

The following text may be printed, copy/pasted, or downloaded and emailed.

Trial by Commission: Legal, and Right

Letter to the Editor
Washington Post
November 25, 2004

As a retired Army judge advocate who taught the law of war -- including the history of and rules for military commissions -- to military lawyers for 16 years, I found the Nov. 18 editorial "Guantanamo Troubles" inaccurate. It said that a prisoner of war "would be entitled . . . to trial by court-martial," but this is a misreading of Article 102 of the Geneva Convention for the Protection of Prisoners of War.

That article does say that a prisoner of war can be sentenced only by the "same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." However, the correct question in applying this article is not whether a prisoner of war must be tried by court-martial but whether a U.S. soldier can be tried by military commission.

The answer to the latter question is yes. In 1952, after the Geneva Conventions had been drafted, the Defense Department reviewed the recently revised Manual for Courts-Martial. It said, "[General court-martials] have concurrent jurisdiction with military tribunals to try any person who by the law of war is subject to trial by military commissions. . . . Under this clause there is no question that members of our armed forces may be tried for violations of the law of war, either by military commissions or general courts-martial."

This should put to rest the mistaken impression that prisoners of war must be tried by courts-martial only.

The editorial also said that Congress should be involved in the creation of military tribunals. Congress has been involved. The jurisdiction of military commissions is recognized and approved in Article 21 of the Uniform Code of Military Justice. Congressional approval of these tribunals has been on the books since World War I. The trials should be permitted to continue. There is no jurisdictional bar to their use, nor should there be.

H. WAYNE ELLIOTT

Charlottesville