

SEVA JOHNSON

The nation has heard much in the news lately about military tribunals. President George W. Bush has authorized military tribunals to try non-U.S. citizens for acts of terrorism against the United States.

Most people don't know what a military tribunal is or how it compares to other courts. I interviewed Frank Moran, executive director of the Boston Bar Association and a retired Air Force colonel, who spent eight years as a military judge and served as chair of the American Bar Association Standing Committee on Armed Forces Law.

What is a military tribunal?

A *military tribunal* or *military commission* is a court-like forum that is created within the military to try a person accused of crimes. It is authorized by the U.S. Constitution and the Uniform Code of Military Justice (UCMJ), which is a federal law (Title 10, United States Code, Chapter 47) passed by Congress. The great majority of the UCMJ is devoted to the rules concerning the trial of U.S. service personnel by court-martial. Article 21, UCMJ, however, provides authority to convene other military tribunals "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

Courts-martial are different from military tribunals because the law involved and their rules for procedure are well established in the UCMJ and *Manual for Courts-Martial*. It is important to understand, at the outset, that the rules, procedures, and law applying to U.S. courts-martial provide very extensive protections to the rights of the accused, in the same manner as any other court in the United States. Although the president's authority to convene military tribunals derives from the Constitution and the UCMJ, the president has great discretion in developing the rules and procedures of a military tribunal, which may be quite different from those applying to courts-martial.

# Military Tribunals and the War Against Terrorism:

## AN INTERVIEW WITH FRANK MORAN

According to President Bush's order, who might be tried by military tribunal?

On November 13, 2001, President Bush signed an executive order that creates the authority to try non-U.S. citizens by military tribunal where there is reason to believe that the accused is a member of the al Qaeda terrorist group or has engaged in, aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation for terrorism, intended to cause injury to the United States or its citizens, or has knowingly harbored any such persons, and that it is in the interest of the United States that such person be subject to this order.

Military tribunals have historically been conducted to try war criminals. *War criminals* are typically combatants who violate the law of war, which is a settled body of international law. For example, the most obvious war crime is the intentional killing of noncombatants (civilians). The last time the United States convened military tribunals was during World War II. More than one thousand German war-crime defendants were tried before U.S. Army military tribunals, some of whom were found not guilty, and more than 250 death sentences were carried out. Several countries that Germany occupied also tried German war criminals using their own military tribunals.

How do military tribunals differ from other courts?

A crucial point needs to be made about the authority contained in the UCMJ to convene military tribunals, which makes a significant difference in the answer to your question. Article 36, UCMJ, states that pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial and military tribunals may be prescribed by the president by regulations that shall, *so far as he considers practicable*, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts.

In Section 1 (F) of his November 13 order, President Bush specifically exercised his prerogative to find that it is *not* practicable to apply the principles of law and rules of evidence of the U.S. district courts to the rules that will be established for military tribunals. Certain basic rules have been established by the order, and the secretary of defense has been charged with developing further rules that, at the date of this interview, have not been issued.

It is easiest to see the differences on a chart (see p. 98). The public debate on military tribunals has, so far, compared trial by military tribunal only with trial in U.S. district court. I include courts-martial in the comparison for two reasons: one, to suggest a court-martial as an alternative trial forum, having the advantages of being conducted by the

military (including overseas) while affording the same or similar rights found in U.S. district court; and two, to demonstrate how the rules in military tribunals established by President Bush are, so far, quite different from the military justice system that we have today.

What are the rules of procedure in these three different forums?

The Federal Rules of Criminal Procedure and the Federal Rules of Evidence govern the procedures in U.S. district court. In courts-martial, the procedures are found in the UCMJ and the *Manual for Courts-Martial* (MCM), and the Military Rules of Evidence are contained in the MCM. These rules are, of course, supplemented by court decisions interpreting the rules or constitutional protections applying to any aspect of procedure. As for military tribunals, as of the date of this writing, the only rules for procedure or evidentiary rules are found within the four corners of the president's November 13 order. However, the order provides for the secretary of defense to issue further rules, which will expand on the very basic guidelines set forth in the president's order.

