UNITED STATES SENATE
COMMITTEE ON ARMED SERVICES
"TO CONTINUE TO RECEIVE TESTIMONY ON MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN HAMDAM V. RUMSFELD"
TESTIMONY OF SCOTT L. SILLIMAN

Wednesday, July 19, 2006

Mr. Chairman, Senator Levin and members of the Committee. My name is Scott L. Silliman and I am a Professor of the Practice of Law at Duke Law School and the Executive Director of Duke's Center on Law, Ethics and National Security. I also hold appointments as an adjunct Associate Professor of Law at the University of North Carolina, and as an Adjunct Professor of Law at North Carolina Central University. My research and teaching focus primarily on national security law and military justice. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department.

I thank you for the invitation to discuss with the Committee my views on the Supreme Court's opinion in *Hamdan v. Rumsfeld*[1] and what your legislative response should be to that ruling. As you take testimony and deliberate on the type of statutory system which could be adopted or crafted for prosecuting terrorists for violations of the law of war, I submit that the task before you extends far beyond Hamdan and the few others at Guantanamo Bay currently facing military commissions. It is to fashion a system for prosecuting terrorists that will withstand judicial scrutiny in our courts, meet commonly accepted international legal standards, and be available for use in other non-traditional armed conflicts in the future. As I will explain in greater detail later, I believe such a system should be predicated upon the Uniform Code of Military Justice and its core elements of procedural protection, with minor modifications made where deemed appropriate. I will first briefly discuss military commissions in general and the substance of the Supreme Court's ruling in *Hamdan* before turning to what I believe are the legislative options currently under consideration.

Military Commissions Generally

Military commissions have been used to try those accused of violations of the law of war as far back as the Revolutionary War when Major John Andre, Adjutant-General to the British Army, was prosecuted in 1780 on a charge that he had crossed the battle lines to meet with Benedict Arnold and had been captured in disguise and while using an assumed name.[2] Others were

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[1] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

[2] See *generally* Scott L. Silliman, *On Military Commissions*, 36 Case W. Res. J. Int'l L. 529 (2005); Louis Fisher, *Military Tribunals and Presidential Power* (Univ. Of Kansas Press 2005).

conducted during the Mexican and Civil Wars, and more recently during World War II.[3] There are actually three different types of military commissions: martial law courts, occupation courts, and war courts.[4] Martial law courts have been used when martial law is declared, such as during the Civil War[5] and in Hawaii during World War II.[6] An occupation court can be used when the United States is an occupying power, such as in post-war Germany when an American dependent wife was charged with murdering her military husband in violation of the German criminal code.[7] Finally, war courts have been used to prosecute violations of the law of war during a period of recognized armed conflict, such as during World War II.[8] The military commissions which were established by President Bush in his Military Order of November, 13, 2001[9] and which were envisioned for use at Guantanamo Bay were of this last type, *war courts*.

The Court's Opinion in *Hamdan v. Rumsfeld*

The first issue facing the Court was jurisdictional–could it still rule on Hamdan's case since the Government argued that the Detainee Treatment Act,[10] enacted on December 30, 2005, "stripped" the Court of the power to hear Hamdan's petitions for habeas and mandamus, even though they had been filed in the district court over two years earlier and the Supreme Court had granted certiorari almost two months prior to the President signing the Act into law. Using principles of statutory construction, the Court ruled that it retained jurisdiction.[11]

On the merits, the Court initially probed the interplay between the powers of the President and those of Congress in time of war, raising, but not answering, a question left lingering from *Milligan*:

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[3] *Id*.

[4] Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, The Army Lawyer, March 2002, DA PAM 27-50-350, 19, 37.

[5] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[6] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[7] *Madsen v. Kinsella*, 343 U.S. 341 (1952).

[8] *Ex parte Quirin*, 317 U.S. 1 (1942); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[9] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (2001).

[10] Pub. L. No. 109-148, 119 Stat. 2739 (2005), hereinafter DTA.

[11] *Hamdan*, *supra* note 1, at 2769.

