at Duke University, said the lack of consultation showed that "the Justice Department wants to remain in firm control of the process as far as prosecutorial decisions go."

Moreover, he said, the decision not to send Mr. Moussaoui to a military tribunal reflected a "midcourse correction" by the administration.

"The administration felt that the president's popularity on the use of force would carry over to this, but there's been a change in public opinion," he said.

The latest New York Times/CBS News Poll found that while most people strongly support the president and the war, 51 percent of Americans said it was not a good idea to try foreigners in secret military proceedings.

Mr. Haynes said the Defense Department was conferring with the secretary of state, Colin L. Powell, on the tribunal regulations. One administration official said the Justice Department would probably determine what to do with terrorist suspects captured in the United States, the Defense Department would decide on those captured in Afghanistan and the State Department on those captured in other countries.

Mr. Haynes also told senators that they should "draw some comfort from the fact" that the decision to go to federal court "may be an illustration of how carefully the president

intends to employ this tool that he is creating in this military order."

Still, Mr. Haynes and Mr. Wolfowitz offered few details on how the order might be fleshed out.

<http://www.nytimes.com>