U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Subcommittee Hearing:
"Civil Liberties and National Security"

Submission of
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Honorable Chairman and Members:

Introduction

My name is Michael Lewis and I am a professor of law at Ohio Northern University's Pettit College of Law where I teach International Law and the Law of Armed Conflict. I spent over 7 years in the U.S. Navy as a Naval Flight Officer flying F-14's. I flew missions over the Persian Gulf and Iraq as part of Operations Desert Shield/Desert Storm and I graduated from Topgun in 1992. After my military service I attended Harvard Law School and graduated *cum laude* in 1998. Subsequently I have lectured on a variety of aspects of the war on terror, at dozens of institutions including Harvard, NYU, Stanford, Columbia and the University of Chicago. I have published several articles and co-authored a book on the war on terror, national security and the laws of war.

Article III courts are generally capable of effectively trying terrorists and should be the first choice for most cases in which terrorists are caught by domestic law enforcement

Federal courts can effectively try terrorism cases and al Qaeda defendants. The highly visible trials of Timothy McVeigh, Richard Reid (the shoe bomber) and Zacarias Moussaoui have demonstrated that such trials can be conducted without jeopardizing classified information and can lead to convictions. More importantly, a large number of less well known cases involving conspiracies, foiled plots and material support charges have moved through the system with reasonably high conviction rates.[1] These statistics support the claim that the federal courts can effectively handle terrorism cases. However they do not, as some have suggested, prove that military commissions do not have a role to play in the prosecution of some al Qaeda suspects.

[1] *See* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 Lewis & Clark L. Rev. 852 (2007).

Because the use of military commissions has been tainted by the perception of illegitimacy,[2] federal courts should continue to conduct the vast majority of terrorism trials in which terrorists are caught by domestic law enforcement, as they have done ever since 9/11. But for both legal and policy reasons there are certain readily-definable situations in which terrorist/al Qaeda defendants should be tried by military commissions.

There is a subset of terrorist/al Qaeda defendants that should be tried by military commissions

While the federal courts are generally capable of effectively trying terrorism cases and al Qaeda defendants, there is a subset of defendants for whom the federal courts are not the best option. These are the defendants that have been apprehended abroad by members of the U.S. military. For this group, trial by military commissions is preferable for both legal and policy reasons.

The evidentiary rules applied by the federal courts were written to govern the apprehension of criminal suspects by police in domestic situations. Chain-of-custody requirements for physical evidence, hearsay exclusions and the rules governing the admissibility of confessions are all designed with the paradigmatic police apprehension in mind. Police officers that are trained in the preservation of evidence arrest a suspect complete a detailed report at the time of the arrest and then appear at trial weeks or even months after the incident to testify about the particulars of the arrest. This process assumes that the arresting officer has a familiarity with the evidentiary requirements and routinely punishes any failure to meet these requirements by excluding the evidence from consideration at trial.

These basic assumptions about the nature and training of the apprehending officer, which are perfectly justified in the domestic law enforcement context, should not apply to soldiers in combat or near-combat situations half way around the world. Soldiers are not trained (nor should they be) in evidence collection procedures, or how to write a police report that will stand up to cross-examination or how to testify effectively when being subjected to cross-examination. These are skill sets that any police officer will tell you take a degree of training and experience to learn. Our combat soldiers should not be asked to expend valuable training time[3] acquiring such law enforcement skills, and as will be detailed below, there is some evidence that they already been asked to do just that.

Unlike the federal courts, the military commissions were specifically designed to deal with the realities of apprehension in a combat or near-combat environment. One illustration of the different approach taken by these two bodies is their treatment of a defendant's statements. Federal courts will exclude any statement made by the defendant

[2] For a point-by-point comparison of the procedures utilized in federal courts and military commissions *see* Jennifer K. Elsea, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court, Congressional Research Service, Nov. 19, 2009.

[3] As someone who attained a high degree of combat proficiency in the past, I can assure this committee that such proficiency is highly perishable and can only be maintained with a great deal of focused training. Training time spent on evidence preservation requirements and report writing will result in a lower level of combat proficiency for those soldiers required to undergo such training.

that was not preceded by a *Miranda* warning and was not voluntarily given.[4] While the question of whether the *Miranda* requirement applies in the context of foreign military apprehension is still unresolved, the fact that *Miranda* warnings have been read to detainees in Afghanistan in anticipation of trial in Article III courts[5] indicates an executive branch concern that such a requirement may exist. Even if the federal courts were to decide that the specific *Miranda* warning requirement did not apply, the voluntariness test established by 18 U.S.C. § 3501 tracks the *Miranda* requirements so closely that it is unlikely that any non-Mirandized confession would be admissible. In contrast, the military commissions take a far more relaxed view of what statements should be admissible.