The Federal Rules of Criminal Procedure and the UCMJ and MCM generally cover preliminary proceedings, jurisdiction, pretrial matters, arraignment, venue, trial procedures, sentencing, appeals, or other reviews of findings or sentence.

In cases tried in U.S. district court and by court-martial, there are very comprehensive rules and case law regarding pretrial notice, disclosure and discovery, including the disclosure of evidence to the defendant which tends to negate the defendant's guilt (exculpatory evidence) or to reduce the sentence. For example, the prosecution would have to disclose the existence of a confession to the crime made by one other than the defendant. The seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963), has applied a Fourteenth Amendment due process standard for the disclosure of exculpatory evidence to the defendant, and this right applies to a defendant in U.S. district court and

to the accused in a court-martial. In court-martial procedures, pretrial discovery is more liberal and less formal than in U.S. district court. However, no such rules are yet provided for in military tribunals, and the argument could be made that under the *Ex Parte Quirin* case (see p. 98), no constitutional right to such disclosure would apply. If the prosecutor in a military tribunal is a lawyer, however, that prosecutor may be bound by the ethical standards in the American Bar Association's Standards for Criminal Justice (Prosecution Function), which provide that it is unprofessional conduct intentionally to fail to make disclosure to the defense of the existence of exculpatory evidence or evidence that would tend to reduce the punishment.

What reasons has the White House given for using military tribunals?

President Bush and members of his staff have stated several reasons why military tribunals provide advantages over civilian trials. They spare civilian jurors, judges, and courts the grave risks associated with conducting terrorist trials. They more easily allow the government to use classified information as evidence without compromising intelligence and military efforts. And military tribunals can dispense justice swiftly, without years of pretrial or post-trial appeals.

Given the events over the last few years, culminating with the September 11 attacks, it is reasonable to assume that the location of any trial of a person associated with al Qaeda will be considered a prime target for a terrorist attack. U.S. civilian courts have tried terrorists in the past, but certainly a trial held on a military installation or military ship has a greater security advantage. Classified information can and has been protected in U.S. district court, but the relative ease of doing so within the military offers greater protection for that information.

The greater difference is in the ability of the court to resolve the case quickly. There is no question that the rules contained in the president's order significantly ease the ability of the prosecutor to prove facts and of the tribunal to reach its findings of guilt or innocence.

Many people oppose military tribunals on the basis that they will violate accused terrorists' rights. What directions do you think the ensuing debate might take?

In Taliban-ruled Afghanistan, the public could not even express themselves with music, and criticism of the government was dealt with severely. In the United States, one constitutional guarantee that we all cherish is the freedom of expression—the right to publicly criticize even our president without sanction.

Public debate of important issues will lead to their correct resolution, and the widespread and heated discussion about whether military tribunals should be used in the wake of September 11 shows that our democracy is functioning well. In answering this question, let me discuss various issues concerning military tribunals that I hope will spur the debate.

Two points bear on my comments. First, as I've already mentioned, the president's order designates the secretary of defense to issue orders and regulations for the conduct of military tribunal proceedings; but, at the time of this writing, the rules have not been issued. In late December 2001, draft regulations were circulated for comment in the Pentagon, the Department of Justice, and the White House, and these are believed to contain some protections for an accused that are found in procedures in a court-martial or trial in U.S. district court. Some of the concerns of military tribunal critics may be satisfied by the provision of certain rights to defendants that may appear in these orders and regulations.

Second, selective use of military tribunals may likewise address critics' concerns. The first case of a non-U.S. citizen tried for terrorism connected to the September 11 attack is that of Zacarias Moussaoui, who was arrested in the United States. He has been indicted in U.S. district court, rather than being brought before a military tribunal.

U.S. constitutional rights normally extend to non-U.S. citizens. Are there any precedents for denying these rights?

