Statement of
Deborah N. Pearlstein

Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
United States House of Representatives
July 8, 2009

Legal Issues Surrounding the Military Commissions System

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Introduction

Chairman Conyers, Subcommittee Chairman Nadler, Ranking Member Sensenbrenner, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject. President Obama's announcement of May 15, 2009, that he recognized military commissions, if properly constituted, as an appropriate venue for trying detainees for violations of the laws of war took many in the national security law community by surprise.[1] Shortly after taking office, the President had instructed prosecutors to seek a suspension of Bush Administration military commission proceedings, a move that was widely thought to signal the end of the use of such tribunals. I, and many others in the civilian and military legal and security communities, have argued that the military commissions, as created by the Bush Administration and codified by Congress in the Military Commissions Act of 2006, were a failure, both as a matter of policy and law. I strongly hold that view today. Yet while I continue to doubt that the use of a new military commission system going forward is a wise or necessary course of policy, I also believe that it is possible to conduct military commission proceedings for certain crimes in a way that comports with U.S. and international law.

[1] The White House, Statement of President Barack Obama on Military Commissions, May 15, 2009, available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/.

Ensuring that any commission to be employed meets those standards is now a key responsibility of Congress.

In this testimony, I first put current efforts to employ military commissions in context, highlighting why it is wrong to accept recent suggestions that the Obama Administration's policy in this area is simply a continuation of policies advanced by George W. Bush. A second section explains why I believe military commissions can be used lawfully, and sets forth specific recommendations for amendments to pursue and consider to the Military Commissions Act of 2006 (MCA). The third section outlines why I believe policy concerns continue to attend the pursuit of military commissions going forward. While the Administration appears to have settled already on its policy to the contrary, it is worth recognizing the policy challenges any commission system will face in order to best ensure that any system going forward is attuned to minimizing those faults.

Understanding the Context

Recent suggestions that the Obama Administration's invocation of military commissions should be understood as a continuation of Bush policies are badly mistaken.[2] They both mischaracterize what Bush commission policy was, and they assume the contours of any Obama commission system going forward are already settled. The first error rewrites history. The second assumes the answers to the questions before Congress today. This section briefly reviews some of the key reasons why the Bush commissions announced in 2001 were so profoundly troubling. Its goal is to make clear

[2] *See, e.g.*, Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is Waging a More Effective War Against Terrorism than George W. Bush*, THE NEW REPUBLIC, May 18, 2009, available at http://www.tnr.com/politics/story.html?id=1e733cac-c273-48e5-9140-80443ed1f5e2&p=4; Benjamin Wittes and Jack Goldsmith, *Will Obama Follow Bush or FDR?*, WASH. POST, June 29, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062802288.html.

that the military commission system as it stands today is in no sense a product of Bush policy, but instead the result of a substantial reformation brought about by eight years of sustained bipartisan criticism, vigorous outside advocacy, courageous internal military opposition, historic litigation, massive legislation, and ultimately, democratic election. What the commissions are, and what they may yet become, will not be because of Bush Administration policy, but despite it.

The Military Order President Bush issued in November 2001 authorized the creation of a system of military tribunals to try a sweeping range of individuals, including anyone who, for example, has "as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy."[3] The decision to create the commissions was evidently reached without the input of key members of the Departments of Defense and Justice,[4] and was properly greeted with widespread, bipartisan condemnation.[5] While the criticisms were many and varied, virtually all of the major domestic human rights organizations agreed: it was *possible* to conduct lawful military trials for violations of the law of war, but the Bush Administration regime did not meet even the most basic tests of the rule of law.[6] Among the Bush system's key

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[3] President George W. Bush, Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, available at http://news.findlaw.com/wsj/docs/terrorism/bushtribunalord111301.html.

[4] *See, e.g.*, Adam Liptak, *U.S. Barred Legal Review of Detentions, Lawyer Says*, N.Y. TIMES, May 19, 2004, available at http://www.nytimes.com/2004/05/19/international/middleeast/19LAWY.html.

