

# DOJ's Tribunal Plan Draws Military Fire

by Edward Spannaus

Little-noticed in the heated debate over the Bush Administration's plan for using military tribunals to try suspected terrorists, is that there is a simmering anger from the military itself over the proposal. According to several sources, the Department of Defense (DOD) was not consulted by the Department of Justice (DOJ) and the White House, and senior military legal officers were as surprised as anyone else when the President issued his Military Order on Nov. 13.

A number of senior military legal officers, both active duty and retired, have told *EIR* that they resent the implication, being promoted by the DOJ and its mouthpieces, that it will be easier to ram through convictions in military tribunals than in civilian courts.

The most prominent signal of military opposition came in testimony to the Senate Judiciary Committee on Nov. 28 by Scott Silliman, Director of the Center on Law, Ethics, and National Security at Duke University. Silliman spent 25 years as a uniformed attorney in the Air Force Judge Advocate General (JAG) Department, and retired with the rank of colonel. Silliman is a leading figure in the American Bar Association (ABA) Standing Committee on Law and National Security, and is a frequent spokesman for military interests.

Silliman argued against the use of military tribunals, on both legal and policy grounds. He identified a number of weaknesses in the legal authority cited by the President's order. For example: The Congressional resolution authorizing use of force, never refers to the Sept. 11 attacks as acts of war, but only as "terrorist" acts. But the use of military commissions are appropriate only in a state of war, Silliman showed.

Silliman's primary concern, one obviously shared by many others in the military, was expressed when he stated, "I believe that we should be cognizant of a potential adverse impact upon our international credibility, as well as tarnishing the image of 50 years of military justice under the UCMJ [Uniform Code of Military Justice]." Silliman contended that the American people do not understand the distinction between courts-martial and military commissions, and he accused former Deputy Attorney General George Terwilliger of fostering the misconception that they are the same thing. "There is a marked contrast in the protections afforded our service personnel under the military justice system, and the lack of due process in military commissions," Silli-

man said.

At a conference of the ABA national security law committee on Nov. 29-30, the military tribunal order was a major topic of discussion. Military representatives were anxious to state that any military tribunals will not be a "kangaroo court" (as suggested by columnist William Safire), and that trials would be conducted fairly.

In a private discussion, a retired general told *EIR* that the senior military officers who would sit on a military commission will not be pushovers for any prosecutor. "Anybody who thinks otherwise doesn't know senior military officers," he said.

DOJ prosecutors are going to be surprised at how strictly military judges will insist that the cases against any suspects be fully proved, he said. In later discussions, he pointed out that the conviction in the Japanese war-crimes trials was only 85%—far lower than in Federal courts today, where the conviction rate in criminal trials runs from 93% to 97%.

## Pentagon Was Not Consulted

In private, one senior uniformed legal officer, still on active duty, indicated that the DOD itself was caught by surprise by the President's order. (Other sources have indicated that, in addition to the DOJ, input into the initial proposal may have come from one or more Deputy Secretary of Defense Paul Wolfowitz-linked aides to Vice President Dick Cheney.)

This issue had also come up in the Nov. 28 Senate hearing, when Assistant Attorney General Michael Chertoff tried to excuse the DOJ's lack of consultation with Congress, by suggesting that the idea had arisen in DOD. Sen. Edward Kennedy (D-Mass.) challenged Chertoff. "I'm a member of the Armed Services Committee," Kennedy said, and "they stated unequivocally, the Defense Department didn't request the authority. They didn't even appear to have been consulted."

In background discussions, it is clear that, just beneath the surface, there is considerable anger in military circles over the way they believe they are being set up by the DOJ.

This was also confirmed by a *New York Times* article on Dec. 2, which reported that former military lawyers are angry at the perception being created by the White House, that military tribunals are just a wartime version of courts-martial. The *Times* story noted that many commentators and others see tribunals as a fool-proof short-cut to a guilty verdict; but some lawyers warn that trials that appear to include short-cuts to win convictions, will raise suspicions around the world.

"It bothers me that people are thinking we try thousands of people this way in the courts-martial system," says a retired Army judge. "There's been a lot of talk about military kangaroo courts. Having grown up in the courts-martial system, I'm rather offended by it, because it is a good system that provides more than adequate due process for the men and women in our military service."