Yes. The U.S. Supreme Court in *Ex Parte Quirin*, 317 U.S. 1 (1942), upheld a

# Tribunal, Court-Martial, and U.S. District Court: A Comparison

Component	Military Tribunal	Court-Martial	U.S. District Court
<b>PRETRIAL DETENTION</b>	Persons may be held, but no rules yet established on length, etc.; president's order says accused has no right to seek remedy in another court.	A speedy trial and protections against unlawful detention are afforded; detention may be challenged in U.S. court ( <i>habeas corpus</i> ).	Laws requiring bail and speedy trial; <i>habeas corpus</i> law may be used for release.
<b>DECISION TO PROSECUTE</b>	Determined by the president.	Art. 32 proceeding provides disclosure of evidence to accused and counsel.	Grand jury indictment required.
<b>RULES OF EVIDENCE</b>	Admission of evidence, "which, in opinion of tribunal, has probative value to a reasonable person"; secretary of defense may issue further rules.	Comprehensive rules of evidence in Manual for Courts-Martial; thereafter, reference to U.S. district court rules that are not inconsistent.	Federal Rules of Evidence.
<b>STANDARD OF GUILT</b>	"A full and fair trial"; other guidance may yet issue from secretary of defense.	Proof beyond a reasonable doubt.	Proof beyond a reasonable doubt.
<b>COMPOSITION OF FORUM</b>	Members of tribunals as finders of both facts and law.	Military judge determines law, court members determine facts (unless military judge without jury).	Trial judge determines law, jury determines facts (unless trial judge without jury).
<b>SECURITY OF EVIDENCE OR HEARING</b>	Order does not require open or closed hearing; closing the hearing or secrecy of evidence "in a manner consistent with protection of classified information."	Open trial required; hearing may be closed and secrecy of evidence and record ordered with respect to classified information (e.g., in the interests of national security).	Open trial required; hearing may be closed and secrecy of evidence and record ordered with respect to classified information.
<b>VOTE ON CONVICTION</b>	Two-thirds vote, a majority being present.	Two-thirds vote, except unanimous for death sentence.	Unanimous vote.
<b>SENTENCE</b>	Two-thirds vote, a majority being present.	Unless judge without jury determines sentence (except death), unanimous for death sentence; three-fourths for more than ten years; two-thirds for lesser sentence.	Determined by judge.
<b>APPEALS</b>	Conviction and sentence subject to final review only by president or, if designated, secretary of defense.	Conviction and sentence may be reviewed by convening authority, then military service courts of appeal, then U.S. Court of Appeals for Armed Forces (civilian judges) and possibly U.S. Supreme Court.	Appeal may be taken to U.S. Court of Appeals and possibly U.S. Supreme Court.

