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

Chairman Sensenbrenner, Ranking Member Scott and Members of the Subcommittee, I thank you for inviting me to testify before you on the subject of using military commissions to try the 9/11 conspirators.

Redefining the Question

I begin by noting that the real question is where to try those who are alleged to be conspirators. At the moment the five individuals who may be charged as principal participants in the horrific attacks on America that occurred on September 11, 2001 have not been prosecuted in any tribunal. They remain presumed innocent irrespective of the assumptions that have been made by many as to their responsibility for the hijacking of airplanes and the killing of innocent people.

Try Cases in Article III Courts

My position on where those charged with the worst act of mass murder on American soil should be tried is clear: IN AN ARTICLE III COURT presided over by a judge appointed by the President and confirmed by the Senate and before a jury of American citizens chosen from a cross-section of the community as juries are chosen in the United States every working day.

The Reasons for Using Article III Courts

Why do I think it is important for the trial to be in an Article III court? There are a number of reasons, many of which have been well articulated by thoughtful people over the years since the 9/11 attacks:

1. Civilian courts are capable of handling complex terrorism and espionage cases. Their track record is strong. Over 400 terrorism-related suspects have been successfully tried in federal courts since 9/11. Only a handful of cases have been handled by military commissions, and the military commission process has been hampered by starts and stops, changes in the rules, and uncertainty about exactly how cases would proceed.

2. The life-tenure provided federal judges by the founders of this Nation is one of our fundamental guarantees that justice in federal courts will be impartial and that those who preside over criminal cases will not be beholden to the

Executive. The independence of the federal judiciary is one of the factors that inspires confidence in the decisions rendered by federal courts. There is no comparable independence of military judges who preside over commissions.

3. A civilian jury is one of the greatest democratic institutions that we have. It is chosen from throughout the community. It is inclusive. Men and women serve together. People of all races and religions are called to serve together. Individuals with varying education, expertise and experience serve as a unit to assess the strength and weakness of evidence. The jurors are screened for bias, and challenges for cause and peremptory challenges offer protections against jurors who are partial. The judgment of such jurors – as, for example, those who assessed a fair punishment for Zacarias Moussaoui – benefits from the many different perspectives that jurors bring to their deliberations. Military commission members are not drawn from a similar cross-section of the community, are chosen by the Convening Authority who also brings the charges against an accused, and will never be viewed as being as fair and impartial as a civilian panel.

4. There is enormous skepticism about the fairness of military commissions that is largely explained by the now discredited procedures originally proposed to govern them. Had the procedures now in place as a result of the Military Commission Act of 2009 ("MCA 2009") and improvements made by the Department of Defense been in place from the outset, some of the concerns about commissions would have been eliminated. But, the process has been slow and once doubts about the fairness of a tribunal arise, it is difficult if not impossible to eradicate them.

5. Many public figures have proclaimed that we ought to use military commissions because they provide a greater certainty of conviction. Such comments fuel the perception that the rules governing the commissions are adopted with an eye to increasing the probability of conviction and a severe sentence rather than increasing the likelihood of a fair and just proceeding. Our goal should be to try individuals charged with these acts of mass murder in a manner that convinces our people and those around the world who look to us for leadership in preserving and protecting the rule of law that we are guaranteeing a fair trial for all charged with crimes, even the worst crimes. Our citizens and those of other nations are most likely to be convinced by trials in federal courts.

6. The individuals charged with the 9/11 murders ought not be treated as

warriors. We are in a fight against international terrorism. There is no mistake about it. But, terrorists who commit murder in the United States against innocent civilians are criminals who should be prosecuted as such. Those alleged to be responsible for the 9/11 attacks should be tried in civilian courts just as Timothy McVeigh was tried for the Oklahoma City bombing. He was proved to have been a murderer, sentenced to death, and executed. The federal court that tried him used the same procedures that govern criminal trials throughout the United States. Those procedures produced a fair trial and a just verdict. Those same procedures can and should be employed in trying those accused of the 9/11 attacks.

7. There is a place for military commissions in the prosecution of terrorists. They are most defensible when employed to prosecute individuals who attack American military targets abroad, where witnesses and evidence may be uniquely available. But, they are not the forum for trying the most serious charges of intentional murder committed on American soil that may ever be brought. That forum is a federal district court.

