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CONGRESSIONAL TESTIMONY

Justice for America: Using Military Commissions To Try the 9/11 Conspirators

Testimony before Subcommittee on Crime, Terrorism and Homeland Security, United States House of Representatives

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I would like to thank Chairman Sensenbrenner, Ranking Member Scott, and members of the Subcommittee for inviting me to testify today on the use of military commissions to try appropriate war crimes, including the 9/11 conspiracy.

My name is Charles Stimson, and I am a Senior Legal Fellow at The Heritage Foundation, where I work on legal and policy issues related to national security, homeland security, and the criminal law. I am also a Commander in the United States Navy JAG Corps (Reserve Component), serving as a military trial judge. In my 18 years of service in the Navy, I have served three tours on active duty, including time as a prosecutor and defense attorney. I have been privileged to be a local, state, and federal prosecutor, and an adjunct law professor at The George Mason School of Law and the Naval Justice School. Most relevant to today's hearing, from 2006 through 2007 I served as Deputy Assistant Secretary of Defense for Detainee Affairs, a position created in 2004 to advise the Secretary of Defense on all matters related to Department of Defense detainees, including those in Iraq, Afghanistan, and Guantanamo Bay.

The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation, the Department of Defense, the Department of the Navy, or the Navy Judge Advocate General's Corps.

Today, there is broad bi-partisan consensus that military commissions provide robust procedural protections to those prosecuted, are appropriately adapted to the needs and exigencies of the war on terrorism, and, ultimately, are the appropriate venue for trying terrorists who commit war crimes.

The breadth of this consensus, on a topic that had sown division only a few years in the past, is remarkable. President Obama, for one, has said that military commissions "are an appropriate venue for trying detainees for violations of the laws of war" because "[t]hey allow for protection of sensitive sources and methods of intelligence gathering… [and for] the safety and security of participants and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in Federal courts."[1]

Senator Carl Levin, Chairman of the Senate Armed Services Committee, said at the introduction of the Military Commissions Act of 2009 before his committee that he believed commissions "can play a legitimate role in prosecuting violations of the law of war."[2]

Ranking Member John McCain echoed that sentiment. He said: "I believe we've made substantial progress that will strengthen the military commissions system during appellate

[1] *Remarks by the President on National Security*, THE WHITE HOUSE, May 21, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.
[2] Senator Carl Levin, Opening Statement at Senate Committee on Armed Services Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, July 7, 2009, http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-July-7-2009.pdf.

review, provide a careful balance between the protection of national security and American values, and allow the trials to move forward with greater efficiency toward a just and fair result."[3]

This bi-partisan consensus makes sense, especially when one understands the robust due process rights and procedural protections contained within the reformed military commissions. What does not make sense is the Obama Administration's continued policy of delayed justice and failure to refer cases to military commissions.

To move the process forward, three points must be understood. The first is that we are at war and that military commissions provide essential capabilities, which are unavailable in federal courts, in support of the war effort. The second is that, under current law, commissions provide due process protections that are unparalleled in the history of war crimes tribunals, and they provide these safeguards *right now*, not at some uncertain future date. The third is that, putting it all together, there is no excuse for further delay in referring 9/11 cases to trial by military commissions.

Let me address each point in turn.

First, we are at war, and there are strong practical considerations militating in favor of the use of commissions. In the years leading up to September 11, 2001, acts of transnational terrorism that affected United States interests were treated, for the most part, as criminal law matters in federal court. The United States was not in a continuing legal state of armed conflict, and the use of federal courts was the only litigation option for bringing terrorists to justice.

As a former federal prosecutor, I have immense respect for our federal courts. Federal terrorism prosecutors have the requisite experience in trying complex cases and federal courts will continue to play a role in this war.