[5] *See, e.g.*, Robert A. Levy, *Indefensible – The Case Against Military Tribunals*, WALL ST. J., Nov. 25, 2002; *see also* William Safire, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001. The criticism in some respects grew as the Pentagon began announcing some of the details of commission rules. *See, e.g.*, National Association of Criminal Defense Lawyers, Ethics Advisory Committee, Opinion 03-04, approved by the NACDL Board of Directors August 2, 2003, available at http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf (concluding that it would be "unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation").

[6] *See, e.g.*, Laura W. Murphy and Timothy Edgar, Letter to Members of Congress Regarding Military Tribunals, Nov. 29, 2001, available at http://www.aclu.org/natsec/emergpowers/14374leg20011129.html

failings: (1) the President simply did not possess unilateral authority under the Constitution to create war crimes tribunals without proper authorization from Congress (not to mention without *any* review by the independent courts); (2) the system appeared to lack any significant set of procedural protections for, or indeed any recognition at all of, the rights of those tried before it (including the right to be tried based on evidence not obtained from torture or cruel treatment); and (3) the system contemplated asserting jurisdiction over a range of "offenses" that went far beyond those specific "war crimes" defined in U.S. and international law – the only crimes that may be lawfully tried before a military tribunal of this nature.[7]

It was in response to this kind of overwhelming condemnation – condemnation that would come to be shared by the courts – that the Administration soon began revising commission rules. Indeed, from the time the commissions were announced in 2001 until the Supreme Court's heard oral arguments in the 2006 case invalidating the commissions, *Hamdan v. Rumsfeld*, commission rules were revised or amended no fewer than 15 times.[8] While the revisions were intended to address the commission's many on-paper deficits, the fact that even the most basic commission rules remained a moving target

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("While the ACLU does not believe that the use of military tribunals is unconstitutional in all circumstances, the ACLU strongly opposes the Military Order…"); Human Rights First, Military Commission Trial Observation, Jan. 9, 2006, available at http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-010906.asp ("Military commissions are not necessarily in and of themselves a problem."); Human Rights Watch, Letter to Secretary Rumsfeld on Military Commissions, Dec. 13, 2001, available at http://www.hrw.org/en/news/2001/12/13/letter-secretary-rumsfeld-military-commissions (urging that military commission rules be adopted to ensure they comply with U.S. and international law guaranteeing the right to a fair trial).

[7] For a detailed account of these arguments, see generally Brief for Petitioner Salim Hamdan, *Hamdan v. Rumsfeld, et al*., No. 05-184 (U.S. S. Ct. Jan. 6, 2006), available at http://www.hamdanvrumsfeld.com/petbriefhamdanfinal.pdf.

[8] For a chronology of military commission development between 2001-2006, see HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE RULES FOR MILITARY COMMISSIONS (2006), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf.

throughout this period undermined any claim they might have had to being a stable, or any sense regular, system of law.

But the problems on paper explained only part of the Bush commission failings. Beginning with the first commission proceedings in 2004, it became clear that the commissions in practice were not an impartial system of justice. These failings were evident in the reports of the many human rights monitors who sat, as I did, in commission proceedings in the early years. Whether from the lengthy fight with the Defense Department to open the trials to any kind of public view, or from the desks and printers and paralegals that prosecutors had (and defense attorneys did not), from the quality of the translators available (who may or may not have known enough of the relevant language to make proceedings comprehensible to the defendant), or from some of the initial selected commissioners (including one officer whose responsibilities in Afghanistan included sorting and sending detainees to Guantanamo in the first place) – it was clear that the commission system was far removed from the ideal of American justice any who have trained at our law schools could recognize.[9] Such failings also became more dramatically evident in the statements of the multiple military prosecutors who resigned from the early commission system at substantial cost to their careers – primarily over concerns that potentially exculpatory evidence was being withheld from the defense.[10] The cumulative result of such practice was to create the appearance and reality of a system skewed badly in favor of the prosecution.