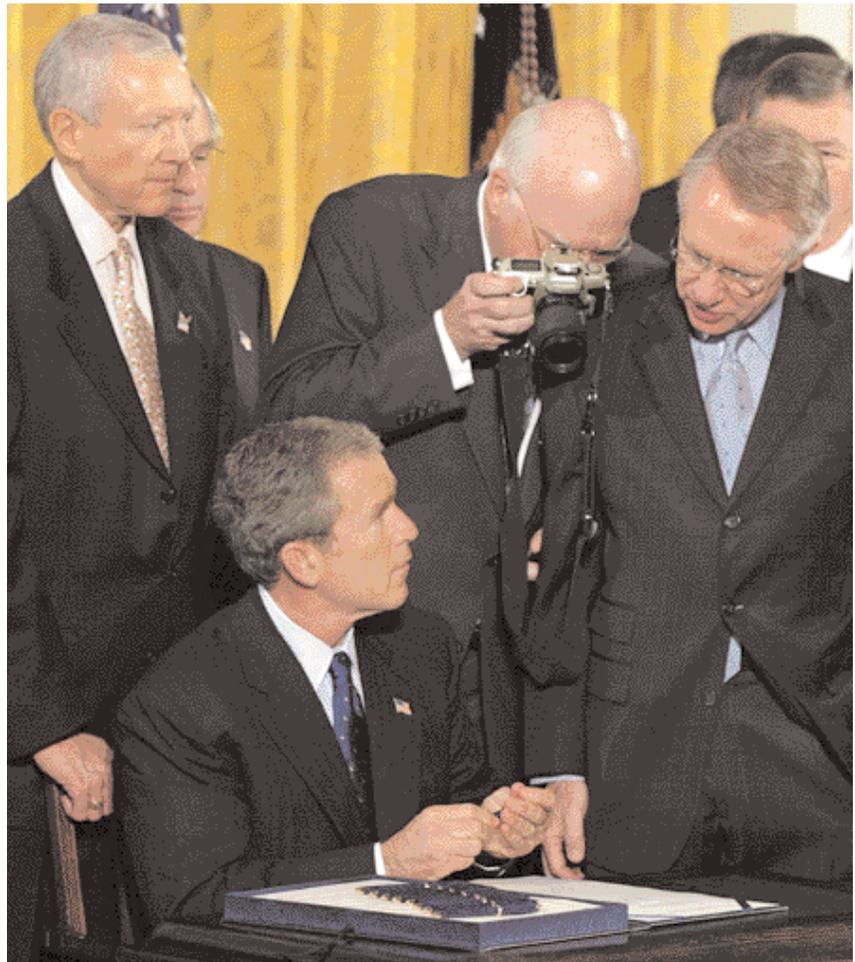
military tribunal that tried six German military saboteurs who landed in the United States in violation of the laws of war. The Supreme Court approved the military tribunal notwithstanding the absence of Fifth and Sixth Amendment protections and other procedural rules found in normal criminal cases. The court found that the practice of military tribunals was recognized by the law of war prior to the adoption of the Constitution and has been followed in subsequent wars. Some contest the authority of President Bush to order military tribunals in an “undeclared” war against terrorism conducted by an entity that is not a sovereign state.

What arguments are being made to provide constitutional rights to those who would face military tribunals?

The United States has long stood for the proposition of equal justice under law. This ideal has been the hallmark of our nation’s legal system and has set the leading example of the rule of law throughout the world. The structure of the military tribunal does not present the appearance of an unbiased and independent forum, and the procedures are so favorable to the government as to raise doubts that trials before them would be fundamentally fair. Thus, critics argue that constitutional rights and the procedural rules applicable to U.S. citizens in our courts should apply to non-U.S. citizens even in a military tribunal.

Further, the United States has long advocated for basic human rights to be afforded to U.S. citizens when they are facing trial for criminal offenses in foreign countries. Its credibility in doing so will be seriously compromised in the face of the rules set out for military tribunals. Finally, the U.S. reputation for justice is being diminished, as demonstrated by the government of Spain’s recent reluctance to extradite terrorists to the United States if they would face the new military tribunal.

Robert Hirshon, American Bar Association president, has stated, “Even with [today’s] new and frightening landscape, the familiar landmarks of the Constitution and the Bill of Rights can—indeed, must—guide us.” He expressed



Sen Patrick Leahy (D-Vt.) peers over the shoulder with his camera as President Bush signs the USA PATRIOT Act Bill during a ceremony in the White House East Room, on October 26, 2001. The law gives police unprecedented authority to search people’s homes and business records secretly and eavesdrop on telephone and computer conversations. *Left to right are: Sen. Orrin Hatch, R-Utah, Patrick Leahy, D-Vt., Sen. Harry Reid, D-Nev.*

concern that the president’s order on military tribunals does not allow for public proceedings or *habeas corpus*, allows a lower standard of proof than military courts-martial, and requires only a two-thirds vote rather than a unanimous vote for the death sentence. On February 4, 2002, the ABA House of Delegates adopted a Resolution that approves the use of military tribunals but recommended that Congress have a role in establishing military tribunals; that military tribunals should guarantee that defendants are presumed innocent and must be proved guilty beyond a reasonable doubt; that a death sentence should require a unanimous verdict; and that tribunals follow the settled rules for courts-martial, including the right to appeal to the U.S. Supreme Court.