For example, I supported the administration when it sent Ahmed Ghailani to federal court for his role in the 1998 embassy bombing case. The facts of that case were unique. For instance, the sites of the acts were treated as crime scenes from the moment the bombs went off; law enforcement officials from Kenya, Tanzania, and the United States preserved valuable evidence from the beginning, including reading suspects rights warnings; all evidence was collected prior to 9/11; and the co-conspirators were tried, convicted, and sentenced to long sentences before 9/11. Ghailani was indicted for his crimes at the time, but was not apprehended until after 9/11. Trying Ghailani in federal court for that pre-9/11 terrorist act was simply finishing up the unfinished business of the 1998 embassy bombing cases.[4]

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[3] Senator John McCain, Statement at Senate Committee on Armed Services Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, July 7, 2009, http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-July-7-2009.pdf.
[4] Charles D. Stimson, *First – and Perhaps Last – Gitmo Inmate Brought to America*, June 13, 2009, http://www.heritage.org/Research/Commentary/2009/06/First-and-perhaps-last-Gitmo-Inmate-Brought-to-America?RenderforPrint=1.

But the events of 9/11 have forced our leaders, including Presidents Bush and Obama, to recognize the need to have at their disposal all lawful tools, including military commissions, to confront and defeat this enemy.

Consider the litigating risks of trying Khalid Sheikh Mohammad, or "KSM," in federal court, versus before a military commission. Some of those risks are similar. For example, in both venues, KSM will likely attempt to take advantage of the "stage" of the courtroom to spew out his hatred of the West and embrace the call to global jihad. Similarly, regardless of where KSM is tried, the trial will take years to finish, as there will be substantial pretrial discovery, myriad motions, and long delays.

But military commissions do not give unprivileged enemy belligerents all of the rights guaranteed to criminal defendants in federal court, and they shouldn't. Furthermore, as the judge in the Salim Hamdan military commissions' trial wrote, "…the Geneva Conventions expressly contemplate tribunals for unlawful combatants that are less protective of their rights than the forum guaranteed to lawful combatants."[5]

Consider just one right, the right to a speedy trial, which is guaranteed to criminal defendants in federal court by the Sixth Amendment.[6] In the federal terrorism trial of Ahmed Ghailani, the federal district judge issued a ruling on whether the government had violated Ghailani's speedy trial rights. In denying Ghailani's motion, he analyzed the underlying facts and utilized the four-factors enumerated in *Barker v. Wingo*. He found the government's reason for delay "weak," but nonetheless denied the motion.[7] The ruling was close.

Here, if the Administration were to try KSM in federal court at this late date, there is a substantial risk that it would not be able to provide a credible legal justification for the years of delay in bringing him to trial. Lack of political courage in making a forum selection is not a cognizable legal excuse. The result: all charges would be dismissed in federal court. In a run-of-the-mill criminal trial, this might make sense: the government has to get on with its case or forfeit its ability to prosecute. But in war, the stakes are much higher.

The Military Commissions Act of 2009 does not give defendants a constitutional Sixth Amendment right to a speedy trial.

Another difference between military commissions and federal courts concerns hearsay. In federal court, hearsay is generally inadmissible,[8] unless the offered statement falls into one of the exceptions to the general prohibition. Even if the out-of-court statement falls

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[5] Keith J. Allred, *Military Commissions: The Right Venue for KSM*, THE WALL STREET JOURNAL, Apr. 19, 2010, http://online.wsj.com/article/SB10001424052748703444804575071880705027218.html.
[6] Barker v. Wingo, 407 U.S. 514 (1972).
[7] United States v. Ghailani, No. S10 98 Crim. 1023(LAK), 2010 WL 2756546 at *16 (S.D.N.Y. July 12, 2010).
[8] Fed. R. Evid. 801 (2011).

under an exception, otherwise relevant evidence may still be inadmissible as it might violate a defendant's rights under the Sixth Amendment's Confrontation Clause, and thus be inadmissible.[9]

But in military commissions and international tribunals, hearsay is admissible as long as the side offering the statement can demonstrate to the judge that it is reliable, material, probative, and that direct testimony from the witness is not available as a practical matter. Once admitted, the finder of fact then can decide what weight, if any, to give the statement.

This evidentiary difference is necessary and practical in the presentation of war crimes' cases.

Keep in mind that this isn't just a benefit to the prosecution. Both sides benefit from the use of the commissions' hearsay rules, and the finder of fact has more information, not less, with which to render a considered judgment.

