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## The Guantanamo Trials

Editorial  
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The Pentagon announced changes last week to the military tribunals that it has been trying to set up at the Guantanamo Bay naval base -- for years now -- to try terrorist suspects on war crimes charges. The tribunals, known as commissions, so far have been a total failure. Not a single detainee has been actually been put on trial. The system has been mired in litigation. There are serious problems of fairness and appropriate process for defendants who could face long prison terms or even the death penalty. The administration's changes improve the system in subtle but important ways, moving it closer to the system of courts-martial by which the military tries its own soldiers. But they don't entirely fix the problems.

The most substantial change in the new order separates the function of the commission's presiding officers from its other members. Under the previous order, all commission members functioned as both judge and jury. Under the new order, the presiding officer will function as the judge, responsible for rulings on matters of law -- though the other members of the commission could still override a decision concerning whether to admit certain evidence. The other commission members would decide guilt and sentencing, decisions in which the presiding officer would not participate. In addition, the order tightens a bit the right of the accused to be present at trial, subject to the need to protect classified information -- a largely symbolic change. And more important, it requires that if any material is withheld from the accused because of national security concerns and a reasonable summary cannot be provided, that material must be excluded from trial if its admission as evidence would preclude a fair trial.

Important differences remain between the commissions and true courts-martial, differences that leave the commissions wanting. The commissions still lack any direct appeal to the federal court system, which is a significant flaw. Their rules of evidence are more relaxed as well. But the more the commissions come to resemble courts-martial, the less sense it makes for the military to create a justice system from scratch rather than using the one it already has -- in which Americans and the international community have high confidence.

The administration's explanations on this point are increasingly less persuasive as time goes on. Al Qaeda operatives, officials note, did not fight according to the laws of war and, as a consequence, are not entitled to the privileges of honorable soldiers -- one of which is trial before court-martial. This is true enough. But is it really worth years of delay and litigation in order to bring defendants to trial under conditions whose fairness many people will doubt? The military also argues that commissions afford the government certain flexibility with respect to classified information and security that could not be easily handled in a court-martial. Again, that's true, but if Congress were to get involved and authorize courts-martial for accused terrorists, it could tinker with the model for these highly specialized circumstances.

At this stage, the critical matter is for fair rules to be clearly written in law. While the commissions are getting better, they still constitute a system in which the executive branch writes the rules (and rewrites them in midstream if need be), carries out the trials, hears the appeals and executes the sentences without input from the other two branches. Even if the commissions were perfectly designed -- and they still are far from that -- this would not be the best way to bring accused terrorists to trial.