MANHATTAN INSTITUTE FOR POLICY RESEARCH

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
Hearing:

Justice For America: Using Military Commissions to Try the 9/11 Conspirators

April 5, 2011

Prepared Statement of

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Mr. Chairman, Mr. Ranking Member, Members of the Committee: I thank you for the opportunity to express my views about the use of military commissions to prosecute the September 11th plotters and other detainees held at the Guantanamo Bay Detention Camp.

In my view, the 9/11 conspirators should be tried by military commission – not in federal court. I will focus my remarks on the risks of federal criminal prosecutions and the ways in which military commissions may alleviate these risks. I will also comment briefly on the substantial due process that military commissions afford the accused.

I. Legal Authority for Military Commissions

I would like to begin by briefly outlining the legal authority for military commissions. Our founders understood the difference between keeping *internal* order, through the criminal justice system, and protecting against *external* threats from our enemies, through military action. Article I, Section 8, clause 10, of the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high

Seas, and Offences against the Law of Nations." Congress has repeatedly exercised this power to establish military commissions.

Indeed, the United States has used military tribunals throughout its history, including in the War of 1812, the Mexican-American War, the Civil War and World War II. As the Supreme Court confirmed in *Ex Parte Quirin*, "unlawful combatants are . . .subject to trial and punishment by military tribunal."[1]

Shortly after terrorists attacked us on September 11th, President Bush established military commissions to try foreign jihadists for war crimes. In 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the Uniform Code of Military Justice required certain procedural protections for military commissions and invited Congress to enact legislation.[2] In reaction to *Hamdan*, bipartisan majorities of Congress passed the Military Commissions Act of 2006, which was amended in 2009 ("the MCA").

II. Military Commissions Alleviate the Risks Involved with Federal Criminal Prosecutions for Unlawful Enemy Combatants.

In the years before the September 11th attacks and the subsequent establishment of military commissions, foreign terrorists were tried in our criminal justice system. But as we learned on 9/11, trying alleged terrorists after an attack does little to prevent the next one. After September 11th, we changed our approach to terrorism -- shifting focus from punishment to prevention.

For at least three reasons, prosecuting foreign war criminals in federal court may undermine our counterterrorism goals. Civilian trials may (A) reveal classified and sensitive information to our enemies, (B) hinder intelligence gathering, and (C) burden military operations abroad. The military commissions enacted by Congress are

[1] *Ex Parte Quirin,* 317 U.S. 1, 31 (1942).
[2] 548 U.S. 557 (2006).

specifically designed to alleviate these risks while granting the accused substantial procedural protections.

A. Protecting Information

i. Classified Intelligence

First and foremost, we need to protect classified information from our enemies. Acquiring intelligence is one of the most crucial means for penetrating and dismantling terror networks and protecting our national security. Obtaining classified communications and operational capabilities of terrorist groups can be a prolonged, painstaking and often very dangerous job for our intelligence agents. Such information -- including sources and methods of intelligence gathering -- must be vigorously safeguarded.

Criminal trials, however, risk disclosing top-secret information to our enemies. In such a trial, the federal judge has discretion to order classified materials released if it deems substitutes inadequate.[3] And, if the government refuses to disclose classified information, the judge may order the indictment dismissed.[4] This can put the government in a catch-22 of either disclosing classified intelligence or risking dismissal of charges.

Congress sensibly addressed this issue in the Military Commissions Act. In a military trial, the Government cannot be compelled to disclose classified information to anyone who does not have the proper security clearance.[5] If the judge determines that

[3]Classified Information Procedures Act, 18 U.S.C. App.3; *See also* U.S. CONST. Amend. VI. (granting the accused the right "to be confronted with the witnesses against him.").
[4] Classified Information Procedures Act, 18 U.S.C. App.3.
[5] Military Commissions Act, 10 U.S.C. 949 p-1(a) ("Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no

access to the information is necessary, the government may redact portions of the information, submit a summary, or substitute a statement admitting facts that the classified material would tend to prove.[6] Furthermore, such an order by a military judge may not be reconsidered.[7]

ii. Sensitive Information

Likewise, the United States also has an interest in protecting information that may not be classified but could nonetheless aid our enemies in their fight against us. Because criminal court proceedings are required to be public under the Sixth Amendment of the Constitution, sensitive information may freely flow to our enemies.[8] For example, in the trial of Sheikh Omar Abdel-Rahman for the 1993 World Trade Center bombings, the prosecution made a routine disclosure to the defense lawyer of a list of unindicted co-conspirators. According to Andrew McCarthy who prosecuted the case, this valuable list of key terror suspects reached Osama bin Laden, halfway around the world, within ten days.[9]

Likewise, in that case, there was extensive data about the engineering and

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circumstance may a military judge order the release of classified information to any person not authorized to receive such information.").

[6] 10 U.S.C. 949 p-4(b) ("The military judge, in assessing the accused's discovery of or access to classified information under this section, may authorize the United States—(A) to delete or withhold specified items of classified information; (B) to substitute a summary for classified information; or (C) to substitute a statement admitting relevant facts that the classified information or material would tend to prove.").

[7] 10 U.S.C 949 p-4(c) ("An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section.").

[8] U.S. CONST. Amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

[9] Andrew C. McCarthy, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD, 2008 at 304.

construction of the World Trade Center building.[10] It is certainly possible that terrorists used this information to design and plot the attacks that destroyed the buildings a few years later.

Congress recognized that the transparency of criminal trials may undermine the goal of protecting our national security. Therefore, the Military Commissions Act provides that while military trials are generally public, the judge is permitted to close proceedings in order to protect national security interests, safeguarding intelligence and law enforcement sources, methods and activities.[11] This flexibility is vital to ensuring that trials do not turn into a feast of national security information for terrorists at-large.

