PROPOSALS TO REFORM THE MILITARY COMMISSIONS SYSTEM

Testimony of

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and

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Committee on the Judiciary

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Chairman Nadler, Ranking Member Sensenbrenner, Chairman Conyers, and Members of the Subcommittee:

Thank you for inviting me to testify about military commissions.

I am a Senior Research Scholar and Florence Rogatz Lecturer in Law at Yale Law School, where I have taught military justice since 1993. I am also president of the National Institute of Military Justice, a nonprofit organization founded in 1991 to advance the fair administration of justice in the armed forces and to foster improved public understanding of military justice. NIMJ has been deeply involved in military commission issues since shortly after President George W. Bush revived them in November 2001. We have published an annotated guide to the original military commission rules, four volumes of *Military Commission Instructions Sourcebooks*, and, earlier this month, the first volume of the *Military Commissions*

Reporter, which collects all of the commissions' rulings from 2006 to 2009. We have presented congressional testimony on several occasions and have filed numerous amicus curiae briefs. We have sent observers to Guantanamo to attend and report on military commission hearings. We do not represent individuals, and neither NIMJ nor I have ever personally represented a Guantanamo detainee or military commission defendant.

I would like to make four basic points.

First, military commissions are not "normal," and we must never lose sight of that. Although they have been used in a variety of contexts since the Mexican War, they plainly are not one of the brighter chapters in our legal tradition—unless you think the mass hanging of Indians in Minnesota or the military trial of the Lincoln Conspirators while the local courts here were open was a good thing. Other doubtful chapters include the use of military commissions in our

effort to suppress the Philippine Insurrection and the unfair proceedings against General Yamashita after World War II.

Military commissions remain a far cry from the familiar process of military justice that we employ in ensuring good order and discipline within our armed forces. They are an even farther cry from trials in our federal district courts. Those courts—the jewel in the crown of our legal system—have earned the respect not only of our own people but of fair-minded observers around the globe. Public confidence in the administration of justice is a key element of our national strategy to defeat terrorism. That means public confidence both here and abroad. We cannot get from where we are now to where we need to be by trying to fashion a "reformed" military commission system 3.0.

Earlier this year, President Obama spoke of military commissions (among other things) at the National Archives. His remarks unfortunately could be interpreted as

suggesting that commissions are a normal part of the fabric of American law. The temptation to do so should be resisted, for reasons I set forth in an op-ed in *The New York Times*. I request that it be made a part of the hearing record. Without suggesting that the history of military commissions is all negative, they have too often been put to uses of which we have little reason to be proud. We must remain alert to the danger that they will, by degrees, become normal rather than a disfavored exception.

Second, and as a corollary to the first, every effort should be made to ensure that military commissions, assuming they are ever to be used, are used no longer than is strictly justified. This means careful policing both at the beginning and the end of the pertinent time-frame. Only if the very limited conditions warranting military commissions have been met should they be employed, and then they should be terminated once the need has passed. Any military

commission legislation should therefore be subject to a sunset provision. Military commissions should never be a permanent feature of our legal system. Remember: we got along without them for over half a century following World War II, despite our involvement in numerous armed conflicts, large and small.

Third, every aspect of military commissions should be governed by a policy to limit rather than to expand their use. Thus, the jurisdictional definitions, both as to what kinds of conduct would be subject to trial by military commission (in other words, subject matter jurisdiction) and as to who should be subject to such trial (personal jurisdiction), should be as narrow as possible. If an offense is not known to the law of armed conflict, such as conspiracy, "material support" or spying, try it in some other forum. Any doubt should be resolved against, rather than for, the exercise of jurisdiction by these exceptional courts. If we do not apply this stringent

test at every turn, you will have created a "national security court" in camouflage. I do not believe our country is ready for such courts.

Fourth, even if a case and an individual are plausibly within the jurisdiction of a military commission, the strongest preference must be given to available trial options in the Article III courts. The recent Sense of the Senate resolution favoring trials by military commission has the telescope turned in precisely the wrong direction. It is fortunate that the resolution lacks the force of law.

In 2006, I testified before the Senate Armed Services Committee that Congress should insist that no case be tried by a military commission unless the Attorney General has personally certified that it could not be tried in district court. That still seems to be the best approach, and I hope the current Administration will apply it or something like it. However, it is important to stress that mere prosecutorial

difficulty or inconvenience or embarrassment to the government arising from a district court prosecution cannot be enough to justify resort to the extraordinary process of a military commission. Only when the politically-accountable Attorney General assures the country, with particularity, that a given case lies outside the complex web of PATRIOT Act-era or earlier civilian criminal law prohibitions should charges be referred to a military commission.