> No statement of the accused is admissible at trial unless the military judge finds that the statement is reliable and sufficiently probative; and that the statement was made "incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement" and the interests of justice would best be served by admission of the statement into evidence; or that the statement was voluntarily given, taking into consideration all relevant circumstances, including military and intelligence operations during hostilities; the accused's age, education level, military training; and the change in place or identity of interrogator between that statement and any prior questioning of the accused.[6]

There are two reasons why this more relaxed, and arguably realistic, approach to evidentiary rules in the context of a combat apprehension are preferable to those employed by the federal courts. The first is quite simply prosecutorial effectiveness. While opponents of military commissions point to statistics indicating that hundreds of terrorism cases have been successfully tried in federal courts, few (if any) of those cases involved defendants apprehended by the U.S. military overseas. Therefore any claim that the current conviction rates for terrorism prosecutions are predictive of how effectively federal courts (and the federal rules of evidence) will deal with future cases involving combat apprehensions is speculative at best.

The second reason why military commissions are preferable to federal courts in the context of combat or near combat apprehensions is the effect that applying the federal rules would have on military operations and training. Below are two forms that U.S. forces have used after capturing suspected enemy fighters in Afghanistan and Iraq. Figure 1 is a capture tag that was used in Afghanistan. It contains the information that the Geneva Conventions require a detaining state to gather on any individual detained

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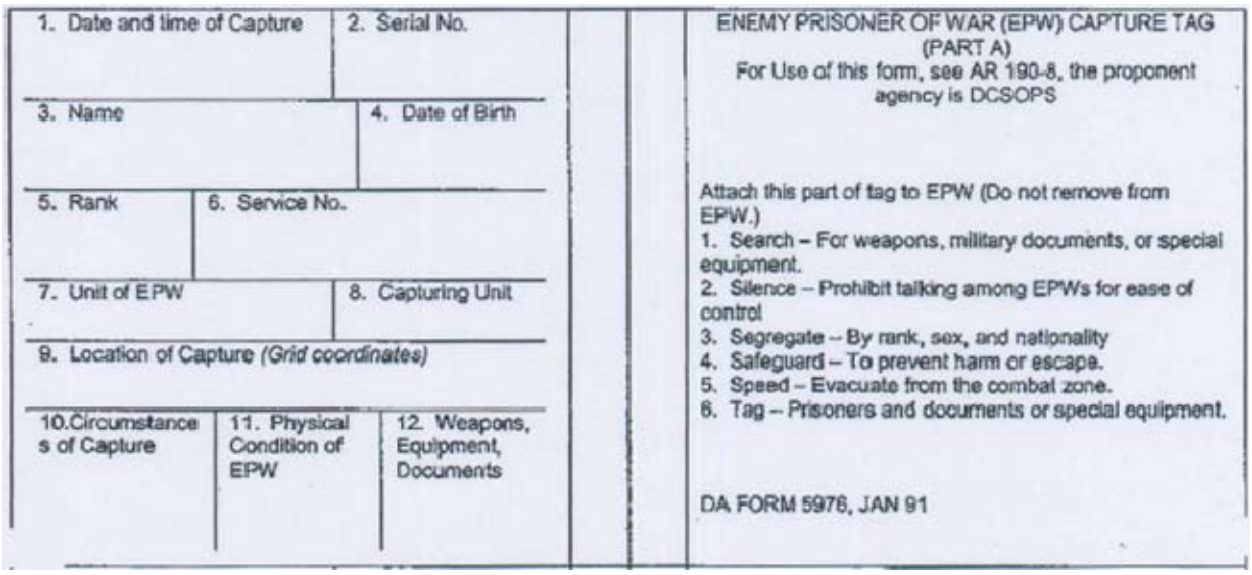
[4] *See* 18 U.S.C. § 3501 and *Miranda v. Arizona*, 384 U.S. 436 (1966).
[5] *See* RESOLUTION OF INQUIRY REQUESTING THAT THE PRESIDENT AND DIRECTING THAT THE ATTORNEY GENERAL TRANSMIT TO THE HOUSE OF REPRESENTATIVES ALL INFORMATION IN THEIR POSSESSION RELATING TO SPECIFIC COMMUNICATIONS REGARDING DETAINEES AND FOREIGN PERSONS SUSPECTED OF TERRORISM, Report 111-189, p. 3 fn. 6.
[6] 10 U.S.C. § 948r.

during an armed conflict.[7] It is relatively simple and straightforward and could be filled out in a minute or two.