> "Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity' is a question this Court has not answered definitively, and need not answer today."[12]

The Court went on, however, to specifically reject the Government's assertion that the President's authority to convene military commissions flowed from statute, whether it be the Authorization for the Use of Military Force (AUMF),[13] the Detainee Treatment Act, or the Uniform Code of Military Justice.[14] In one sentence of singular significance, albeit buried in a footnote, the Court clearly foreshadowed its principal holding:

> "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations which that Congress has, in proper exercise of its own war powers, placed upon his powers. See *Youngstown Sheet and Tube Co. V. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise."[15]

The Court then discussed two statutory provisions which established just those limitations, Articles 36(b) and 21 of the Uniform Code of Military Justice, 10 U.S.C. §§ 836(b) and 821, respectively. The Court looked to the text of Article 36(b),[16] interpreting it to mean that procedures established for military commissions must be uniform with those established in the UCMJ for courts-martial unless such uniformity was not practicable.[17] The Court ruled that the President's determination that such uniformity was impracticable was insufficient to justify the variances from court-martial procedures.[18]

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[12] *Id.* at 2774.

[13] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[14] "The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. "...."Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws', including the law of war." (*Id*. at 2774, 2775).

[15] *Id.* n. 23.

[16] "All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b).

[17] *Hamdan, supra* note 1, at 2790.

[18] *Id*. at 2791.

With regard to Article 21,[19] the Court ruled that Congress had conditioned the President's use of military commissions on compliance with the law of war, of which Common Article 3 of the Geneva Conventions was a part and which dictated the use of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[20] Because the accepted definition of a regularly constituted court includes ordinary military courts (courts-martial) but excludes all special tribunals,[21] the President's military commissions were not in compliance with Common Article 3 since he had demonstrated no practical need for deviating from courts-martial practice.[22]

Put most simply, the Court's ruled that in unilaterally creating a system for military commissions, the President exceeded his authority by running afoul of statutory limitations imposed by the Congress, in this instance in the UCMJ.[23] Since my testimony is limited to the Court's ruling with regard to military commissions under the President's Military Order, I will not address whether or to what extent the Court's inclusion of Common Article 3 as a part of the law of war impacts other applications of executive power in the War against al Qaeda.

Possible Legislative Options in Response to the Court's Decision

One option being considered is to pass a law which merely gives legislative sanction to the prior system for military commissions–putting everything back in place the way it was–notwithstanding the Court's determination that there must be compliance with Common Article 3. Because Article VI of the Constitution treats statutes and treaties alike as "the Supreme Law of the Land",[24] and a later enacted statute displaces an earlier one,[25] I believe that, *as a matter of domestic law*, Congress could legislatively restrict the application of Common

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[19] 10 U.S.C. § 821.

[20] *Id*. at 2796, citing the Geneva Conventions of 1949, 6 U.S.T. at 3320 (Art 3(1)(d)).

[21] *Id*.

[22] *Id*. at 2797.

[23] In this regard, the Court's analysis in *Hamdan* is no different from that in earlier cases. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) and *Youngstown Sheet & Tube Co. V. Sawyer*, 343 U.S. 579 (1952).

[24] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art VI, cl. 2.

[25] *See Head Money Cases*, 112 U.S. 580, 598-599 (1884).

Article 3 with regard to military commissions. There is, however, no assurance that such a "reblued" military commission system would pass judicial muster and, at the very least, it would invite additional challenges in the courts and further years of uncertainty. More importantly, merely giving Congressional sanction to the minimal level of due process in a military commission system which was criticized as inadequate by the Supreme Court[26] and which fails to satisfy commonly recognized international legal standards is, I believe, imprudent.

A second option is for Congress to craft a statute authorizing a completely new military commission system, using the President's Military Order and Military Commission Order No. 1[27] as a base line and "building up" to a higher level of due process by adding in procedural protections from the Uniform Code of Military Justice. Such a statute could remedy most of the defects which the Court cited in its opinion, and yet still satisfy those who demand a more flexible standard for the admissibility of evidence. For example, less reliable testimony such as unsworn statements or hearsay is not allowed in our federal and state courts, but could be admissible in military commissions if Congress made that the rule. Even under this more flexible standard, however, I strongly believe that statements of an accused or others acquired through coercive interrogation techniques should not be allowed into evidence under any circumstances. If the statute provided that a detainee would be present at all trial sessions unless he became disruptive; if there were provisions to ensure that classified national security information was safeguarded; and if there was some provision for a more substantial judicial review of a conviction, such as in the United States Court of Appeals for the Armed Forces which deals with military justice issues, such a system would, I think, satisfy the objections of most. In other words, if virtually all the due process safeguards which currently apply in courts-martial, save for a more flexible standard for the admissibility of evidence, were grafted into a newly enacted military commission system, that type of legislative response would be, I suggest, a better option. I submit, though, that this option starts from the wrong base line–the old system–and is unnecessary because an already existing statute can readily be tailored to achieve a better result.