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[9] Human Rights First, for example, sent a series of monitors to observe military commission proceedings at Guantanamo Bay since their commencement in 2004. I was the first such observer on behalf of Human Rights First, for which I then served as Director of that organization's Law and Security Program. My reports, and those of subsequent Human Rights First monitors, may be found here: http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm.

[10] *See, e.g.*, Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 (military commission prosecutor complaining of evidence withheld by the C.I.A. and of evidence

In the face of this record, it was thus not surprising that more than three dozen amicus briefs were filed in the Supreme Court embracing Mr. Hamdan's challenge to the legality of the commissions – with signatories variously including a distinguished group of retired American admirals and generals, nearly two dozen former U.S. diplomats, more than 400 members of the European Union and British parliaments, and hundreds of leading American scholars in constitutional, military, and international law.[11] And the Supreme Court ultimately agreed in substantial part with each of the major categories of criticism identified above: (1) the commissions had not been properly authorized; (2) the commission structure and procedures violated U.S. and international law in multiple respects; and (3) the commission likely exceeded its jurisdiction in charging Mr. Hamdan with "conspiracy," an offense not plainly recognized by the common law of war.[12] The Bush Administration commissions had been categorically repudiated by the nation's highest court, and those proceedings that had begun under them came to an end.

The MCA – the commission structure currently on the books – was Congress' attempt to start over, to create a commission system that complied with U.S. and international law. While the MCA itself has multiple deficits, as I will address below, there can be no question that it remedied the first major legal deficit of the Bush Administration commissions. Military commissions have now been authorized by Congress under chapter 47A of title 10 of the U.S. Code. Moreover, the MCA recognizes, albeit to an inappropriately limited extent, the authority of the civilian federal

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misrepresented by other members of prosecution team); Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

[11] All briefs filed in the *Hamdan* case are available online at http://www.hamdanvrumsfeld.com/briefs.

[12] Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Four justices agreed that the charge of conspiracy in this setting lacked sufficient authorization; Justice Kennedy believed it was not necessary for the Court to reach the question of the conspiracy charge in invalidating the commissions. *Hamdan*, 548 U.S., at 655 (Kennedy, J., concurring).

courts to review judgments of the commissions.[13] Whatever form the commissions may take going forward, they can no longer be assailed on one of the grounds that made them so profoundly troubling in their initial incarnation – that they enabled the President to act as judge, jury and executioner. Such differences alone are enough to categorically distinguish what comes next from anything the Bush Administration contemplated before the Supreme Court compelled it to change course in 2006.

Whether a new commission system will address the remaining deficits – the protection of basic individual rights, jurisdiction limited to crimes that violate the existing law of war, and attention to the practical demands of ensuring basic trial fairness – is yet to be determined. Under any circumstances, Congress, the President, and the courts will bear shared responsibility for the legality of any commission proceedings to come.

The Future of Military Commissions: Laws and Legal Structure

As noted above, while the MCA may in principle remedy the failure of lawful authority that fatally undermined the Bush Administration commissions, it leaves in place a structure and set of procedural rules that in key respects falls short of existing U.S. and international law. President Obama's announcement signaling his intention to rely on commissions going forward recognized these deficits in part, and the changes the President has ordered – most important, the absolute prohibition as evidence of statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods – are a positive first step.[14]

[13] *See* MCA, 10 U.S.C. §950g (providing for review by the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court).
[14] The White House, Statement of President Barack Obama on Military Commissions, May 15, 2009, available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-

But these changes do not suffice to bring the contemplated commissions fully in line with U.S. and international law protecting individual trial rights; indeed, in some places, the MCA expressly rejects the notion that the commissions must comply with these standards. Moreover, the changes announced to date leave in place two charging offenses – commission crimes of conspiracy and "material support" – that are not substantive offenses under the law of war. While such offenses may be properly tried in regular criminal court, they have no place in a lawfully constituted war crimes tribunal. Although the following should not be considered an exhaustive list, this section highlights some of the most important changes to the MCA that Congress will need to make or consider if commissions are to go forward. They are listed in order of their appearance in the MCA.