The process described in the Detention Policy Task Force's July 20, 2009 protocol on Determination of Guantanamo Cases Referred to Prosecution falls short. It speaks of "feasibility" of prosecution in federal court, but the preference for civilian trial is merely a presumption, and one that can be overridden based on broad factors that leave far too much to discretion: "strength of interest," "efficiency" and "other prosecution considerations." For example, "evidentiary problems that might attend prosecution in the

other jurisdiction" enables forum-shopping that should be rejected. Similarly, it is difficult to see why the fact that the armed forces have sunk investigative costs in a case should play any role in deciding whether an offense should be tried in a military commission rather than in district court. This is not to suggest congressional micromanagement of prosecutorial decisions, as these are quintessentially within the ken of the Executive given the President's duty under Article II, § 3 of the Constitution, to "take Care that the Laws be faithfully executed." Still, Congress can and should impose limits rather than permit a matter as sensitive as this to be so unstructured.

In 2006, Congress enacted the Military Commissions Act under tremendous pressure from the White House and, as far as I could determine as an observer of the passing scene, out of concern for permitting the subject to be made an issue in that year's congressional elections. The result

was most unwise. It left us with the traditional military justice system which permits war crimes to be tried by general courts-martial, a set of military commissions for trying war crimes by lawful combatants, and yet another set of military commissions for trying war crimes (and other offenses) by unlawful combatants.

The result is senseless. We don't need two flavors of military commissions; indeed, we may not even need one. I would therefore advise that the MCA be repealed and if military commissions prove necessary, let them conform with general court-martial procedures and rules subject to a very few exceptions such as dispensing with the need for a pretrial investigation. The current arrangement, whereby three distinct systems exist, is needlessly complex and an open invitation for yet more years of litigation.

Two weeks ago I prepared some notes on aspects of the Senate bill (as it then stood) that might have been improved.

I ask that my slightly updated version be made part of the record. Even if all of the questions in those notes were resolved in the manner indicated, I would still restore the (pre-MCA) status quo ante. And in any event I would encourage the Subcommittee as well as those who will be responsible for both the administration and judicial review of any future military commissions to bear in mind the four basic points set out in this testimony as a way to minimize the insult to our constitutional system.

I will be happy to respond to your questions.

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OP-ED CONTRIBUTOR

The Trouble With Tribunals

By EUGENE R. FIDELL

IN a Manhattan courtroom last week, the first Guantánamo detainee to face a trial in a civilian court pleaded not guilty. President Obama has indicated that other terrorism cases will likewise be tried in the federal courts, but that does not necessarily spell the end for military commissions. In a speech at the National Archives in May, he confirmed that the commission system won't be abolished, merely revised.

Whether his proposed changes will substantially improve the military commissions and increase public confidence in the commissions' administration of justice will be the subject of debate in the coming months and years. There is, however, a more fundamental question: the president's assertion that military commissions have long played a respectable role in American legal history.

The history is more ambiguous than many have assumed, and is not one of which we have much reason to be proud. Let's consider the high points typically cited.

A board of general officers conducted an inquiry into the spying case of Maj. John André, a British officer, in 1780. Whether that board or the one convened in another Revolutionary War spying case constituted a military commission is open to doubt. At the time, of course, the country was an actual battleground and there were not yet any civilian federal courts. But these inquiries were isolated events and hardly a solid starting point for an entire system of justice.

Fast forward more than half a century to the Mexican-American War. Gen. Winfield Scott, who commanded the American contingent in southern Mexico, found his forces in a partial legal vacuum, as the Articles of War — the Army predecessor of the Uniform Code of Military Justice — did not cover non-military offenses. He had no alternative but to create a system of military commissions to try both American soldiers and enemy civilians.

Congress did not even acknowledge Scott's system until 1862, when it did so backhandedly: the legislation dealing with the position of judge advocate general simply noted his duty to review military commission cases.

During the Civil War and Reconstruction, military commissions were used in a variety of settings. Famously, the Supreme Court forbade their use in states that had not seceded and in which the courts were open. In the South, however, civilian courts were closed or could not be relied on to prosecute offenders against the Union.

A commission was actually convened to try the conspirators in the Lincoln assassination. Why? The Civil War was for all practical purposes over by then and it was almost certainly the wrong impulse not to trust the

District of Columbia's courts.

Military commissions were occasionally used during the so-called Indian wars. An 1862 commission trial after a Sioux uprising in Minnesota led to the largest mass hanging in American history, even after Abraham Lincoln spared a number of those who had been condemned. Is the genocidal war our country waged against the original inhabitants a chapter of which we are proud?

We used military commissions in the aftermath of the Spanish-American War. But our efforts to suppress the Philippine insurrection of 1898 were brutal and in service of a blatantly imperialistic cause; and whether these commissions were conducted fairly or not, the setting is not one to be held out as a model for the 21st century. At least those commissions were conducted in the field — unlike the Guantánamo commissions.

Many Americans have heard of the military commission that convened in 1942 to try eight German saboteurs. But few are aware that a major reason the case was tried by commission rather than in the federal courts was that federal law at the time did not prescribe harsh enough penalties for what they had attempted to do. That is obviously not so today, thanks to the Patriot Act and other legislation passed since World War II.

