

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

Unjust, unwise, unAmerican

The Economist print edition
July 10, 2003

America's plan to set up military commissions for the trials of terrorist suspects is a big mistake

[Get article background](#)

YOU are taken prisoner in Afghanistan, bound and gagged, flown to the other side of the world and then imprisoned for months in solitary confinement punctuated by interrogations during which you have no legal advice. Finally, you are told what is to be your fate: a trial before a panel of military officers. Your defence lawyer will also be a military officer, and anything you say to him can be recorded. Your trial might be held in secret. You might not be told all the evidence against you. You might be sentenced to death. If you are convicted, you can appeal, but only to yet another panel of military officers. Your ultimate right of appeal is not to a judge but to politicians who have already called everyone in the prison where you are held “killers” and the “worst of the worst”. Even if you are acquitted, or if your appeal against conviction succeeds, you might not go free. Instead you could be returned to your cell and held indefinitely as an “enemy combatant”.

Sad to say, that is America's latest innovation in its war against terrorism: justice by “military commission”. Over-reaction to the scourge of terrorism is nothing new, even in established democracies. The British “interned” Catholics in Northern Ireland without trial; Israel still bulldozes the homes of families of suicide bombers. Given the barbarism of September 11th, it is not surprising that America should demand retribution—particularly against people caught fighting for al-Qaeda in Afghanistan.

This newspaper firmly supported George Bush's battles against the Taliban and Saddam Hussein. We also believe that in some areas, such as domestic intelligence gathering (see article), his government should nudge the line between liberty and security towards the latter. But the military commissions the Bush administration has set up to try al-Qaeda suspects are still wrong—illiberal, unjust and likely to be counter-productive for the war against terrorism.

[A question of integrity](#)

The day before America's Independence Day celebrations last week, the Pentagon quietly announced that Mr Bush had identified six “enemy combatants” as eligible for trials before military commissions, which are to be set up outside America's civilian and military court systems. The Pentagon did not release the names of the accused, or any charges against them, but the families of two British prisoners and one Australian held at the American naval base at Cuba's Guantanamo Bay were told by their governments that their sons were among the six deemed eligible for trial.

The Australian government's failure to protest about this has caused protests (see article). British ministers have expressed “strong reservations” about the commissions. In the past, they have asked for British citizens caught in Afghanistan to be sent home for trial in British courts—just as Mr Bush allowed John Walker Lindh, a (white, middle-class Californian) member of the Taliban, to be tried in American courts.

American officials insist that the commissions will provide fair trials. The regulations published by the Pentagon stipulate that the accused will be considered innocent until proven guilty beyond a

reasonable doubt, that he cannot be compelled to testify against himself, and that the trials should be open to the press and public if possible.

The problem is that every procedural privilege the defendant is awarded in the regulations is provisional, a gift of the panel which is judging him. The regulations explicitly deny him any enforceable rights of the sort that criminal defendants won as long ago as the Middle Ages. Moreover, the planned commissions lack the one element indispensable to any genuinely fair proceeding—an independent judiciary, both for the trial itself and for any appeal against a conviction. The military officers sitting as judges belong to a single chain of command reporting to the secretary of defence and the president, who will designate any accused for trial before the commissions and will also hear any final appeals. For years, America has rightly condemned the use of similar military courts in other countries for denying due process.

Why dispense with such basic rules of justice? Mr Bush's officials say they must balance the demand for fair trials with the need to gather intelligence to fend off further terrorist attacks. Nobody denies that fighting terrorism puts justice systems under extraordinary strain. But this dilemma has frequently been faced by others without resorting to military trials. The established procedure is to pass special anti-terrorism laws, altering trial rules somewhat to handle terrorist cases, but not abandoning established court systems, and trying to retain the basic rights of those accused as far as possible. Britain and Spain have done this. There is no reason why America's own civilian courts, which have successfully tried plenty of domestic and foreign terrorists (including Mr Lindh), could not be adapted to this purpose.

Since the 2001 attacks, the Bush administration has avoided America's own courts repeatedly. Soon after the attacks, Mr Bush issued his executive order permitting military commissions outside the purview of the courts. Since then, his administration has imprisoned some 680 people at Guantanamo Bay precisely because it believed that the naval base, held on a perpetual lease, is outside the reach of anyone's courts, including America's. It has also claimed the right to arrest American citizens, even on American soil, as "enemy combatants" and to imprison them without charge until the war on terrorism is over. Appeals by civil libertarians to America's court system have been resisted at every stage.

Mr Bush could have asked Congress to pass new anti-terrorism laws. Instead, he is setting up a shadow court system outside the reach of either Congress or America's judiciary, and answerable only to himself. Such a system is the antithesis of the rule of law which the United States was founded to uphold. In a speech on July 4th, Mr Bush rightly noted that American ideals have been a beacon of hope to others around the world. In compromising those ideals in this matter, Mr Bush is not only dismaying America's friends but also blunting one of America's most powerful weapons against terrorism.