- Clarify MCA §948d(a) (''A military commission under this chapter shall have jurisdiction to try any offense made punishable *by this chapter or the law of war* when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.") (emphasis added). This provision raises two concerns. First, it could be read as an effort by Congress to criminalize conduct under "this chapter" of the MCA whether or not the conduct was already prohibited by the criminal law at the time the defendant acted. Retroactive application of a new criminal offense, not already a violation of the law of war, would be a violation of the Ex Post Facto Clause of the U.S. Constitution. Second, the language "by this

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Military-Commissions/ ("The Secretary of Defense will notify the Congress of several changes to the rules governing the commissions. The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts.").

chapter or the law of war" appears to acknowledge that the offenses listed in the MCA are not coextensive with, and reflective of, the law of war. Yet Congress' power under Article I of the Constitution to "define and punish … Offences against the Law of Nations" does not give Congress the authority unilaterally to declare any crime it sees fit a "war crime" regardless whether that act is actually an offense in the substantive law comprising the "Law of Nations."[15]

- Delete MCA §948(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). Whether or not the Geneva Conventions provide a plaintiff in a civil case a cause of action to get into federal court, the Geneva Conventions are, at a minimum, available as a rule of decision in cases before the federal courts. Such availability is mandated by the Constitution, declaring "all Treaties made" part of the "supreme Law of the Land," and consistent with the Supreme Court's application of the Geneva Conventions through the Uniform Code of Military Justice in *Hamdan v. Rumsfeld*.[16] Yet this section, as well as the similarly worded MCA §5, would seem intended to deny courts the power to look to whole bodies of law in the cases they decide.[17] As Justice Kennedy's

[15] *See Hamdan*, 548 U.S., at 598-613 (quoting In re Yamashita, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war.")).

[16] In rejecting the President's arguments that the military commissions convened at Guantanamo Bay were properly authorized, the *Hamdan* Court looked in part to a federal statute expressly invoking the law of war (the Uniform Code of Military Justice) as limiting the President's authority to convene military commissions. *Hamdan*, 548 U.S., at 613-35.

[17] These provisions are particularly troubling in this regard when viewed alongside, for example, MCA § 6(a)(2), which purports to forbid courts from relying on foreign or international law in interpreting the federal War Crimes Act, or MCA § 6(a)(3), which affords the President the "authority for the United States to interpret the meaning and application of the Geneva Conventions." For more detailed discussion of why these provisions pose special problems, see Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. POL'Y REV. (Online) (Nov 6, 2006), http://www.hlpronline.com/2006/07/pearlstein_01.htm; NEW YORK CITY BAR, REPORT CONCERNING THE MILITARY COMMISSIONS ACT OF 2006 RESTRICTING HABEAS CORPUS

concurrence in *Hamdan* emphasized, whatever the procedural mechanisms for enforcing treaty requirements, as far as the federal government is concerned, "requirements they are nonetheless."[18] The courts must, and do, have the authority to apply all applicable law in deciding cases or controversies properly before them.

- Review MCA §948r (excluding statements made by torture) and §949a(b)(2)(D) (providing that no statement shall be deemed inadmissible "on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with" the MCA torture-exclusion provision) to ensure that they adequately reflect the degree of voluntariness required by the U.S. Constitution for evidence to be admissible in criminal court. U.S. criminal trials in civilian court, as well as courts martial, have long prohibited the admission of "involuntary" statements at trial. Such statements have been recognized as inherently unreliable, and allowing them to be used at trial has been understood to create perverse incentives for detaining authorities to apply coercion beyond that authorized by law.[19]
- Revise MCA §950f(b-c) ("(b) In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law. (c) The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the

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JURISDICTION AND INTERFERING WITH JUDICIAL ENFORCEMENT OF THE GENEVA CONVENTIONS (March 2007), at pp. 12-17, available at http://www.nycbar.org/pdf/report/Restoration_Habeas_Corpus.pdf.