8. Some of the arguments made in favor of military commissions sound as though we do not trust civilian courts. The case of Ahmed Khalfan Ghailani is cited as an example of why we should avoid civilian courts. Although Ghailani was acquitted on all charges but one, his conviction on a conspiracy charge relating to the 1998 East Africa Embassy bombings led to a life sentence without the possibility of parole. The fact that a civilian jury found the evidence insufficient on the other charges ought to inspire confidence that the trial was fair, the government was put to its proof as required by the Constitution, and there is no reason to question the integrity of the guilty verdict of conspiracy.

Those that argue that the evidence deemed inadmissible against Ghailani would have been admissible in a military commission may be wrong. Judge Kaplan, the trial judge, stated in a footnote in his ruling that it was far from clear that the witness's testimony would be admissible if Ghailani were being tried in a military commission because the MCA 2009 likely would require exclusion, but even if it did not the Constitution might do so even in a military commission proceeding.

9. Although the rules of evidence that currently govern military commissions are more favorable to the prosecution than either the Federal Rules of Evidence applicable in federal courts or the Military Rules of Evidence applicable in courts-

martial, there is uncertainty as to whether the commission's evidence rules will ultimately be held to satisfy the Constitution's guarantee of due process. We can be certain that the Federal Rules of Evidence will pass constitutional muster and that trials under those rules satisfy due process. The uncertainty as to whether the commission rules will ultimately be upheld is genuine and reason to avoid prosecuting the 9/11 cases in any forum other than an Article III court. The Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), stands as a caution not to assume that federal courts that review commission proceedings will find that the procedure and evidence rules are constitutionally adequate.

10. A trial in civilian court that results in a conviction could be appealed to a federal circuit court. If the conviction is affirmed, the defendant could seek review in the United States Supreme Court. The appellate process is familiar and can be efficiently employed. Military commissions will employ an appellate process that is less familiar and more cumbersome. First, there is review by the Convening Authority. Second, there is review by the Court of Military Commission Review, a unique tribunal that was created specifically to review commission proceedings whose membership keeps changing. Third, there is review by the United States Court of Appeals for the District of Columbia Circuit. Finally, there is potential review by the United States Supreme Court. There is every reason to believe that the military commission appellate process will be more prolonged than its civilian counterpart.

Responses to the Arguments Against Article III Courts

I am not persuaded that there is any insurmountable problem with trying those accused of the 9/11 murders in civilian court. So let me address some of the so-called problems.

1. Security for the trial will be prohibitively expensive and disruptive.

This could be true if the trial were held in lower Manhattan and the New York Police Department concluded that prudence required a massive security presence and a substantial cordoned-off area. Although some have questioned the need for such security and have pointed to the fact that Ghailani was transferred to New York City from Guantanamo and was tried without incident, I would not second-guess the NYPD. There is no requirement that the trial be held in New York, however. It could be held in the Eastern District of Virginia, where the

Alexandria federal courthouse is already relatively secure.

The case could also be initiated in the Southern District of New York, and either side could move for a change of venue. The case could be tried, for example, in New Jersey where a federal court sits next to a detention facility and defendants may be moved from the facility to the court through an underground tunnel. Such a forum ought to cut security costs and ameliorate threat concerns considerably.

Moreover, if there were reason to believe that a specific threat of retaliation were directed at the location of a trial, an Article III trial could be convened at a military installation in the United States where security would presumably be adequate to thwart any attempt at retaliation.

There is surely good reason to question the assumption that if the trial is held in a military commission in Guantanamo, there will be no attempted retaliation by sympathizers of the defendants. After all, retaliation can be directed at any American facility; it need not be directed at the courthouse where a defendant is tried. The World Trade Center buildings were attacked as symbols. Any terrorist who sought to retaliate against the United States for trying those accused of the 9/11 attacks could choose another symbol far removed from the trial itself. So, no one should be choosing a military commission as a means of avoiding potential retaliation.

2. Civilian trials put judges and jurors at risk.

It is true that a federal judge who presides over a trial involving any individual associated with a criminal enterprise could be the target of retaliation. The danger is ever present when judges sentence a member of a group that is known to engage in violence. Yet, our federal judges have not hesitated to preside over these trials. Indeed, our judges fully understand that the rule of law would be weakened if they did not meet their responsibilities even at some risk. It is true security may be required for a judge after some cases, but we have provided it in the past and should be prepared to provide it when necessary to enable our judges to do their jobs.

What is true of physical locations is also true of people. One terrorist sympathizer could retaliate against the trial of another terrorist by retaliating

against any government officer. There are no rules governing retaliation. A terrorist could retaliate against a military commission proceeding by targeting a judge, a member of Congress, or a civilian who had nothing to do with the proceeding. The fact is that there is no way to guarantee that there will be no retaliation as a result of any trial.