The third option, and the one I advocate, is to use the Uniform Code of Military Justice[28] as the base line, and then make whatever minor adjustments may be necessary where certain provisions

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[26] A military commission system with a similar lax standard for the admissibility of evidence and little overall due process drew criticism from two justices of the Supreme Court in an earlier era. Although the Court upheld the constitutionality of the military commission which convicted Japanese General Tomoyuki Yamashita, Justices Rutledge and Murphy wrote scathing dissents about the lack of due process requirements in that commission. *Yamashita v. Styler*, 327 U.S. 1, 26-29, 44-45, 48-66 (1946).

[27] Dep't of Def. Military Commission Order No. 1, Mar. 21, 2002, *available at* http://www.defenselink.mil/news/legalrefs.htm (last visited July 17, 2006).

[28] 10 U.S.C. § 801 *et seq.* (2000 ed.).

of the Code or the Manual for Courts-Martial[29] are deemed impracticable. The UCMJ is a fair and well-proven system of law, created by Congress some 56 years ago partly in response to the many criticisms of military justice actions during World War II where there was little due process in courts-martial. It is the military criminal code used to deal with misconduct committed by members of our own armed forces, and the Supreme Court clearly implied that it could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay. Further, and more importantly, the Code already provides for jurisdiction to prosecute, either by court-martial *or military commission*, those who violate the law of war during armed conflict,[30] although I am unaware of any such trials being conducted under this authority. If we were dealing with individuals who were classified as prisoners of war, the Third Geneva Convention requires that only a court-martial (or perhaps trial in federal criminal court) could be used to prosecute them;[31] but those held at Guantanamo Bay have not been so classified, so either system under the UCMJ, courts-martial or military commission, is permitted. To use courts-martial, the type of tribunal used for our own military personnel, with its inherent procedural protections which meet and sometimes exceed those in federal criminal trials, is clearly not appropriate. The use of military commissions, as provided for under the Code, is therefore the better prosecutorial forum.

Even before the enactment of the UCMJ in 1950, military commissions were recognized as an alternate form of tribunal for use by commanders in the field when courts-martial were deemed

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[29] Manual for Courts-Martial, United States (2005 edition), Exec. Order No. 13365, 69 Fed. Reg. 71333 ((2004)(*hereinafter* MCM).

[30] Article 18 reads, in part, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818. Article 21 reads "The provisions of this chapter conferring jurisdiction upon-courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals" 10 U.S.C. § 821. And Article 2(a)(12) extends personal jurisdiction to those non-military, non-US citizens at Guantanamo Bay: "Subject to any treaty or agreement to which the United States is or may be a party or to an accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a)(12).

[31] Article 84 provides that "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power..."; and Article 102 states "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power...." Geneva Convention Relative to the Treatment of Prisoners of War, arts 84, 102, July 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

inconvenient or impracticable.[32] However, Congress in the UCMJ stipulated that the rules and regulations under the Code should be "uniform insofar as practical"[33] and, no matter how that provision was interpreted in the past, the Supreme Court in *Hamdan* said that it meant that "the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable."[34] The task, then, is to identify those court-martial provisions which would clearly be impracticable when prosecuting terrorists by military commission. I suggest that those articles of the UCMJ which would not, in part or in whole, be practicable in military commissions are few; the greater number would be in the Manual for Courts-Martial, an executive order, which requires action only by the President, perhaps with Congressional approval.

As to the UCMJ, I suggest that Article 31(b),[35] requiring the rendering of advice of rights to a person being interrogated who is suspected of an offense, has no application in a military commission procedure. Similarly, Article 32,[36] requiring a pretrial investigation prior to the convening of a general court-martial, would be neither necessary nor appropriate. Finally, with

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[32] The legislative history of Article 15 of the Articles of War, the predecessor of Article 21 of the UCMJ, is relevant in this regard. Army Brigadier General Crowder, then Judge Advocate General of the Army, testified before the Senate Subcommittee on Military Affairs on February 7, 1916, as follows:

> "**General Crowder**: Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced....It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, *so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient*....Yet, as I have said, these war courts never have been formally authorized by statute." (Emphasis added) Testimony of Brigadier General Enoch H. Crowder, United States Army, Judge Advocate General of the Army, on February 7, 1916, before the Subcommittee on Military Affairs, United States Senate, Revision of the Articles of War, S. Rep. No. 130, 64th Cong., 1st Sess. 40.