B. Miranda Warnings Impede Intelligence Gathering

Bringing federal criminal actions may not only reveal sensitive information, it may also impede intelligence gathering. The Fifth Amendment of the Constitution protects criminal defendants from self-incrimination.[12] The Supreme Court has held that statements of the accused are not permitted in criminal trials unless the defendant was advised of his rights.[13] FBI and law enforcement generally read Miranda warnings immediately upon arrest so as to preserve evidence for prosecution.

But the U.S. Constitution does not give foreign wartime enemies the privilege to be tried in federal court and thus shielded from self-incrimination. When an alien terrorist is apprehended, our national security interests demand that we acquire as much information as possible to prevent a future attack and neutralize security threats. Any

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[10] Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv. J.L. & Pub. Policy 591 2002 at 609.

[11] 10 U.S.C. Section 949(d)(c)(2)(a).

[12] U.S. CONST. Amend. V. (No person "shall be compelled in any criminal case to be a witness against himself.").

[13] *Miranda v. Arizona*, 384 U.S. 436 (1966).

intelligence officer will tell you that starting off with, "you have the right to remain silent . . ." is not the way to gain counterterrorism data.

Take, for example, the case of Umar Farouk Abdulmutallab, otherwise known as the Christmas Day bomber. The self-professed al Qaeda-trained operative attempted to explode a flight from Amsterdam to Detroit the Christmas before last. Despite the fact that Abdulmutallab is a Nigerian national, with no right under any statute or the Constitution to be tried as a U.S. civilian, the Obama administration immediately decided to grant him the rights of a U.S. citizen. In a first round of questioning, he disclosed his al Qaeda training in Yemen and mentioned additional terrorist plots. But after only 50 minutes of questioning, he was given Miranda warnings and told he had the right to remain silent and the right to obtain a lawyer – compliments of the taxpayers he had just tried to explode. Needless to say, he quickly became reticent after receiving these warnings.

Congress recognized that reading terrorists Miranda warnings would severely hinder intelligence gathering and compromise counterterrorism efforts. Therefore, in military commissions, detainees' statements are admissible if a judge determines that they are reliable, probative and made during lawfully conducted military operations.[14]

C. Federal Prosecutions May Burden Military Operations

Federal prosecutions may also burden military operations abroad. The facts in a transnational terrorism case often include second-hand statements, known as hearsay,

[14] 10 U.S.C. 948r(c) ("A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds— (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that— (A) 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 (B) the statement was voluntarily given.").

which are generally prohibited in federal court.[15] For example, key witnesses in such cases are often the soldiers or CIA agents who captured the defendant overseas. But these officers may still be engaged in combat abroad, and interrupting their counterterrorism mission to testify in federal court could place an undue burden on military efforts.

Given the unique challenge of prosecuting war crimes while hostilities are ongoing, the military commission rules allow the government greater flexibility to introduce second-hand statements. The Military Commissions Act allows hearsay to be admitted if the judge determines that the statement is reliable and probative and the witness is not available.[16] In determining whether to admit second-hand statements, the judge is specifically directed to take into account "the adverse impacts on military or intelligence operations that would likely result from the production of the witness."[17] Just as important, the hearsay rule is reciprocal.[18] So the accused may admit material to prove his defense that would otherwise be excluded under the Federal Rules of Evidence.

III. Unlawful Enemy Combatants Are Granted Substantial Due Process

Finally, while the MCA mitigates many of the risks of criminal prosecution, it also affords the accused substantial procedural protections similar to those provided in federal court. In a military commission, (1) the accused is presumed innocent;[19] (2) the Government must prove guilt beyond a reasonable doubt;[20] (3) the accused has a right to

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[15] Federal Rules of Evidence 802; U.S. CONST. Amend. VI.
[16] 10 U.S.C. 949a(b)(3)(D).
[17] 10 U.S.C. 949a(b)(3)(D)(ii)(III).
[18] 10 U.S.C. 949a(b)(3)(D).
[19] 10 U.S.C 949(l)(c)(1) ("the accused must be presumed to be innocent.").
[20] 10 U.S.C 949(l)(c)(1) ("the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt.").

counsel;[21] (4) he is protected from double jeopardy;[22] (5) the government is obligated to disclose exculpatory evidence;[23] and (6) the accused has the right to appeal to a Military Review Court,[24] then the United States Court of Appeals for the DC Circuit and finally petition the US Supreme Court.[25]

V. Conclusion

In conclusion, the 9/11 plotters and other inmates held at Guantanamo should be tried in military commissions -- not criminal court. Criminal trials may undermine our national security by revealing important information to our enemies, impeding intelligence gathering and placing an undue burden on military operations. There is no reason to gamble with America's security.

[21] 10 U.S.C 948(k) (Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable.).
[22] 10 U.S.C. 949(h) (No person may, without the person's consent, be tried by a military commission under this chapter a second time for the same offense."); 10 U.S.C 950d(b) ("In no case may a proceeding in revision (i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty.").
[23] 10 U.S.C. 949(j)(b) ("(1) As soon as practicable, trial counsel in a military commission under this chapter shall disclose to the defense the existence of any evidence that reasonably tends to (A) negate the guilt of the accused of an offense charged; or (B) reduce the degree of guilt of the accused with respect to an offense charged. (2) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial. (3) The trial counsel shall, as soon as practicable upon a finding of guilt, disclose to the defense the existence of evidence that is not subject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation evidence at sentencing. (4) The disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant.").
[24] 10 U.S.C. 950 (f).
[25] 10 U.S.C. 950 (g).