[18] *Hamdan*, 548 U.S., at 635 (Kennedy, J., concurring) ("The provision is part of a treaty the United States has ratified and thus accepted as binding law."); *cf.* Sanchez-Llamas v. Oregon, 126 S.Ct. at 2684 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) at 177 (1803) ("If treaties are to be given effect as federal law [under our legal system], determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."); Williams v. Taylor, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility--independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States--to interpret federal law.").

[19] *See* United States v. Raddatz, 447 U.S. 667 (1980).

consideration of— (1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States."). There is no apparent reason for circumscribing the jurisdiction of the federal courts in this manner. Particularly given the Article I status of the commissions, it is essential that Article III judicial review be as thorough as possible. Review should extend to questions of fact, subject to respect by the court to the extent commission findings have the power to persuade. And, consistent with the concerns raised about MCA §§5-6 above, the scope of review should be clarified to include "the Constitution, laws *and treaties* of the United States."

- Revise MCA §950v (listing crimes triable by military commissions) to exclude, at a minimum, the offense of "providing material support for terrorism," and the offense of "conspiracy." I have as yet unearthed no credible authority suggesting that "material support" has ever been understood as a war crime. The offense is not listed as such in the U.S. War Crimes Act, 18 U.S.C. § 2441, in the U.S. Army Law of War Handbook (2005), or in any of the major treaties defining such offenses (including the statutes of the International Criminal Court, or the International Criminal Tribunals for the Former Yugoslavia or Rwanda). Likewise, as at least four justices of the Supreme Court have already recognized, "conspiracy" as charged in the prior commissions "is not a recognized violation of the law of war."[20] If the principal justification for pursuing commission trials instead of prosecution in civilian court is that the subject of the commissions are

[20] *Hamdan*, 548 U.S., at 598-613 (noting that neither of the Geneva Conventions nor the Hague Conventions identifies conspiracy as a war crime). Again, Justice Kennedy believed it was not necessary for the Court to yet reach that question. *Hamdan*, 548 U.S., at 655 (Kennedy, J., concurring).

specialized, and specific, war crimes, then it is critical the charging offenses not infringe on what is otherwise an ordinary part of domestic criminal law.

The Future of Military Commissions: Policy

While correction of these provisions would go a long way toward addressing the remaining legal failings of the commission system, they do not of themselves constitute an affirmative case for why prosecutions in military commissions instead of in the Article III courts is a wise course of action. On the contrary, that case remains to be made. As a distinguished group of retired admirals and generals recently put the question: "If significant procedural differences exist between new military commissions and the civilian system, public attention at any trial will inevitably focus on those differences. The world will continue to be preoccupied not with the crimes of the terrorists but with the deficiencies of our system. If, on the other hand, the procedural differences are minor, then it is hard to see the benefit of creating again a new system of justice that will be subject to challenge and delay."[21]

Neither do such changes in law suffice to justify renewed faith in a system that, as indicated above, proved in practice to be far worse than one might have imagined based only on its inadequate rules on paper. The Obama Administration may succeed in securing adequate resources for both prosecution and defense counsel, in demanding accurate translation services for the court and all trial participants, and in sharing with defense counsel all the potentially exculpatory information apparently withheld in the

[21] Letter of Vice Admiral Lee Gunn, et al. to President Barack Obama, May 15, 2009, available at http://www.humanrightsfirst.org/pdf/090515-etn-opp-mil-camp.pdf.

past Administration.[22] But it will be exceedingly difficult to overcome the reality and the recent memory of where these commissions have been. This President is obviously acutely attuned to the importance of the perceptions of the international community – a community not only of international allies and sources of intelligence, but also of those people the President believed would be further enraged by, for example, the release of new photos from the torture at Abu Ghraib. As the President himself noted in his recent speech at the National Archives: "Instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained."[23] The military commissions have been, understandably, tarred with the same brush. And they will inevitably face far more challenges in the courts going forward than would prosecutions pursued in civilian courts. Whatever tactical gain the Administration may seek in pursuing these trials, it must also recognize that the use of commissions at this stage will inevitably come with a strategic cost of conducting trials under a system many will continue to see as lacking in the legitimacy of standard Article III courts.

