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Closed-door changes threaten nation's liberty, justice

By Tom Allen

Since Sept. 11, we have faced an unprecedented threat to our security. This new danger calls for effective responses, including identifying and prosecuting terrorists and those who help them. For these suspects, President George W. Bush has unilaterally created a new military criminal justice system.

In addition, Attorney General John Ashcroft has promulgated a new rule that would allow the government in these cases to eavesdrop on communications between American citizens (as well as aliens) in custody and their lawyers, without court approval.

I believe it was a grave mistake to craft these sweeping changes behind closed doors. By excluding Congress, the courts and the American people from the process of balancing liberty and security, the president has presented us with an ill-conceived plan, one that reaches to everywhere, and is inconsistent with the values and interests that make our country strong.

Consider what the president's order on military tribunals allows. Foreign nationals arrested here or abroad can be detained indefinitely, without ever going to trial. They can be denied access to the evidence against them, tried in secret under unspecified rules of evidence and standard of proof. They can be denied the right to choose their lawyer. They can be sentenced to death by a non-unanimous panel of military officers, without possibility of review by civilian courts.

The system not only omits fundamental protections, but potentially applies to a huge class of people — any of the 20 million resident aliens in the United States whom the president believes have ever aided what the president deems international terrorism. Perhaps this system will be used sparingly. The Dec. 11 indictment of Zacarias

Moussaoui, accused of being the so-called 20th hijacker, in a federal district court in Virginia rather than a military tribunal, suggests this may be the president's thinking. The order itself, however, provides no such limits. If we are "a nation of laws, not men," we should not have to depend solely on trust in our leaders to do the right thing.

Americans would be incensed if such a justice system had been used against the U.S. airmen and women who were captured when their aircraft was forced to land in China earlier this year. Although these Americans eventually were released through intense diplomatic efforts, a New York woman charged with aiding terrorists in Peru was not so lucky. Lori Berenson was convicted of treason and sentenced to life without parole in a trial conducted by hooded military judges who barred cross-examination of witnesses. Only after years of pressure from Washington was she granted a civilian court retrial. How could we have made such a plea unless we passed the test ourselves?

Similarly, the rule that eliminates lawyer-client confidentiality in certain circumstances is overbroad and unnecessary. Under current law, if investigators have reason to believe these privileged communications are in furtherance of criminal plans, they can seek a court order to listen in. Pervasive monitoring of the sort permitted by the new rule has never been sanctioned, and it is certain to have a chilling effect on inmates' full and open consideration of legal options with their lawyers.

When the attorney general was grilled about this rule and the order on military tribunals by a Senate panel on Dec. 6, he did little to allay concerns. Rather, he accused critics of giving "ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil."

Precisely the opposite is the danger. It is the civic obligation of citizens to speak out when our Constitution is threatened. Yet, the attorney general has maligned people of good will. As for our friends, Spain and other allies have balked at turning terrorist suspects over to be tried under this system. And in this model our enemies find a justification for ignoring basic liberties.

To be sure, in times of war, presidents have cut constitutional corners. In hindsight, however, we view these acts as shortsighted. During the Civil War, Abraham Lincoln suspended the writ of habeas corpus, the ancient right to court review of arbitrary governmental actions. President Franklin Delano Roosevelt ordered the trial by secret military tribunal of German saboteurs who were captured in New York. But as Peter Cox, the son of the U.S. prosecutor in that case, recently wrote in the *Portland Press Herald*, "The secrecy surrounding those events ... has left me wondering not if they were guilty but whether the process and punishment were just. Uncertainty is the price we pay for secrecy." FDR also allowed the detention of 100,000 law-abiding Japanese-Americans in internment camps for the duration of World War II. Decades later, Congress formally apologized and authorized the payment of reparations.

Let's not repeat the mistakes of the past. Congress should debate the alternatives and the American people should be heard. While some form of military justice may be appropriate for a limited class of suspects, the system must be fair. Judicial review is essential in any process to check potential abuses in individual cases. Only by respecting the constitutional framework that has served us well for more than two centuries will we successfully meet the challenges of our time.

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