There is also the matter of incentives. The rules of war codified in the Geneva Conventions create a set of incentives for belligerents: follow the rules and, if you're captured, you'll be accorded the benefits of those rules. But by trying unprivileged enemy belligerents in federal court—instead of military commissions—we reward the violation of those rules and give those belligerents greater protections than a typical lawful prisoner of war would receive. This practice upends the carefully crafted incentive structure of the Geneva Conventions, and is harmful.

Finally, there is an ongoing debate among legal scholars as to whether the crimes of conspiracy and material support to terrorism are traditional war crimes. The debate continues, and likely will unless or until the United States Court of Military Commissions Review or higher appellate courts rule on the issue. But that debate is irrelevant to the topic at hand. The government has ample direct and circumstantial evidence to prove the 9/11 case, and can rely on traditional war crimes statutes to charge KSM and the 9/11 plotters.

Second, reformed military commissions provide robust protections to detainees, more so than any other international war crimes tribunal ever created. Indeed, they are specifically modeled after and adapted from the established procedures and rules of evidence found in the Uniform Code of Military Justice. Although neither traditional criminal law nor the law of war provide clear answers to the multitude of detainee issues that have arisen since 9/11, it is clear that under Common Article 3 of the Geneva Conventions and Supreme Court precedent, unlawful combatants are entitled to be tried by a "regularly constituted court that affords all the judicial guarantees…recognized as indispensable by civilized peoples."

And when one compares the procedural protections and rules contained in the Military Commissions Act of 2009 to standard U.S. courts-martial and other international

[9] *See* Crawford v. Washington, 541 U.S. 36 (2004) *et seq.*

tribunals, as I have, you see that today's commissions offers unlawful combatants more robust due process and protections that any international tribunal ever created.

The United States has led the world in the development of the law for a long time. The rules and procedures embodied in the Military Commissions Act of 2009 are fairer than the rules used at Nuremberg after World War II, the current International Criminal Court, and the International Criminal Courts of Yugoslavia and Rwanda. Perhaps in the years to come, international tribunals may look to the Military Commissions Act of 2009 as a model for enhancing their rules and procedures.

Those protections, which I have detailed in a comparison chart attached to my remarks, include but are not limited to:

1. The legal presumption of innocence throughout the trial;
2. Proof beyond a reasonable doubt is required to convict;
3. Protection from self-incrimination;
4. The right to be present whenever evidence is admitted;
5. The right to counsel;
6. The right to present and call witnesses;
7. The right to cross-examine government witnesses who appear in court;
8. The right to pretrial discovery of all evidence to be introduced at trial;
9. A prohibition on use of statements obtained through cruel, inhuman and degrading treatment
10. The right to remain silent, without any adverse inference;
11. The right to introduce evidence through expert witnesses; and
12. The right to introduce reliable hearsay evidence.

We should judge the fairness of these procedures by whether we would feel comfortable if our own military personnel were subjected to similar procedures. We should also ask whether they are consistent with our values as Americans.

The answer to both questions is "yes." And that is not just my position, but the implicit position of the Obama Administration and inescapable conclusion of many Members of Congress from both sides of the aisle.

Finally, we are almost a decade from 9/11, and we still don't have a decision on where these cases are to be tried. The victims haven't had their day in court. That's wrong. Delay also does not benefit the detainees, as they deserve a decision as well. At this point in time, it is time for leaders to lead, and make a decision. We pay our leaders to do just this. And for 10 years, no decision has been made.

The administration is to be commended for reforming and keeping military commissions. But it is now time for the administration to start referring cases to military commissions, including the 9/11 case. The President's Detainee Policy Task Force concluded, "Justice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed." The Administration has established a protocol governing the disposition

of Guantanamo cases for prosecution. Any objective analysis of the three factors in that protocol leads to but one conclusion: the lead actors who caused the United States to go to war for 9/11 deserve a war crimes tribunal.

Members of Congress should call on the administration to take this step, to stop delaying, and to bring Khalid Sheikh Mohammad to justice in a military commission trial. Once that decision is made, it is imperative that the Congress provide the Administration, and in particular the Office of Military Commissions, with those resources its needs to fully support both the defense and prosecution teams to carry out their respective duties.

I thank you for the opportunity to testify, and I look forward to our discussion.

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