[33] UCMJ, Article 32(b), s*upra* note 16.

[34] *Hamdan*, *supra* note 1, at 2791.

[35] 10 U.S.C. § 831(b).

[36] 10 U.S.C. § 832.

regard to appellate review of convictions of military commissions, Article 66[37] would need to be amended by adding military commissions to the jurisdiction of the service Courts of Criminal Appeals, and also adding a provision for the President to designate which of the respective Courts of Criminal Appeals would exercise jurisdiction over the commissions. Since Article 67,[38] regarding review by the Court of Appeals for the Armed Forces, uses the term "cases", there appears to be need for any amendment to that provision.

Proposed amendments to the UCMJ sponsored by the National Institute of Military Justice (NIMJ), which are on record with the Committee and which I specifically endorse, would effect the change to Article 66. As to excluding Article 32 from military commission procedure, the NIMJ proposal also contains a recommended amendment to Article 36 which would grant the President the authority to prescribe procedures for military commissions, applying the principles of law and the rules of evidence prescribed for general courts-martial (with the exception of Article 32) insofar as he considers them practicable, as long as those procedures are not contrary to or inconsistent with international law. The amendment also contains a reporting requirement to Congress regarding the President's determination of impracticability. Finally, the NIMJ proposal includes an amendment to Article 21[39] which would provide specific statutory authorization for the President to establish military commissions (and provost courts) in time or war or pursuant to an authorization for the use of force, as long as the commissions are consistent with international law, including the law of war. Since I take the view that the President, when acting pursuant to his commander in chief powers under Article II, Section 2, is constitutionally empowered to establish military commissions *unless* constrained by Congress,[40] I do not believe this proposed amendment to Article 21 is necessary, but it may be prudent as an additional, statutory grant of authority for him to establish a commission system pursuant to the Code.

There are several provisions of the Manual for Courts-Martial which would seemingly not be practical in military commission procedures, but, as mentioned above, making changes to these provisions is within the purview of the President but would also presumably be subject to the reporting requirement of NIMJ's proposed amendment to Article 36. The speedy trial rules governing courts-martial,[41] as well as the myriad rules governing the admissibility of evidence and the application of the exclusionary rule,[42] will need to be tailored to meet the exigencies of captures and acquiring evidence in battlefield environment while still maintaining a fundamental

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[37] 10 U.S.C. § 866.

[38] 10 U.S.C. § 867.

[39] UCMJ, Article 21, *supra* note 30.

[40] *See Madsen v. Kinsella*, *supra* note 7, at 348.

[41] MCM, *supra* note 29, at R.C.M. § 707.

[42] *See generally* MCM, *supra* note 29, at M.R.E. 301-504

fairness to the accused. The provisions which govern the admissibility of classified and other sensitive government evidence (when requested by the accused)[43] which generally mirror the Classified Information Procedures Act[44], would have to be amended to provide for the safeguarding and use of classified and other sensitive government information to be introduced by the government to prove the guilt of the accused, while still ensuring measure of authenticity of that evidence. As to the many changes to the military rules of evidence governing courts-martial which might be required when applied to military commissions, a general clause regarding exceptions could perhaps be added to M.R.E. 101[45] and, more especially, M.R.E. 1101[46] to effect that purpose.

Finally, although I have offered a few proposed changes to the rules and procedures for courts-martial which, to my mind, would make them more adaptable for use in military commissions, I strongly urge that a committee of judge advocates be formally convened to carefully study and make recommendations to the President as to what may, in their view, be required. They are the practitioners who know the Code and the Manual best. If this proposed military commission system under authority of the UCMJ is to provide an appropriate forum for prosecuting those we now detain, as well as those who commit violations of the law of war in future conflicts, we must ensure that perceived pressures to legislate quickly do not cause us to err and fail in our goal to establish a system which reflects our national values and which satisfies commonly accepted principles of international law.

Mr. Chairman, Senator Levin, and members of the Committee, thank you again for inviting me to share my views with you. I look forward to answering any questions you might have.

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43 *Id.* at M.R.E. 505-506.

44 18 U.S.C. app. III §§ 1-16 (1988).

45 MCM, *supra* note 29, at M.R.E. 101.

46 *Id.* at M.R.E. 1101.