What are some arguments against affording U.S. constitutional rights to accused terrorists?

Those holding this position point out that constitutional rights are not absolute and must be balanced with significant threats to the security of our citizens. They assert that when a foreign force for the first time in our nation’s history murders more than three thousand innocent U.S. citizens on our soil and threatens to continue such attacks, extraordinary action is required, such as the establishment of military tribunals with less stringent protections for the accused. They also argue that the nation should not be willing to set a non-U.S. citizen free on a “legal technicality” to allow that person to lead the next suicide attack on our homeland for the sake of “equal justice under law.”



Prisoners in Shibergan Prison in Afghanistan in December 2001. U.S. forces sealed off the northern Afghanistan prison on December 29, so they could transfer detainees, foreigners, and possibly some Afghans, to a staging area for suspected al Qaeda and Taliban members, some of whom could face U.S. military tribunals.

Most of the constitutional protections afforded to criminal defendants have been developed only within the last fifty years by the U.S. Supreme Court's interpretation of the Constitution. Such interpretation has taken place solely within the context of a criminal justice system that is willing to set a guilty person free rather than possibly convict an innocent person. Our justice system affords more rights to the accused than does any system in the entire world. The "cost" of this system to our society has been acceptable.

But today's context is new: terrorist attacks that result in the murder of thousands, damage in the trillions of dollars, and threatened biological or nuclear attacks. The cost to our society of affording constitutional protections for accused suicidal terrorists is unacceptable to the many people who argue that our criminal justice system was never intended as the due process system for non-U.S., mass-murdering war criminals. According to them, accused ter-

rorists should receive due process, but the process due a war criminal like that found in other war-crime tribunals around the world.

What about procedural rights (some of which are constitutional)? What are the arguments for affording the same procedural rights to accused terrorists as are applied in U.S. district court or courts-martial?

The Human Rights Watch organization and many other critics who hold this position maintain that the American tradition of "justice for all" will be undermined, along with the ability of the United States to promote fair trials abroad, unless basic due process rights are provided for in military tribunal procedures, including the following rights.

- ▶ The accused is informed of all charges.
- ▶ The accused is not forced to testify against him- or herself, nor may statements from him or her be obtained through coercion; and any statement so obtained is excluded from evidence.

- ▶ The accused has a right to counsel of his or her choice, at public cost if he or she is indigent, and the ability to freely communicate with a lawyer and have adequate time to prepare defense.
- ▶ The accused is given access to all exculpatory evidence.
- ▶ The accused has the right to be present during trial.
- ▶ The accused has the assistance of translators or interpreters.
- ▶ The accused has the ability to cross-examine all witnesses against him or her, challenge other evidence, and introduce witnesses on his or her behalf.
- ▶ The accused is presumed to be innocent until guilt is proven beyond reasonable doubt.
- ▶ Any conviction is not based on acts or omissions that were not offenses under law at the time they were committed.
- ▶ The penalty for any offense is not greater than it was when it was committed.
- ▶ There is a right of appeal to the U.S. Court of Appeals for the Armed Forces.
- ▶ No death sentence can be adjudicated without a unanimous vote.

What are the arguments against affording such procedural rights to accused terrorists?

Many are related to publicity, practicality, and the likely outcome of the trial. Most people agree that a long, drawn-out trial of any al Qaeda leaders, especially Osama bin Laden, with the attendant publicity, would carry with it the increased rage and retaliation of those committed to this cause, a "stage" for propaganda from this radical group, and the greater likelihood of converts to this cause.

