

“Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond”

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON TERRORISM AND HOMELAND SECURITY

Statement of Senator Kyl

- We’re going to hear the testimony of several witnesses today on the extent to which military commissions should be used in the prosecution of terrorists presently detained at Guantanamo.
- Before they testify, however, I think it is important to recall that military commissions have a long history in this country¹ precisely because it is widely recognized that procedures governing civilian criminal trials lack the flexibility that is frequently needed to deal appropriately with the unique circumstances presented in war. These include issues regarding the admissibility of hearsay evidence obtained in the battlefield and the protection of classified information. Military commissions can provide a workable solution to these issues, while still providing the accused with a fair trial.
- Opponents of military commissions like to point out that we’ve successfully convicted terrorists in civilian courts, such as Omar Abdel Rahman (the so-called “Blind Sheik”). But rather than prove the adequacy of civilian courts

¹ It has been noted that General George Washington used military tribunals during the American Revolution. See Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law*, 2nd Edition, 266 (2006).

for terrorist prosecutions, these cases actually highlight the national security risks inherent in prosecuting terrorists as if they were common criminals.

- In the case of Mr. Rahman, intelligence information was compromised when the government was forced to turn over to the defense a list of unindicted co-conspirators, as required in civilian prosecutions. According to the 9/11 Commission's final report, the release of that list had the "unintended consequence of alerting some al Qaeda members to the U.S. government's interest in them."²
- Similarly, Judge Mukasey, who presided over several terrorists prosecutions, has described how our national security interests were compromised in the prosecution of Ramzi Yousef when "an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised."³ According to Mukasey, this communication link "had provided enormously valuable intelligence"; but as a result of the public testimony, the link "was immediately shut down and further [intelligence] information lost."⁴
- Cognizant of these serious national security concerns, Congress has, in a bipartisan fashion, repeatedly ratified its support for military commissions. Indeed, just last week, the Senate passed an amendment to the National

² 9/11 Commission Report, 472 n.8 (2004).

³ Michael B. Mukasey, *Jose Padilla Makes Bad Law*, Wall St. J., Aug. 22, 2007, available at <http://www.opinionjournal.com/extra/?id=110010505>.

⁴ *Id.*

Defense Authorization Act that, once again, stated that military commissions were the “preferred forum” for the trial of terrorists.⁵

- In light of the significant national security risks associated with civilian prosecution of terrorists and the oft-repeated support of military commissions by Congress, I am deeply troubled that the Obama Justice Department’s July 20 protocol for Guantanamo cases adopts a “presumption” that terrorism cases will be prosecuted in civilian courts. In my view, the Justice Department’s July 20 policy puts Americans at risk unnecessarily. Military commissions have been used for over two centuries to bring justice to war criminals, and they have done so in a way that is fair to the accused.
- More troubling than what we heard from the Justice Department on July 20, however, is what we didn’t hear. President Obama has issued an arbitrary deadline for closing Guantanamo by January 22, 2010—less than six months from now.⁶ But thus far, we know precious little about how he intends to do that. I had hoped that this hearing—which the Chairman initially entitled “Closing Guantanamo: The Path Forward under the Rule of Law”—might provide an opportunity for the Administration to lay out its plan. Apparently, however, Administration officials are not ready to talk about their plan, if one exists.
- I would add that the Justice Department has been unwilling to fulfill even the simplest requests for information. For instance, I sent a letter to

⁵ Senate Amend. 1650 to S. 1390 (accepted by voice vote on July 23, 2009).

⁶ Executive Order 13492 (Jan. 22, 2009).

Attorney General Holder on May 29, 2009, asking for details regarding the terrorists who are currently imprisoned in the United States. I reiterated my request during the Attorney General's oversight hearing before this committee on June 17, but still have not received a response from the Justice Department.

- It is clear to even the most casual observer that the Administration will either need to push back its arbitrary deadline for closing Guantanamo or bring those presently detained at Guantanamo to the United States. Bringing the detainees to the United States could, of course, substantially curtail the range of options available to detain and prosecute suspected terrorists. It could also mean that detainees who are not convicted will be ordered released into our country. This is understandably of concern to all Americans, especially since the Pentagon believes that more than 70 previously released Guantanamo detainees have resurfaced on the battlefield.⁷
- We therefore need to know whether the Administration intends to bring Guantanamo detainees into the United States before we can have an informed debate on prosecution alternatives.
- Finally, I would note that any plan to bring detainees into the United States would likely require congressional action. It is, therefore, critical that the Administration devise a plan and share that plan with Congress as soon as possible, while there are still sufficient legislative days to fully consider and debate the available policy options by the President's self-imposed deadline.

⁷ Defense Department Fact Sheet, *Former Guantanamo Detainee Terrorism Trends*, April 7, 2009, available at <http://www.defenselink.mil/news/returntothefightfactsheet2.pdf>.