In addition to correcting the commission rules on paper, then, I believe it is important for the Administration and Congress to take steps that will mitigate not only the reality but also the perception of unfairness that now understandably follows the idea of military commissions. Two steps in particular seem essential in this regard. First, all military commission trials conducted to resolve cases of detainees currently held at Guantanamo Bay should be held in the continental United States. Problems of access,

[22] *See supra*, note 10.
[23] The White House, Remarks by the President on National Security, May 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter National Archives Speech].

resources, cost and convenience that have plagued the Guantanamo military commissions simply need not accompany the adoption of any new system going forward. The profoundly destructive symbolism of Guantanamo, coupled with the practical hurdles posed by the need to transport defense counsel and court personnel alike to Cuba for every pretrial hearing, should make Guantanamo the last, not first, place for pursuing military commission trials under the Obama Administration. Seven years after the first detainees began arriving at Guantanamo, there is no longer any argument that these commissions are intended to be courts of exigency, with rules specially tailored to the highly specialized demands of the battlefield. The commissions now under contemplation are full fledged Article I courts, and proceedings therein should be treated as they would in any regular Article I system.

Second, the authority of the military commission system should be strictly limited in duration. As the President has recognized, the closure of Guantanamo involves a set of problems that is "difficult and complex," and that is the result of a "mess" not of the current Administration's making.[24] Trials have been grossly delayed; there are credible allegations that evidence has been mishandled; and some detainees have suffered such torture and mistreatment that their statements – whether or not true – can never be admissible in court.[25] It may be understandable in these extraordinary circumstances for the President and Congress to employ all lawful options available to resolve this highly particular set of dilemmas. It will be much less understandable going forward.

The substantive criminal law today sweeps much more broadly than it did when detainees first began arriving at Guantanamo Bay, with more offenses now extending to

[24] *Id.*
[25] See, e.g., Motion for Preservation of Torture Evidence, *Khan v. Gates*, No. 07-1324 (D.C. Cir., Nov. 30, 2007), available at http://ccrjustice.org/files/Khan_Redacted_Torture_Motion_12_07.pdf.

cover conduct outside the territory of the United States.[26] The law unequivocally prohibits the torture, or cruel, inhuman or degrading treatment of any detainee in the custody of any U.S. agency; we need not confront such pervasive problems of tainted evidence again. Once it becomes evident that criminal prosecution may be appropriate for a detainee in U.S. military, it is entirely possible to ensure that intelligence and law enforcement professionals work together to achieve both the goal of intelligence gathering and evidence collection.[27] And as the criminal courts engage a growing number of terrorism cases, their expertise in both managing classified evidence, and in meeting the security needs of terrorism trials, only increases.[28] This Administration has undertaken to make out a case that military commissions are a necessary and lawful tool to achieve the resolution of the cases now pending at Guantanamo Bay.[29] It has not made that case with respect to the security interests of the United States into the indefinite future. In cases where the law has been violated, criminal prosecution in Article III courts must remain the rule. The exceptional MCA should be limited accordingly.

Conclusion

In the end – as it was from the beginning – it is still possible to create a lawful set of rules for the operation of military commission trials. It remains a challenge for all three branches to see it done. As ever, I am grateful for the Subcommittee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

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[26] *See, e.g.*, 18 U.S.C. §2339A (material support in furtherance of a terrorist act); 18 U.S.C. §2339D (receiving military training from a designated foreign terrorist organization).
[27] HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (May 2008), available at 101-05.
[28] *Id*., at 121.
[29] *See* National Archives Speech, *supra*, note 23 ("We are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them…. [G]oing forward, *these cases* will fall into five distinct categories.") (emphasis added).