As for jurors, federal courts have considerable experience impaneling anonymous juries and their use has been upheld by appellate courts. As a result, jurors have been willing to serve and have been safe from retaliation. There is no reason to believe that anonymous juries could not be employed in the 9/11 cases or that their use would put jurors at risk.

3. The prosecution has a better chance of convicting in military commissions than in civilian court.

I agree that this is true, but do not see it as a reason to choose commissions. Quite the contrary, I see it as one of the reasons that there is so much concern and distrust about commissions. Evidence that would never be admitted in a federal trial or a court-martial can be admitted in a commission proceeding. Why? The answer is that the Executive makes the rules. That does not equate with fair and just proceedings in the eyes of many. It also supports the notion that when federal courts finally do get to review commission proceedings they may find the rules favoring the government to deny due process to a defendant, as noted above.

Moreover, the rules that govern military commissions exclude some of the evidence would have been admissible under earlier sets of rules. Opponents of using the traditional criminal justice system claim that involuntary/coerced self-incriminating statements obtained from defendants would be inadmissible in our traditional criminal justice system, but would be admissible in the military commissions. However, Congress limited the admissibility of such statements in the MCA 2009 providing that: "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made."

It is true that exceptions exist: "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." Exactly what fits under (2)(A) is unclear. But (2)(B) seems to indicate that a coerced confession that would be inadmissible in federal court is equally inadmissible in commission proceedings.

4. Civilian trials can turn into a circus and provide a forum for defendants to insult and demean the memory of the victims of 9/11.

Civilian trials are among the most formal, controlled proceedings that governments experience because they are controlled by federal judges who have power to assure that litigants, lawyers and observers behave or are removed from the courtroom if they do not behave.

It is true that a defendant who takes the witness stand or who makes a statement during sentencing has the opportunity to say things that are insulting, demeaning, or even threatening. But, this is equally true in civilian trials and in military commissions. More importantly, the defendant does not get the last word. After Zacarias Moussaoui spoke to the court at sentencing, Judge Brinkema had the last word and informed him that he would have 23 hours a day in solitary confinement to contemplate the crimes he committed. She spoke the last words, and they represented the response of a nation. She was not the only federal judge to speak such words. Judge Coughenour of the Western District of Washington has noted the power of words when federal judges let convicted terrorists know that they are nothing more than mere criminals.

5. There are speedy trial concerns with proceeding in federal court after so much delay.

There are two responses to this concern. Judge Kaplan addressed the speedy trial issue in the Ghailani trial: "Although the delay of this proceeding was long and entirely the product of decisions for which the executive branch of our government is responsible, the decisions that caused the delay were not made for the purpose of gaining any advantage over Ghailani in the prosecution of this

indictment. Two years of the delay served compelling interests of national security. None of the five year delay of this prosecution subjected Ghailani to a single day of incarceration that he would not otherwise have suffered. He would have been detained for that entire period as an enemy combatant regardless of the pendency of this indictment. None of that delay prejudiced any interests protected by the Speedy Trial Clause in any significant degree. In these specific circumstances, Ghailani's right to a speedy trial has not been infringed." The same analysis ought to apply to 9/11 defendants.

But, if there is a speedy trial problem, there is no assurance that it would not be just as much of a problem in a commission proceeding. As I have noted, no one is sure what aspects of constitutional law ultimately will be held binding in commission proceedings. If it is unfair to try a defendant in a civilian court because of undue delay, it may be equally unfair to try that defendant in a military commission.

6. Classified information can be better handled in military commissions.

I disagree with this argument on the basis of substantial personal experience with classified information in federal criminal cases. During the Iran-Contra prosecutions by Independent Counsel Lawrence Walsh, I handled the classified information issues for the Department of Justice in the prosecution of Lt. Col. Oliver North. As a result, I became extremely familiar with the Classified Information Procedures Act. Dealing with classified information in a federal trial under the Act poses the same problems as dealing with classified privileged information in a court-martial under Military Rule of Evidence 505. Federal courts are as capable as military commissions of preparing "substitutes" for classified information that protect a defendant's right to confront the evidence against him and to offer relevant evidence in support of a defense. The process contemplated by Mil. Comm. R. Evid. 505 is similar to that which would occur in a federal court. Federal courts have demonstrated that they can protect confidential and classified information while moving federal criminal trials to a successful conclusion.

Conclusion

For the reasons stated above, I strongly believe that justice is best served by trying those accused of the 9/11 attacks in an Article III court.