

Martial Justice, Full and Fair

By Alberto R. Gonzales

WASHINGTON

Like presidents before him, President Bush has invoked his power to establish military commissions to try enemy belligerents who commit war crimes. In appropriate circumstances, these commissions provide important advantages over civilian trials. They spare American jurors, judges and courts the grave risks associated with terrorist trials. They allow the government to use classified information as evidence without compromising intelligence or military efforts. They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.

And they can consider the broadest range of relevant evidence to reach their verdicts. For example, circumstances in a war zone often make it impossible to meet the authentication requirements for documents in a civilian court, yet documents from Al Qaeda safe houses in Kabul might be essential to accurately determine the guilt of Qaeda cell members hiding in the West.

Some in Congress and some civil

The rule of law and the rules of war.

libertarians remain skeptical of the military commissions. Their criticism, while well-intentioned, is wrong and is based on misconceptions about what the president's order does and how it will function.

The order covers only foreign enemy war criminals; it does not cover United States citizens or even enemy soldiers abiding by the laws of war. Under the order, the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States. The president must determine that it would be in the interests of the United States that these people be tried by military commission, and they must be chargeable with offenses against the international laws of war, like targeting civilians or hiding in civilian populations and refusing to bear arms openly. Enemy war criminals are not entitled to the same procedural protections as people who violate our domestic laws.

Military commission trials are not secret. The president's order authorizes the secretary of defense to close proceedings to protect classified information. It does not require that any trial, or even portions of a trial, be conducted in secret. Trials before military commissions will be as open as possible, consistent with the urgent needs of national security. The specter

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of mass secret trials, as depicted by critics, is not an accurate reflection of the order or the president's intent.

The order specifically directs that all trials before military commissions will be "full and fair." Everyone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense. The American military justice system is the finest in the world, with longstanding traditions of forbidding command influence on proceedings, of providing zealous advocacy by competent defense counsel, and of procedural fairness. Military commissions employed during World War II even acquitted some German and Japanese defendants. The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system.

The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

Military commissions are consistent with American historical and constitutional traditions. Confederate

agents disguised as civilians traveling to New York to set it afire were tried by military commission. Nazi saboteurs who came ashore on Long Island during World War II disguised as civilians and intending to attack American war industries were tried before military commissions. The use of such commissions has been consistently upheld by the Supreme Court.

Military commissions do not undermine the constitutional values of civil liberties or separation of powers; they protect them by ensuring that the United States may wage war against external enemies and defeat them. To defend the nation, President Bush has rightly sought to employ every lawful means at his disposal. Military commissions are one such means, and their judicious use will help keep Americans safe and free. □