In its review of the saboteurs' case, Ex parte Quirin, the Supreme Court did sustain the military commission's jurisdiction — but, in a discomfiting move, did not even release its legal reasoning until months after six of the Germans had been electrocuted. Though the ruling was unanimous, Justice Felix Frankfurter declared that Quirin was "not a happy precedent."

Other commissions were held in the aftermath of World War II. Gen. Tomoyuki Yamashita, the Japanese commander in Manila, was hanged after an appallingly unfair military commission trial. Here again, at least his case was held overseas, not in territory over which the United States had full power to use its regular courts.

In 1950, Congress passed the Uniform Code of Military Justice, which substantially upgraded the military justice system and reduced the disparities among the disciplinary laws governing the various branches of the armed forces. From 1951, when the code took effect, until 2001, when President George W. Bush set the stage for the Guantánamo tribunals, we did perfectly well without military commissions, despite numerous armed conflicts, large and small — and despite a growing engagement with terrorism.

This is not to say that no military commission has ever been conducted fairly or in a worthy cause. At times the commissions' work has been acceptable, especially when they applied general court-martial standards. Nonetheless, the history of our military commissions brings little credit on our country. We should not invoke that history without recognizing the combination of doubtful goals and missed opportunities to use other forums. The coming new-and-improved model of military commissions — our third effort in less than a decade — is unlikely to inspire confidence here or abroad in our administration of justice.

There is a second point to be made concerning President Obama's recent speech. At no point did he give a detailed explanation of why military commissions had to be used rather than the federal district courts, or why some detainees will have full procedural safeguards in federal court while others will be afforded fewer rights before a military commission.

This is not a matter to be addressed generically. Rather, it is incumbent on the administration to state why any particular case cannot be tried in the federal courts. Those courts are open, and have demonstrated that they can try terrorists in ways that bring honor on our country and fully respect our legal values.

The issue is not whether it is easier or more convenient to use military commissions, but whether the conduct sought to be punished is literally outside the complex web of criminal provisions Congress has enacted over the years, including the Patriot Act.

President Obama justifiably reminded his audience at the National Archives that the last administration left the country with a terrible, and terribly complicated, legal mess. His personal commitment to the rule of law cannot be doubted. Nonetheless, unless his administration explains why specific cases cannot be prosecuted in the federal courts, it will have done no better than its predecessor on a pivotal threshold issue.

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S. 1390, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010

NOTES ON § 1031, MILITARY COMMISSIONS

1. Section 948b(d): why exclude application of the speedy trial rule and UCMJ art. 31?

2. Section 948c: overbroad definition of persons subject to trial by military commission. This would confer jurisdiction over persons who have never been on the battlefield, for nontraditional war crimes like material support and terrorism.

3. Section 948d would permit military commissions to try spying charges

4. Section 948j makes no provision for terms of office for military judges, in contrast to Army regulations that provide for 3-year terms for military judges in courts-martial.

5. Section 948r would permit evidence obtained by means of cruel, inhuman, and degrading treatment so long as it's reliable and not a product of one of the specific methods noted in § 1003 of the Detainee Treatment Act.

6. Section 949a(b) authorizes the Secretary of Defense to depart from general court-martial procedures under a very fuzzy standard ("unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need"). Any guaranteed opportunity for public comment before submission to Congress? *See* § (d) (last page).

7. Section 949a(b)(2) is unclear: does the accused have a right to probe the government's non-live evidence by interrogatories or other means of discovery?

8. Section 949a(b)(3)(D) allows the use of hearsay evidence that would never be admitted in a general court-martial or district court, and well beyond the parameters actually applied in international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia.

9. Section 949d(c)(4) seems to depart from general court-martial procedures for classified information. Why is any departure necessary? Why is there no provision for dismissal if the military judge finds there is no adequate substitute and the information is deemed essential to the defense?

10. Section 949j erects a "reasonable opportunity" standard in place of UCMJ art. 46's "equal opportunity" standard for access to witnesses and other evidence. Why the difference? The military commissions had denied the defense access to high-

value detainees. Will that denial continue to be possible under the amendments? If so, why?

11. Section 950f provides for review as of right by the Court of Appeals for the Armed Forces. If enemy combatants are entitled to this, why not our own military personnel, who (except for those sentenced to death) must show "good cause" under the UCMJ. This part of the bill is good, but raises a question as to why most court-martial appellants cannot even seek certiorari from the Supreme Court (because the Court of Appeals has denied discretionary review). Congress should pass this provision, but it would be a disgrace to do so without putting GIs' cases on the same footing with respect to eligibility for Supreme Court review. *See* S. 357 (Sen. Feinstein); H.R. 569.

12. Section 950p(c) permits military commission trials only if the offense is committed in the context of and associated with armed conflict. This loose standard could sweep in non-battlefield conduct not subject to trial by military tribunals under the law of armed conflict.

13. Section 950u: four Justices in *Hamdan* did not believe conspiracy is a crime under the law of armed conflict. Including it is a misuse of the military commission as an institution.

14. What new matter in the amendments made by § 1031 addresses the specific problems of independence of trial and defense counsel that have repeatedly arisen under the MCA?