The Federal Rules of Evidence and the Military Rules of Evidence (for use in courts-martial) exact a high standard before evidence is allowed to be "admitted" and considered by the finder of fact, and they would require a lengthy trial. There are many rules, including the qualifying of documentary evidence; the admissibility of evidence, such as photos and tapes; and the consideration of hearsay testimony that might be relaxed

or avoided in a military tribunal. The distance between the source of the evidence (e.g., Afghanistan) and the location of trial (e.g., the United States) multiplies the impact of these rules because of the logistics of providing live witnesses or responding to unexpected evidence during trial. The cooperation of witnesses sometimes depends on whether they will be required to be transported—in this case, halfway around the world—to present their testimony.

By comparison, the standard for admissibility in a military tribunal established under President Bush's order is evidence that "has probative value to a reasonable person" and is more easily achievable. A military tribunal would result in a more expeditious trial and can still provide the requisite due process. Trying cases from the Bosnian war, the United Nations Court in the Hague permits fact-finders to consider hearsay evidence, convictions and sentencing by nonunanimous vote of the judges, and the closing of the proceedings for "safety" and "security" reasons. The two criminal trials of the terrorists convicted for the 1993 bombing of the World Trade Center were held in U.S. district court. One trial lasted five months with more than two hundred witnesses and more than one thousand exhibits, and the second trial took more than eight months involving more than two hundred witnesses and hundreds of exhibits. In 1996, the government of Sudan offered to arrest Osama bin Laden and place him in Saudi custody for extradition to the United States. The White House decided it did not have an adequate case to convict him in U.S. courts and rejected the offer. The use of military tribunals would likely have resulted in more expeditious trials—and a decision to take custody of Osama bin Laden to try him.

What impact is September 11 likely to have on our legal system?

The most powerful country in the world has experienced a frightening blow from an organization of terrorists who have proven that our best defenses can be overcome by sheer will and determination. It has changed many things in our

country, not the least of which is how we view our legal system. National security and public safety are now competing interests to individual liberties at a level that we have not seen since World War II, and public opinion polls bear that out. The president of the United States has ordered unprecedented changes in laws affecting rights of individuals.

Here are some questions that remain to be answered: Does the president's order suspend the use of *habeas corpus* in these cases? To what extent should secrecy in military tribunals be allowed when not dealing with classified information? What minimum due process should be afforded accused persons in military tribunals, like the right to counsel, to confront witnesses, and to present their own case? Does the use of court-martial rules satisfy those who believe the tribunal's rules are insufficient, thus at least allowing the military to conduct the case overseas or in the United States for reasons of security?

What difference will public debate about military tribunals have?

U.S. law and public policy are not static; they are alive and usually responsive to the needs of our society, continually balancing interests to attain the common good, consistent with our Constitution. Public debate of these important issues is crucial to their just resolution. When judges, members of Congress, and the president make decisions, they must follow the law, but they must also listen to public views on important issues. Good citizens educate themselves on these issues and make their views known in various forums and at the voting booth. By such debate, good citizens can influence the outcome. 

**Frank Moran** is executive director of the Boston Bar Association and a retired Air Force colonel who spent eight years as a military judge. Moran is former chair of the ABA Standing Committee on Armed Forces Law and is a member of the ABA Standing Committee on Public Education.

**Seva Johnson** is director of publishing and marketing for the ABA Division for Public Education in Chicago.

## Asian Educational Media Service

<http://www.aems.uiuc.edu>

*Bookmark our  
Web site for free  
advice on finding  
and selecting the  
audio-visual materials  
you need on the  
cultures of Asia!*



- Search our online database
- Read a review
- Write a review
- Download teacher's guides
- Sign up for our free newsletter
- View images from Asia
- Post a message
- Request information
- Make a suggestion
- Check out our many helpful links!

**Asian Educational Media Service • Center for East Asian and Pacific Studies  
University of Illinois at Urbana-Champaign • 230 International Studies Building  
910 South Fifth Street • Champaign, IL 61820**

**Toll Free Telephone: 1-800-828-AEMS (2576) or 217-265-8642  
E-mail: [aems@uiuc.edu](mailto:aems@uiuc.edu) • Fax: 217-265-8641**