

**TESTIMONY OF PAUL WOLFOWITZ  
DEPUTY SECRETARY OF DEFENSE  
AND  
DEPUTY SECRETARY OF DEFENSE  
PAUL WOLFOWITZ  
BEFORE THE SENATE ARMED SERVICES COMMITTEE  
“MILITARY COMMISSIONS”  
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Mr. Chairman, Members of the Committee, good morning.

On September 11<sup>th</sup>, Americans found their nation under attack. Terrorists hijacked civilian airliners, turned them into missiles, and used them to kill thousands of innocent Americans—men, women and children—as well as people from dozens of nations.

Today, three months after the attack, the ruins of the World Trade Towers are still burning—and bodies are still being pulled from the wreckage. Over the weekend, the remains of twenty more were recovered—five firefighters, two policemen, and a group that had been trapped in a stairwell as they tried to escape the collapsing tower. Their families will now be able to bury them. But many hundreds of families who lost loved ones—mothers and fathers, husbands and wives, sisters and brothers, sons and daughters— still have not been able to bury their dead... and possibly never will.

It is still difficult to fathom the enormity of what happened on September 11<sup>th</sup>. As time passes, and the fires finally burn out, Americans will eventually recover from the shock and horror of what befell our nation that day.

But those who are responsible for our national defense must not lose sight of the fact that these are *not* normal times. We have been attacked. We are at war. And we must take the steps necessary to defend our people, and protect them from further harm.

The September 11<sup>th</sup> attacks were acts of war. The people who planned and carried out these attacks are not common criminals—they are foreign aggressors, vicious enemies whose goal was, and remains, to kill as many innocent Americans as possible.

And let there be no doubt: they will strike again, unless we are able to stop them.

We have no greater responsibility as a nation, than to stop these terrorists—to find them, root them out, and prevent them from murdering more of our citizens.

To accomplish that objective, the President is marshalling every tool at his disposal—military, diplomatic, financial, economic. He is working to freeze the assets of terrorist leaders and organizations that sponsor and finance terror. He is working with foreign governments to shut down the terrorist networks that operate in dozens of countries across the world. And he has sent brave Americans to Afghanistan—courageous soldiers, sailors, airmen and marines, who at this moment are risking their lives to stop the al-Qaeda terrorist network and the Taliban that seek to kill our people.

This is not a law enforcement action. It is war. We seek to defeat or destroy our terrorist enemies, so that they cannot harm Americans. When coalition forces storm a Taliban compound or an al-Qaeda safe house, they cannot first ask for a search warrant. When they confront Taliban or al-Qaeda fighters in the caves and shadows where they hide, they are in combat. Their objective is to stop the terrorists and prevent them from continuing to threaten our country.

The U.S. military is doing this in Afghanistan—and they are doing it extremely well. But the terrorists who threaten us are not only in Afghanistan. They operate in dozens of countries—including the United States. They are, and remain, unlawful belligerents, adversaries who attacked our nation in contravention of the rules of war. And the President has made it clear that we will hunt them down wherever they hide.

When enemy forces are captured, wherever they are captured, they must then be dealt with. There are a number of tools at the country's disposal for doing so. One of those tools is the establishment of military war crimes commissions.

The president, as commander-in-chief, has issued a military order that would permit individual non-U.S. citizens to be tried by military

commission. As yet, he has not designated anyone to be tried by such a commission. He may do so; he may not.

To prepare for the possibility that he may do so, the Department of Defense is developing appropriate procedures for such commissions.

We are in the process of developing these procedures. We are consulting a variety of individuals and experts, in and out of government, to discuss how such commissions should operate, and how they have operated in the past. We are working to establish rules of procedure that will ensure, in the event the President decides to designate a non-U.S. citizen to be tried by a military commission, that it is handled in a measured, balanced, thoughtful way that reflects our country's values.

Military commissions have been used in times of war since the Founding of this nation. George Washington used them during the Revolutionary War; They were used during the Civil War; President Franklin Roosevelt used them during World War II.

During and following World War II, we didn't bring German and Japanese war criminals to the U.S. for trial in civilian courts. We tried them by military commissions. In Germany, we prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions—of which 856 were convicted. These conviction rates are not out of line with normal, non-military commission outcomes—indeed, they are lower than the felony conviction rate in the U.S. federal courts last year.

When eight Nazi saboteurs landed on our coast in 1942, with the intention of destroying American industrial facilities, they were tried by military commissions.

Indeed in that case, the Supreme Court upheld the constitutionality of military commissions. In *Ex parte Quirin*, the Court ruled unanimously—in an 8-0 decision—that the trial of the Nazi saboteurs by a military commission, without a jury, was indeed constitutional, declaring “unlawful combatants...are subject to punishment by military tribunals for acts which render their belligerency unlawful.”

Further, the U.S. Congress also recognized the use of military commissions, after World War II, when it passed the Uniform Code of Military Justice in 1950, which included statutory language preserving the jurisdiction of military commissions. So all three branches of the U.S. government have endorsed the use of military commissions.

Our ability to bring justice to foreign terrorists is critical to our ability to defend the country against future terrorist threats. Moreover, it is well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution. Furthermore, there are a number of compelling reasons for using military commissions instead of civilian courts to try unlawful belligerents in times of war.

First, by using military commissions, we can better protect civilian judges, jurors and courts from terrorist threats and assure the security of the trial itself.

Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack is still under 24 hour protection by federal marshals—and probably will be for the rest of his life.

It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.

Second, federal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence—a flexibility which could be critical in wartime, when it is often difficult, for example, to establish chains of custody for documents or to locate

witnesses. Military commissions allow those judging the case to hear all probative evidence—including evidence obtained under conditions of war—that could be critical to obtaining a conviction.

Third, military commissions can allow the use of classified information without endangering sources and methods. This point is critical. During the course of a civilian trial, prosecutors could be faced with a situation where, in order to secure a conviction, they would have to use classified information that would expose how the U.S. monitors terrorist activities and communications. They could be forced to allow terrorists to go free, or offer them lighter sentences, in order to protect a source that is critical to our national security.

Do we really want to be in the position of choosing between a successful prosecution of an al-Qaeda terrorist, and revealing intelligence information that, if exposed, could reduce our ability to stop the next terrorist attack—at a cost of thousands more American lives?

A military commission can permit us to avoid this dilemma. We can protect national security, including ongoing military operations in Afghanistan, while at the same time ensuring a full and fair trial for any individuals designated by the President.

Again, Mr. Chairman, the President has not designated anyone to be tried by military commission, and we have not yet issued regulations or established rules of procedure.

But we are at war with an enemy that has flagrantly violated the laws of war. They do not wear uniforms. They hide in caves abroad, and among us here at home. They target civilians—innocent men, women and children of all races and religions. And they intend to attack us again. Let there be no doubt.

They are not common criminals—they are war criminals. We must—and we will—defend this country from them.

Military tribunals are one of many instruments we may use to do so. We are confident that we will develop a process that Americans will have confidence in, and which is fully consistent with the principles of

justice and fairness our country is known for throughout the world. We have the reputation as a nation for dealing fairly in these kinds of matters—and we will do so in this case. We will bring justice to the terrorists, and ensure that the American people can once again live their lives in freedom and without fear.

Thank you.

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