1. Date and time of Capture	2. Serial No.			ENEMY PRISONER OF WAR (EPW) CAPTURE TAG (PART A) For Use of this form, see AR 190-8, the proponent agency is DCSOPS
3. Name		4. Date of Birth		
5. Rank	6. Service No.			Attach this part of tag to EPW (Do not remove from EPW.) 1. Search – For weapons, military documents, or special equipment. 2. Silence – Prohibit talking among EPWs for ease of control 3. Segregate – By rank, sex, and nationality 4. Safeguard – To prevent harm or escape. 5. Speed – Evacuate from the combat zone. 6. Tag – Prisoners and documents or special equipment.
7. Unit of EPW	8. Capturing Unit			
9. Location of Capture *(Grid coordinates)*				
10.Circumstances of Capture	11. Physical Condition of EPW	12. Weapons, Equipment, Documents		DA FORM 5976, JAN 91

In contrast Figures 2 and 3 are the Coalition Provisional Authority Forces Apprehension Forms that were used in Iraq several years ago. These forms look very similar to a police report, would take a great deal of time to fill out at the point of capture and would require a fair amount of training if they were to be filled out in a way that was designed to minimize their vulnerability to a cross-examination by a skilled defense attorney. These forms were utilized to help facilitate the domestic Iraqi prosecution of the detained individuals.

One of the effects of declaring that all al Qaeda detainees will be tried in Article III courts is likely to be that our soldiers will spend a great deal more time learning how to be better police officers. A job for which they are not currently suited and one for which we should not want them to become suited because it will come at a price in combat proficiency.

[7] *See* Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 70. It is actually modeled after the card found in Annex IV B of the Third Geneva Convention.

COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM

YELLOW FIELDS MUST BE FILLED IN, IF APPLICABLE, UPON APPREHENSION

Offense against Civilian(s) [check one] If "Other" then describe: _____

- Arson (I.P.C. 342)
- Solicitation of Fornication/Prostitution (I.P.C. 399)
- Rape/Indecent/Sexual Assaults/Acts (I.P.C. 393-98, 402)
- Murder (I.P.C. 405)
- Aggravated Assault/Assault With Intent To Kill (I.P.C. 410)
- Maiming (I.P.C. 412)
- Simple Assault (I.P.C. 415)
- Kidnapping (I.P.C. 421)
- Burglary or Housebreaking (I.P.C. 428)
- Extortion/Communicating Threats (I.P.C. 430)
- Theft (I.P.C. 439)
- Destruction of Property (I.P.C. 477)
- Obstructing a Public Highway/Place (I.P.C. 487)
- Discharging Firearm/ Explosive in City/Town/Village (I.P.C. 495)
- Riot or Breach of Peace (I.P.C. 495(3))
- Other

Offense against Coalition Forces [check one] If "Other" then describe: _____

- Violation of Curfew
- Illegal Possession of Weapon
- Assault/Attack on Coalition Forces
- Theft of Coalition Force Property
- Trespass on Military Installation or Facility
- Photographing/Surveilling Military Installation or Facility
- Obstructing Performance of Military Mission
- Other

Apprehending Unit:			Location Grid:		
Date of Incident: (D/M/Y) / / to / /	Time of Incident: hrs to	hrs	Date of Report: (D/M/Y) / /	Time of Report:	hrs

Detainee #_____			Key Connected Person: ☐ Victim ☐ Witness		
Last Name:			Last Name:		
First Name:	Given Name:		First Name:	Given Name:	
Hair Color:	Scars/Tattoos/Deformities:		Hair Color:	Scars/Tattoos/Deformities:	
Eye-Color:	Weight: lb	Height: in	Eye-Color:	Weight: lb	Height: in
Address:			Address:		
Place of Birth:			Place of Birth:		
Ethn/Tribe/ Sect:	Sex: ☐ M ☐ F	Phone#: DOB D/M/Y: ☐ Mobile ☐ Regular	Ethn/Tribe/ Sect:	Sex: ☐ M ☐ F	Phone#: DOB D/M/Y: ☐ Mobile ☐ Regular
☐ Passport ☐ Dr. license ☐ Other (specify) Document #:			☐ Passport ☐ Dr. license ☐ Other (specify) Document #:		

Total Number of Persons Involved _____ (list names/identifying info on reverse under "Additional Helpful Information")

☐ Vehicle Information Vehicle Number _____ of _____ Vehicle(s)

Make:	Color:	License No.:	Owner:
Model:	Type:	Plate No.:	Number of People in Vehicle:
Year:	Names of People in Vehicle:		
Contraband/Weapons in Vehicle:			

☐ Property/Contraband ☐ Weapon Photo Taken of Suspect with Weapon/Contraband: Yes/ No

Type:	Model:	Color/Caliber:
Serial No.: Quantity:	Make:	Receipt Provided to Owner: Yes/ No
Other Details:	Where Found:	Owner:

Name of Assisting Interpreter: Email, Phone, or Contact Info:

Detaining Soldier's Name (Print): Last, First MI	Supervising Officer's Name (Print): Last, First MI
Signature:	Signature:
Email: Unit Phone: Date: / /	Email: Unit Phone: Date: / /

COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM

Why was this person detained?

Who witnessed this person being detained or the reason for detention? Give names, contact numbers, addresses.

How was this person traveling (car, bus, on foot)?

Who was with this person?

What weapons was this person carrying?

What contraband was this person carrying?

What other weapons were seized?

What other information did you get from this person?

Additional Helpful Information: