Testimony of
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House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
30 July 2009

INTRODUCTION

I thank Chairman Nadler and the Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for allowing me to testify on a topic of critical importance to the fairness of any future military commissions system – the provision of adequate resources to the defense to ensure trials that produce verdicts that are both reliable and fair to the accused. I will also have a few words to say about the standard of fairness that should be applied to military commission trials: compliance with both Common Article 3 of the Geneva Conventions and the United States Constitution. Because the latter topic has received the most attention from witnesses before this and other committees and subcommittees of both the House and the Senate, however, my testimony today is primarily devoted to the issue of defense resources, which to date has received far too little attention.

I am the fourth Chief Defense Counsel to come before the Congress as you debate the fourth iteration of these military commissions. I am therefore the fourth Chief Defense Counsel to talk to you about the fundamental and fatal flaws of the military commission system as it is currently constituted, and, in the present case, as it has been passed by the Senate. I hope to be the last. If the problems I identify today are finally addressed in the present legislation, it will go a long way toward "leveling the playing field" between the defense and prosecution in the military commissions in a way that finally brings this system into line with other American court systems, both civilian and military, and thus makes its claim to fairness far more legitimate than it ever has been in the past. VADM MacDonald set the right standard in his testimony before the House and Senate Armed Services Committees. Trial by military commission should be trials that we would expect for our own soldiers, sailors, airmen and marines.

I emphasize at the outset that I am testifying solely as The Chief Defense Counsel on behalf of the Office of Military Commission-Defense and not on behalf of any accused, as I am prevented by regulation from representing any individual charged in the military commissions. In addition, my testimony today should not be construed as an endorsement of the adoption of a military commissions system, nor should it be construed to suggest that the problems mentioned are the only deficiencies in the current or proposed system. Finally, given my role as Chief Defense Counsel, my testimony does not represent an endorsement or approval of any policy or the legal sufficiency of any action on behalf of the Government, and should not be cited as such.

DEFENSE RESOURCES IN THE MILITARY COMMISSIONS: PROBLEMS AND SOLUTIONS

In two recent memoranda to the Administration, I have detailed many ways that the commissions' current resourcing policies have prevented detailed defense counsel from carrying out their mission. *See* Memorandum for the General Counsel of the Department of Defense (13 July 2009) ("13 July Memo") (Exh. A hereto);[1] Memorandum to the Attorney General of the United States and General Counsel of the Department of Defense (9 June 2009) ("9 June Memo") (Exh. C hereto). These memoranda cover a wide range of crucial issues in the current resourcing system that make adequate representation of the accused difficult at best and in many cases, impossible.

Because these memoranda discuss the covered topics in factual and legal detail, in the testimony that follows I focus primarily on the structural issues that the memoranda do not address and otherwise simply highlight the most important aspects of memoranda topics. Please consider these memoranda incorporated by reference into this testimony, and read the individual sections of the below testimony in conjunction with the relevant memorandum section.

In each of the following subsections, I describe one of the problems that the current resourcing policies have created and, where appropriate, recommend at the end of the section an amendment to the current Senate bill to address that problem, either with specific legislative language and/or with a description of the conditions that a sufficient legislative fix must meet. Where the nature of the problem makes it more appropriately addressed at the regulatory rather than legislative level, I have suggested that language be included in the appropriate legislative reports identifying the problem and directing the Department of Defense or other regulatory agency to issue regulations that address and resolve the issue.

The Principle of "Equality of Arms"

The military commission system, like the court-martial system under the Uniform Code of Military Justice ("UCMJ") and prosecution in federal court, is an adversarial system of justice that is premised on the belief that the most reliable way of finding the truth of a criminal charge is to allow the government and the accused to present their clashing versions of the evidence of the crime. It is a given that no such system can either achieve reliable results or guarantee fairness unless the accused has an equivalent ability to investigate and present his defense as does the prosecution to investigate and prove its charges. As the United States Supreme Court put it, "[w]e recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1984).

In the court-martial system, this fundamental principle of "equality of arms" is embodied in UCMJ Art. 46 (10 U.S.C. § 846), which provides that the defense "shall have equal

[1] I have omitted the attachments to the 13 July memo itself because they are all included as separate exhibits to this testimony.

opportunity to obtain witnesses and other evidence" as the prosecution and the court-martial. In federal court, the principle is embodied in the Criminal Justice Act ("CJA"), which guarantees that all services "necessary for adequate representation" shall be provided to defendants unable to pay for them. 18 U.S.C. § 3006A(e).

The Military Commissions Act of 2006 ("current MCA") deliberately deviated from this model by allowing the accused, in direct contrast to the parallel UCMJ provision, only a "*reasonable* opportunity to obtain witnesses and other evidence" – that is, neither an "equal opportunity," nor the services "necessary" to obtain "adequate" access under the CJA model. *See* current 10 U.S.C. § 949j(a). This change from traditional military practice was a clear message to the Secretary of Defense, the Convening Authority, and the military judges that the UCMJ rule of "equality of arms" should not apply in the commissions, with results that can be seen in the below discussion and attached exhibits.

Inexplicably, although the Senate Armed Services Committee Report to the proposed MCA amendments refers to the problem of defense resources, the bill reported out and subsequently passed by the Senate maintains the current MCA's "reasonable opportunity" standard for defense access to evidence and witnesses. Expressions of concern in Committee Reports, however well intentioned, are not enough in this situation. The simplest solution is to restore the language of Art. 46, and amend the language of proposed § 949j(a)(1) to eliminate the current language and substitute the first sentence of Article 46 (as suitably modified by changing "court-martial" to "military commission"): "The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Apart from its fundamental fairness, this is a standard with a long history of application in military courts with which all JAGC members and military judges are familiar, and thus can be inserted in the present system without fear of confusion.

Solution: Amend proposed § 949j(a)(1) as follows:

> ''(a) IN GENERAL.—(1) ~~Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.~~ *The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.*

The Military Commission Convening Authority: An Untenable Dual Role

Many of the problems associated with the funding of the defense in the commissions is a result of the untenable and inherently conflicted role of the Convening Authority ("CA"), a position that is established by statute under both the current MCA and Senate bill. *See* current 10 U.S.C. § 948h; proposed § 948h. The reality is that significant defense resourcing issues will continue to arise unless this fundamental structural flaw in the system is resolved.

Some background in conventional military law is required to understand the nature of the problem with the CA structure and how this problem arose in the formulation of the military commissions. It must be recalled that the military justice system serves a disciplinary, as well as strictly-speaking criminal, function within the military. Thus, under the UCMJ, courts-martial are convened by a commanding officer when a serious disciplinary problem, which sometimes rises to the level of criminal behavior, occurs in his command unit. In such cases, the commander convenes a court-martial of some type (depending on the seriousness of the offense), which then hears the case against the accused service member. This gives the convening authority, just because he is also the commander of the unit, the dual responsibility of not only enforcing the law but of defending the rights of the service member under his or her command. In the strictly military context, that makes sense, given the fact that the commander/convening authority in courts-martial is the officer in charge of ensuring the good order and discipline of his entire unit, including not only the accused but the prosecution (and often the witnesses) as well. In this situation, such centralized control of the case on both the prosecution and defense sides makes some sense as a matter of logic, as well as of the simple reality that the court-martial takes place in a military unit in which the convening authority, as commanding officer, is the ultimate military authority and promotes military discipline and efficiency.

Neither logic nor military reality compels any such centralization of prosecution and defense control in the hands of a single individual in the military commissions system. To say the obvious, the Convening Authority in the military commissions is not responsible for the "good order and discipline" of the Guantanamo detainees. Indeed, even Joint Task Force-Guantanamo, the military unit responsible for guarding and administering the Guantanamo prison camps, is an entirely separate military entity under a separate command that does not answer to the Convening Authority. Nor is there any military or otherwise natural necessity for the Convening Authority to hold ultimate power over funding of both the prosecution and defense. The Office of Military Commissions - Convening Authority is entirely a creature of Congressional and Department of Defense regulation, headed by a political appointee (who is currently a civilian). This structure could be entirely overhauled with no damage to either the prosecutorial or defense functions. Indeed, as we explain below, if constituted logically – that is, by separating the prosecutorial and defense functions – such an overhaul would enormously enhance the fairness of the entire system.

In any event, despite the absence of any logic or necessity, the conventional military role of the Convening Authority is replicated under the current military commission system, with disastrous consequences for the defense, and nothing in the Senate bill purports to change this situation. In part by statute but mostly by regulation, the Convening Authority is currently responsible, on one hand, for the ultimate decision to proceed with charging and trial of the accused (Regulation for Trial by Military Commission ("RTMC") § 4-1), ultimate acceptance or rejection of pretrial agreements (the military term for plea bargains) (RTMC § 12-1), and initial review and correction of all convictions (current 10 U.S.C. § 950b) – all prosecutorial or quasi-prosecutorial functions. At the same time, the Convening Authority is responsible for all of the most critical defense resource and funding decisions: the initial decision whether or not the defense is entitled to retain and fund defense experts at government expense (RTMC § 13-7); the initial decision to authorize travel funding of all witnesses (which, given the location of the

accused and trials in Guantanamo Bay, is tantamount to virtual veto power over the presentation of most witnesses) (RTMC § 13-2); and to provide for interpretation and translation service for the defense (current 10 U.S.C. § 948l(b), RTMC § 7-3(c)).

This structure has had two consequences for the defense, both of which are unjustified by any military or other need, and both of which have rendered the process fundamentally unfair.

The first consequence is that, because the Convening Authority is the *de facto* chief prosecutor as well as the arbiter of defense resources, defense requests have not been ruled upon with even a semblance of fairness or objectivity. As of 21 July 2009, of the 56 requests for expert assistance filed in 11 cases, only nine have been granted. *See* Table, "Expert Requests filed by OMC-D Counsel to the Convening Authority" (Exh. B hereto). Not a single request made by detailed counsel in the four capital cases among these has been granted. That statistic alone is astonishing, given the special need for mitigation specialists and other experts in capital cases, which has been recognized by both the United States Supreme Court and the Court of Appeals for the Armed Forces, as well as by authoritative guidelines for competent representation and resourcing of capital cases. *See* Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision) ("ABA Guidelines"); Guidelines for the Administration of the Criminal Justice Act and Related Statutes (promulgated by the Administrative Office of the Federal Judiciary and approved by the Judicial Conference of the United States) ("AO Guidelines"); s*ee generally* 13 July Memo (Exh. A), at 3-4, 5-12.

Even these data are misleading. Of the nine requests that have been granted, seven have been in the single case of *United States v. Khadr*. In all of the other cases, which include four capital defendants, only two experts have been authorized, and one of these was granted only after the intervention of the military judge. The underlying reality is thus that while the defense in the other 10 cases combined have received one grant and 41 denials; the defense in *Khadr* has received seven grants and only six denials.

The disparity between the treatment of Mr. Khadr and the other accused is highly significant and damning to, at a minimum, the appearance of fairness of the CA's actions. The accused in the *Khadr* case is a Canadian, and the former legal advisor to the Convening Authority, BG Hartmann (who was disqualified from further participation in *Khadr* and two other cases for unlawful influence or the appearance thereof), stated in testimony before the commission that during the pendency of the *Khadr* case he met with and thereafter provided regular updates to representatives of the Canadian government on the progress of the case.[2] My

[2] BG Hartman's testimony was as follows:

> Q [LCDR KUEBLER]: Sir, have you had any communications with any officials of the Canadian government concerning the Khadr case?
>
> A [BG HARTMANN]: Yes.
>
> Q [LCDR KUEBLER]: And who would that be, sir?
>
> A [BG HARTMANN]: Bernard Lee is at the Canadian embassy here in the United States, and I've spoken with him a few times. And then there was a meeting among--there was a meeting in, I believe, it was in the summer of 2007, I believe there was a meeting with the legal advisor to the

office is not aware of any other such regular contacts between the CA's office and the home governments of any of the other current accused, none of whom are from Western countries. The inevitable danger of this kind of inside contact by an accused's interested and sympathetic home government is that not just "updates" but influence is involved. In this case, that is a danger that at least gives the appearance of having come to fruition on the evidence of the disparity between the CA's treatment of Khadr's expert requests when compared to those of the other accused. No system that makes, or even appears to make, the provision of resources to the defense dependent on extraneous diplomatic and political considerations can possibly be considered fair. Whether or not the accused have the resources they need to prepare for trial should not be a function of their passport or their home government's relationship with the United States.

The second significant consequence of making the CA the source for defense resources is that simply filing a request to the CA requires our defense teams to lay out, in detail, defense strategy and privileged materials that the CA freely shares with the prosecution. Moreover, in practice, the prosecutors have enjoyed a vote on whether or not defense counsel requests will be granted. If the request is not granted, defense counsel must submit on the record filings with the military judge to reverse the CA's decision. As a result, the defense is forced to make the Hobson's choice between seeking needed expert assistance or protecting privileged information.

> Foreign Ministry--Canadian Foreign Ministry and then he had two other people with him, one of whom was a military person, another person I do not recall, and then Mr. Lee was there as well.
>
> Q [LCDR KUEBLER]: What were--was the subject matter of those meetings?
>
> A [BG HARTMANN]: It was just one meeting. It was just a general--don't recall the subject matter exactly. It was just a general introduction for me because, I think, I only had been in the job for 2 weeks when this happened, very, very shortly after I arrived. I don't remember the entir--anything about the content of the conversations except that it was about Mr. Khadr.
>
> Q [LCDR KUEBLER]: Who initiated----
>
> A [BG HARTMANN]: And just in general the--just in general the process that we were going through and that--how the military commissions process worked.
>
> Q [LCDR KUEBLER]: Who initiated the meeting, sir?
>
> A [BG HARTMANN]: I don't know who initiated the meeting. I was invited to it.
>
> Q [LCDR KUEBLER]: Were there other DoD or administration officials present?
>
> A [BG HARTMANN]: Mr. Paul Nye was there, who was the person that I generally spoke with inside the Office of General Counsel, and I believe Mr. John Bellinger was there from the State Department.
>
> Q [LCDR KUEBLER]: And your conversations with Mr. Lee, sir, what were they related to?
>
> A [BG HARTMANN]: Generally, they had been just updates. If Mr. Lee has a question about something that appears in the press, he'll call and ask. And if he learns about a motion and the motion has been released, he may ask me to provide that to him or something like that.
>
> Q [LCDR KUEBLER]: And you have provided motions to Mr. Lee?
>
> A [BG HARTMANN]: To the extent that they've been released to the public, yes.

United States v. Omar Khadr, Transcript of Rule of Military Commission 803 Session (13 August 2008), at 600-601.

Moreover, the need to appeal the CA's decision to the military judge in virtually every case has made the proceedings grossly inefficient and has led to significant delays even if the defense requests are ultimately granted.

With regard to the logic of defense resourcing, military commissions far more resemble federal court prosecutions than they do courts-martial. Both military commissions and federal court prosecutions serve purely criminal functions where the government is in an exclusively adversarial position to the accused. Military commissions serve no military-disciplinary functions and the accused lack any status that would constitute membership in or service to the government. Accordingly, military commission applications for defense resources should be made on the same terms as federal applications -- on a purely *ex parte* basis. See 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application."); *see generally* the discussion of this problem in the 9 June Memo (Exh. C), at 2-3.

In short, the joined prosecutorial and defense functions of the current CA structure is unjustified by any military or other necessity and has proved, both in theory and, very clearly in practice, fundamentally unfair. Indeed, this structure is the source of most of the other resourcing problems discussed below and in the 13 July (Exh. A) and 9 June Memos (Exh. C).

Solutions: Any solution to this problem must meet the criterion of separating the defense resourcing functions of the position of CA from all of its other duties under the statute, and creating a firewall that prevents the CA (or any other DoD or other official affiliated with the prosecutorial functions of the government) from influencing the function of defense resourcing. In the federal system, this is the norm, and is achieved by administering the defense's resources and funding through an agency of the federal judiciary – the Administrative Office of the Federal Courts – which is in a different branch of government than the prosecution.

Assuming that that degree of separation is impossible, the solution to the problem will have to resolve the issue of how a defense funding agency within the same Department of government can be made truly independent of the rest of the Departmental agencies. Because the Office of the CA and especially its role in defense resourcing is primarily a creation of DoD regulation, a new defense funding agency itself could be established at the regulatory level. Nevertheless, there are legislative changes that can establish the principles of separation and independence that will require the regulatory scheme to avoid the concerns articulated above.

One possibility is amending proposed § 949b(a) (which prohibits unlawful influence) along the following lines (deletions are struck-through; insertions are italicized):

> ''(a) IN GENERAL.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, *the defense resource funding authority*, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

‘‘(2) No person may attempt to coerce or, by any unauthorized means, influence—

‘‘(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

‘‘(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; ~~or~~

‘‘(C) the exercise of professional judgment by trial counsel or defense counsel*; or*

“(D) the action or decision making of the defense resource funding authority with respect to its acts authorizing or funding defense resources.

‘‘(3) The provisions of this subsection shall not apply with respect to—

“(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; ~~or~~

‘‘(B) statements and instructions given in open proceedings by a military judge or counsel*;or*

‘’(C) requests by defense counsel to the defense resource funding authority for the authorization or funding of defense resources for use in cases to which they have been detailed.

Language along these lines, especially with an accompanying explanation in the legislative record, would go some distance in requiring the establishment of a “defense resource funding authority” within the Department of Defense with the kind of independence from outside influences – including prosecutorial and political influences – that have plagued the current system.

Finally, the problem of prosecutorial involvement and interference with defense resource requests, to the extent not covered by the above amended unlawful influence provision, could be addressed by inserting language equivalent to that of 18 U.S.C. § 3006A(e)(1)(“Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application.”) into proposed § 949j(a)(1), which, after the amendment suggested in the first section, would result in the following amended language:

''(a) IN GENERAL.—(1) ~~Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.~~ *The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Defense counsel may request the authorization or funding of resources from the defense resource funding authority in an ex parte application.*

The Special Problem of Capital Cases

Congress has recognized that capital cases pose a special need for resources since the passage of the original federal Crimes Act of 1790, in which it authorized, uniquely in capital cases, the appointment of two counsel, one of whom was required to be "learned in the law," and counsels' right to meet with their clients at all reasonable hours. That special capital provision has been carried forward with only minor modifications to the present day in the form of 18 U.S.C. § 3005, which provides in relevant part that the judge in a capital case "shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours." Other provisions of federal law, both by their terms and as interpreted by the federal judiciary's rulings and its funding Guidelines promulgated by its Administrative Office, similarly recognize the special need for mitigation specialists, experts, investigators, and other special defense services in capital cases.

These topics are covered in detail in the attached 13 July and 9 June Memos (Exhs. A and C), and rather than repeat myself I will simply incorporate those discussions by reference and highlight some the most important points here. In sum, a capital defense team that meets current professional standards of practice, as embodied in the Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (promulgated by the Administrative Office of the Federal Judiciary and approved by the Judicial Conference of the United States), the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) and relevant Supreme Court precedents requires the following (see ABA Guidelines 4.1 ("The Defense Team and Supporting Services") and 10.4 ("The Defense Team"):

a. At least two defense counsel, one of whom is "death qualified" within the meaning of the ABA Guidelines and "learned in the law applicable to capital cases" within the meaning of 18 U.S.C. § 3005. In those cases in which a death-qualified JAGC member "learned in the law applicable to capital cases" is not available, then a civilian "learned counsel" should be appointed and funded by the government to serve in that role.

b. A mitigation investigator, who is qualified to perfonn the duties described in Commentary (B) to ABA Guideline 4.1 and the Supplementary

Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008), selected by lead defense counsel.

c. A professional investigator trained in and competent to perfonn the special duties associated with the investigation of death penalty cases pursuant to ABA Guideline 10.7 ("Investigation"), selected by lead defense counsel.

d. At least one mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel

e. An expert in the accused's native culture, selected by lead defense counsel f. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel.

g. A privilege team.

h. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team.

All of these resources should be made available to the accused from the time that charges are preferred. Because of the enormous amount of preliminary work involved in capital cases, provision of these experts and services should not wait until the capital referral – in fact doing so will ordinarily cause significant delays in the proceedings.

The degree to which the CA has fallen woefully short of these professional norms and standard federal-court practices in the military commission capital cases is suggested by the attached Table, “Expert Requests filed by OMC-D Counsel to the Convening Authority” (Exh. B). As noted above, the CA has denied every single request for a mitigation specialist or expert made by every capital defense team that has sought one. Apart from the denials of the requests for mitigation specialists, she has denied a request for a mental health expert to assist in a competence evaluation of a capital accused to whom the government was administering anti-psychotic drugs prior to counsel’s appearance, whom a panel of court-appointed government mental health experts found to be mentally ill, and for whom the military judge himself had ordered a competency hearing *sua sponte*.

This record of denials is, to say the least, inconsistent with current military practice under the UCMJ, in which there has been a growing recognition of the need for special resources in capital cases. Whether this trend is the result of the fact that eight of the last nine military death sentences have been overturned on appeal or some other reason, it is clear that military justice now recognizes that special resourcing of the defense is required if capital cases have a chance of being tried in a manner that meets appellate standards. Most recently, in a far less complex case than those being tried in the commissions, the Court of Appeals for the Armed Forces ruled that it violated the Due Process Clause to deny a capital accused the services of a mitigation

specialist, noting that "because there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." *United States v. Kreutzer*, 61 MJ. 293, 298 n.7 (CAAF 2005). It is inconceivable that the present cases fail to meet the *Kreutzer* standard, yet in every case the Convening Authority has denied the request for a mitigation specialist.

Nevertheless, for the reasons explained above, the real point of comparison and measure of fairness of the commissions is the federal courts system. (Indeed, this is the standard implicit in the President's decision, for those Guantanamo detainees who are to be prosecuted, to try them either in federal court or by military commission – courts-martial are not an option.) Thus, to fully comprehend the magnitude of the unfairness of the CA's treatment of the capital cases, these denials should be compared with the initial funding order in the now-federal court case of *United States v. Ghailani* (*Ex Parte* Order, *United States v. Ahmed Khalfan Ghailani*, 98 Cr 1023 (LAK), U.S. District Court, Southern District of New York, 25 June 2009; Exh. D hereto). Ghailani was originally an accused in the military commissions, with capital charges preferred against him that were eventually referred non-capitally to a commission for trial. He was recently transferred for trial to federal court, and, in parallel fashion, has been charged with capital crimes but the Department of Justice has not yet decided whether or not to seek the death penalty against him. Despite the uncertainty of whether his case will ultimately be treated capitally, the judge issued the attached funding order providing for extensive resources – including 300 hours of a mitigation expert's time at the rate of $100 per hour -- given the mere possibility that the case will end up capital, and prior to the defense counsel even being required to submit a budget. This, moreover, is a standard order issued at the outset of all such capital cases in the Federal District Court for the Southern District of New York; it is not based on demonstrated need in the particular case but on the federal court's experience with the expert and funding needs in such cases as a general matter.

The disparity between Mr. Ghailani's treatment in the commissions (he was denied a mitigation specialist by the CA along with another request for a privilege team prior to being transferred) and the treatment he and other capital (and potentially capital) defendants receive in federal courts poses an enormous challenge to the legitimacy and the credibility of the entire military commissions system. The President's Detainee Task Force is currently deciding whether to charge individuals, capitally and noncapitally, in federal courts or the commissions. Under present circumstances, given the monumental disparity in defense resources between the two systems of capital prosecution, how can a decision to try a capital defendant in the commissions be viewed as anything but a government decision to increase the chances of achieving a death sentence by providing him with a third-rate or worse defense? Given this disparity, how can such a system ever be fair, or be viewed as fair by an outside observer?

Solutions: Any solution to these problems must begin with the restructuring of the CA functions as described above, to ensure that the funding decisions in all cases, including the capital cases, receive the impartial consideration of the defense's real needs and the relevant professional norms and guidelines that they would receive in federal court. But it will also require a genuine commitment on the part of the Administration not to allow this disparity to continue, and to bring its support for the defense function in the commissions up to the norms of

other legitimate American courts. The TJAGs all testified before the House Armed Services Committee that they opposed the Administration's "preference" for federal court prosecution on exactly these grounds – that no such preference will be necessary if the military commissions are made just as fair and just as legitimate as federal courts. Unless the disparate treatment of defense resourcing between commission cases generally, capital and noncapital, and parallel cases in federal court is rectified, that standard cannot be met. In the present circumstances, it is the capital cases in which the commissions' egregious failure by this measure is most evident.

Along with a change of CA structure and a change of commitment at the Department of Defense level, however, there are amendments to the Senate bill that are necessary to enable capital cases in the commissions to achieve the kind of fairness and reliability that federal court capital prosecutions provide. In particular, the primary requirement of "learned" or "death-qualified" counsel on the capital defense team cannot presently be met by JAGC attorneys alone. As the Court of Appeals for the Armed Services has recognized, "there is no professional death penalty bar in the military services," *Kreutzer*, *supra*, for the simple reason that that there are too few capital cases in the military for JAGC members to gain the experience necessary to become death-qualified.

In my office today, there are two death-qualified attorneys – a civilian who was hired specifically because of his capital experience as a resource counsel, and a Navy reservist who was called up after the capital cases were fully staffed. Neither are detailed to any of the capital defense teams, in part because I need them to remain conflict-free with the capital defendants so that they can advise them all even-handedly. As a result, none of the military lawyers detailed to the capital cases are death-qualified under the ABA standards or "learned" within the meaning of 18 U.S.C. § 3005. In an effort to provide the representation to their clients that they are well-aware is required, these fine attorneys have sought out the services of "learned" civilian co-counsel with extensive experience in capital cases in the civil courts. To date, these civilian attorneys have either been funded by non-governmental organizations or, in some cases, not at all, acting – to the extent that they have been able to afford it – on a *pro bono* basis.

This is an untenable situation, since these civilian attorneys will not be able to continue in their current capacities, especially as these cases become more active again. The correct solution – the one adopted in 18 U.S.C. § 3005 – is to appoint and pay these civilian attorneys on a contract basis during the term of the case, as is currently done in federal capital cases under § 3005 and the Criminal Justice Act. As currently enacted, however, and as proposed under the Senate bill, the government is forbidden to pay civilian attorneys serving as commissions defense attorneys, no matter how necessary they are for the adequacy of the accused's capital defense. Both current and proposed § 949a(b)(2)(C) by its terms only entitles an accused to a civilian attorney "if provided at no expense to the Government." I note that this is unfair not only as a matter of guaranteeing capital defendants the representation they need, but by the measure of "equality of arms" as well. The commission prosecution teams – and the capital HVD prosecution teams in particular – are largely staffed by Department of Justice attorneys, that is, by civilians who are being paid by the government.

One amendment to the Senate bill that would solve this problem would be to amend § 949a(b)(2)(C) as follows:[3]

> ''(2) Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights:
>
> . . . . .
>
> ''(C) *(i) When none of the charges preferred against the accused are capital, t*~~T~~o be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or by military counsel of the accused's own selection, if reasonably available, *or (ii) when any of the charges preferred against the accused are capital, to be represented before the military commission by at least two counsel, one of whom is learned in the law applicable to capital cases within the meaning of 18 U.S.C. § 3005 who, if necessary, may be a civilian compensated pursuant to regulations prescribed by the Secretary of Defense. Subject to these requirements, the accused may be represented by detailed defense counsel, military counsel of the accused's own selection, if reasonably available, or by civilian counsel provided at no expense to the Government.* [4]

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[3] Military courts have, to date, resisted the appointment of paid civilian counsel in capital cases (although there is some precedent for it, *see e.g. United States v. Curtis*, 33 M.J.101, 109 n.11 (C.M.A. 1991) (authorizing funding of military defense counsel "for use in their discretion to obtain the assistance of 'death qualified' civilian counsel, to retain expert consultants, or otherwise prepare their case"), as I have already explained, the nature of courts-martial is unlike other courts insofar as it has a disciplinary component and the participants in the court-martial – prosecutor, defense attorney, military judge, and convening authority – typically share a common military culture and sense of common commitment. Given these differences from federal court, it is not surprising that historically military courts have not seen the need for funding of nonmilitary counsel.

[4] Alternatively, a solution that would leave the structuring of the "learned counsel" provisions in the hands of the regulatory authority of the Secretary of Defense, could amend the same subsection with the following language:

> ''(C) To be represented before a military commission by civilian counsel ~~if provided at no expense to the Government~~ *pursuant to regulations prescribed by the Secretary of Defense*, and by either the defense counsel detailed or by military counsel of the accused's own selection, if reasonably available.

This amendment would leave the Secretary to issue regulations that, for example, provided for hourly payment to death-qualified, civilian "learned counsel" in capital cases but not to civilian attorneys in noncapital cases or civilian co-counsel in capital cases who were not "learned" (or payment to "non-learned" civilians at a lower rate).

Resource Problems Common to All Cases, Capital and Noncapital

As I explain in the 13 July Memo (Exh. A), even the noncapital cases in the office are extraordinarily complex and require unusual resourcing, far beyond what is typical either in courts-martial or even federal criminal prosecutions. *See* 13 July Memo, at 5, 15-19. Foreign, non-English speaking clients; extraterritorial crimes requiring international travel, all the difficulties of investigations on foreign, non-English-speaking territories, and coordinating interaction and cooperation with the Department of State; and clients who are naturally suspicious of Americans in uniform after many of them were abused, sometimes seriously, by other Americans wearing the uniform – these are not obstacles that most defense attorneys usually face. Accordingly, as I state in the 13 July Memo, in my view an adequate defense team in a noncapital case in my office is composed, at a minimum, of the following individuals:

a. Two defense counsel, one of whom is experienced in complex criminal litigation, and preferably with experience in defending foreign defendants charged with extraterritorial crimes.

b. A professional investigator competent to perform the special requirements of extraterritorial investigations, selected by lead defense counsel.

c. A mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel.

d. An expert in the accused's native culture, selected by lead defense counsel.

e. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel.

f. A privilege team.

g. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team.

The justifications for these particular team members are provided in the 13 July and 9 June Memos (Exhs. A and C) and I will not repeat them here. Suffice it to say that almost all of the many difficulties that the detailed attorneys have experienced in fulfilling these requirements has stemmed from the recalcitrance of the CA, who has been no more forthcoming with requests for, for example, privilege teams than she has been with the expert requests. The privilege team denials, which are documented and explained in the 13 July Memo (Exh. A), at 17) have made representation of clients particularly difficult, especially in the HVD cases where the TS//SCI materials are concentrated. It has led to defense counsel in effect walking a high-wire with no safety net whenever the have needed to submit classified material in connection with motions or

even speak about it in court. Counsel have even been threatened with prosecution for such statements.

Among the issues discussed in my memoranda, I think it is important to highlight the problem of client access created by the over-classification of defense-relevant materials, up to and including the very words that the HVD accused speak, a security environment that separates attorneys from their clients both physically and psychologically, insofar as the accused are subjected to "security measures" every time they are taken from their cells to see the attorneys that are reminiscent of the abuse they suffered previously at the hands of Americans, and the virtual impossibility of getting experts the chance to meet, assess and/or treat the clients in many cases. Moreover, the abysmal state of the translation and interpretation services creates another difficulty in making access meaningful even when it occurs at all. While the issue of client access is discussed under the "Capital Case" heading in the 13 July memo (Exh. A) (at 12-15), because it is a particular problem in capital cases where there is an increased needs to develop a relationship with the client and obtain expert access, it is a problem that is experienced across the board, in every case. Many of the restrictions are so inhibiting with so little justification or rational explanation that, as I state in the memo, they arguably rise to the level of deliberate interference with the attorney-client relationship – certainly, at a minimum, their continued existence despite our many pleas, complaints and motions demonstrates deliberate indifference to the needs of defense attorneys to establish and maintain client relationships. None of this is good for the commission process, as any trial judge, prosecutor or appellate judge who has had to work with a *pro se* case can tell you. Why the government would want to buy this trouble is unclear, since these policies are unlikely to help any convictions stand up on review.

The problem of inadequate investigation resources is also one that appears under the "Capital" heading in the 19 July Memo but affects the fairness of the noncapital cases as well. Along with the issues raised in the 19 July Memo, there is a persistent "inequality of arms" on the investigation front that has been particularly evident in the government's differential access to witnesses and databases. It should go without saying that the defense has the right to obtain information about its own and the government's case outside the discovery process – that is, by legitimate investigatory and intelligence-gathering means. In fact, however, databases and witnesses to which the military investigators and intelligence analysts had routine access when they were detailed in the court-martial context have been foreclosed in the commissions arena. For example, the majority of personnel on our intelligence analysis team have been affirmatively denied access to various intelligence databases routinely used by members of their profession, even though they had the appropriate security clearances and "need to know" mandate.

The prosecution, on the other hand, does not suffer the same handicaps. Denials to defense analysts included requests for access to the Joint Detainee Information Management System (JDIMS), even though OMC-P and DoD OGC attorneys appear to have had access to selected JDIMS information through a file transfer protocol site at least since May of 2009. They have similarly been denied requests for specific information (RFI) submitted through the typical intelligence processes, and have been referred back to the prosecution or to databases for which their access had not been approved. The prosecution and attorneys who support habeas litigation in the DoD Office of General Counsel have the ability to submit RFIs to the Joint

Intelligence Group at JTF-GTMO, for questions such as the circumstances under which statements were made by a detainee or information supporting factual assertions use to determine enemy combatant status. Our intelligence analysts are denied any ability to submit such requests as part of their inherent investigatory function.

Prosecutorial control of information is another structural problem faced by investigators and attorneys alike. Defense counsel have been unable to obtain authorization to interview government witnesses, including interrogators responsible for extracting statements from their clients in detention. By withholding such authorization, the prosecution can effectively shield itself from defense arguments that the statements were obtained by cruel, inhumane or degrading treatment, or otherwise under conditions that made the statements involuntary or unreliable. In another case, defense counsel requested contact information for overseas witnesses known to the prosecution in preparation for travel to a predominantly traditional Muslim state cited by the U.S. State Department for a risk of terrorism, indiscriminate attacks on tourists and Westerners, and serious levels of crime. The prosecutors refused to give defense counsel the contact information they possessed, and the military judge in the case denied a request to order the prosecution to provide this information. Military defense counsel were left to seek out and locate the witnesses themselves, additionally and unnecessarily jeopardizing their personal safety.

Some of these problems could be solved by an independent defense resource funding authority that took defense needs seriously (provision of privilege teams); others will require policy changes within the DoD or by JTF-GTMO (equality of investigator access and meaningful client access). There are two problems, however, that require amendments to the proposed Senate bill to fix.

The first is the many issues my office has had with the both the quality and number of translators and interpreters provided to detailed counsel under the auspices of the CA. *See* 13 July Memo (Exh. A), at 16-17. By statute, the CA is responsible for the provision of interpretation services to the defense. Proposed § 948l(b). Its language should be amended to delete references to "defense counsel" and the "accused," and responsibility for the provision of these services should be assigned to the independent defense resource funding agency:

> "(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the military commission, and, as necessary, for trial counsel ~~and defense counsel~~ for the military commission~~, and for the accused~~."

Second, under proposed § 949c(b)(3)(A), an accused cannot be represented by a civilian unless that civilian is a United States citizen. For reasons discussed in the 13 July Memo (Exh. A) (at 17-18), this limitation is not justifiable and works a very real hardship on many accused and on their detailed counsel as well, who virtually always find it a benefit to their own relationship with the client to serve as counsel with an attorney from the accused's home country or culture. This subsection, and the related subsection § 949c(b)(3)(B), which requires

membership in the bar of a state, federal territory or federal court as a related requirement, should be deleted from the Senate bill.

HOW SHOULD THE FAIRNESS OF ANY MILITARY COMMISSIONS SYSTEM BE JUDGED?

To date, interested parties have offered various overall measures of fairness by which to test and justify any new commissions system. The TJAGs recently testified before the House Armed Service Committee that they believed that Common Article 3 of the Geneva Conventions, and no other body of law, was the correct legal standard that the new commissions must meet. The Administration, through DoD General Counsel Jeh Johnson and DOJ National Security Division head David Kris, has suggested that if the military commissions do not satisfy some ill-defined notion of constitutional "general due process," then federal courts may strike them down. Navy TJAG VADM Bruce MacDonald, in his testimony before both Senate and House Armed Services Committee, provided an informal measure: Any new commissions system must be one that we would feel comfortable in trying our own servicemen and women for violations of the law of war.

My position, and the official position of my office, is that the Commissions must meet the standards of both Common Article 3 and the United States Constitution as a whole. Because this stakes out a position somewhat different, and more stringent, than the other parties, I want to briefly discuss my reasons for believing that this standard is the correct one. Those reasons are both historical and logical, apart from the strictly-speaking legal basis for the argument. Those legalities are being fought out in commissions, so today I will address the historical and logical reasons to believe that the Constitution applies in full to the proposed military commissions.

(1) The Actual History of Military Commissions

First, understanding those reasons requires an understanding of the institution of the military commission in greater historical depth than others have generally supplied. Air Force TJAG Lt. Gen. Rives, for example, cited the history of military commissions several times in explaining his general support for the Senate bill in his testimony in the House Armed Services Committee, but his citations only reached back to World War II and the *Quirin* and *Yamashita* cases that upheld two of the more well-known (or notorious) of that period's commission verdicts. The military commission existed, however, for 100 years before World War II, since their inception in General Winfield Scott's General Order 20 issued in connection with his invasion of Mexico during the Mexican war, and when that history is included in the analysis, the picture of what military commissions actually stand for changes dramatically.

I obviously cannot tell that whole story here in any detail, and so will only review those aspects demonstrating that the current assumptions about the historical role and practices of military commissions underlying the TJAGs and Administration's positions are fundamentally inaccurate and at odds with their actual history.[5] In particular, this actual history demonstrates

[5] For that full picture, I recommend the article by David Glazier, a 20-year active-duty Navy Commander-turned law professor who has gone into this history with the greatest scholarly depth. David Glazier, "Precedents Lost: The Neglected History of the Military Commission," 46 Va. J. Int'l L. 5 (2005).

that those aspects of the Senate bill that continue to embrace procedural rules that are in patent conflict with our constitutional traditions – including the provisions permitting the introduction of coerced statements and otherwise inadmissible hearsay – are deeply inconsistent with the history and actual practice of military commissions.

The genuine history and practice of military commissions demonstrates two general propositions that have been entirely lost in the current debates:

a. A commitment to constitutional values embodied in the common law of evidence, including in particular (i) a prohibition on the admission of coerced (involuntary) statements and (ii) a prohibition on the admission of hearsay (except for the common law hearsay exceptions); and

b. A commitment to conform to court-martial procedures.

These propositions may appear strange if one is accustomed to hearing the current Senate bill's variations from constitutional norms justified on the basis of "battlefield evidence" and "military necessity." In fact, however, this use of "military necessity" is completely at odds with the original meaning of "military necessity" as it was used in connection with military commissions. The traditional justification for the use of military commissions was indeed based on "military necessity," but that term had nothing whatsoever to do with "battlefield evidence" and similar notions. Rather, from Gen. Winfield Scott's original Mexican War commissions forward, the "military necessity" for the use of commissions has been jurisdictional, and not based on any putative need for admitting otherwise patently inadmissible evidence. The jurisdictional necessity for the use of military commissions was based on the severe limitations placed on the jurisdiction of courts-martial until Congressional revision of the Articles of War in the 1912-1916 period. As a result of these limitations, civilians and enemy combatants could (with certain limited exceptions) generally not be tried in courts-martial in situations of military occupation (e.g., General Scott's march through Mexico), under martial law (e.g., military governance of parts of border states during the Civil War), and in battlefield situations involving the capture of enemy combatants who violated the law of war (i.e., "law of war military commissions" such as those established by the original MCA of 2006 and carried forward by the current proposed amendments).

The need created by that jurisdictional gap was the actual meaning of "military necessity" until the notion began to be employed by the previous Administration as a justification for commission procedures that violated the Constitution and Common Article 3 of the Geneva Conventions. *See e.g.* Benet, *A Treatise on Military Law and the Practice of Courts-Martial, 6th ed.*, Chapter XV, "Military Commissions") (1868); Winthrop, *Digest of the Opinions of the Judge Advocate General* 325 (1880), among other sources. Proof that this jurisdictional problem was the meaning of "military necessity" is provided by the fact that, with extremely limited exceptions (and none relevant to the present legislation), military commissions consistently followed the same procedures as courts-martial. Indeed, as the below points demonstrate, the one thing that the phrase "military necessity" has clearly *not* meant is that

military commissions can deviate from court-martial practice in a manner that violates the Constitution as a matter of course.

First, for 100 years, it was a cardinal principle of military commissions that they followed the procedural and evidentiary rules of courts-martial. The conformity of military commission practice with court-martial evidence rules is particularly telling, because both courts-martial and commissions followed the common law of evidence. As a result, military commissions, like courts-martial, imposed an absolute bar on the use of coerced statements and any hearsay that fell outside the scope of one of the accepted exceptions to the hearsay rule.

By way of example, during the Spanish-American War numerous military commission trials were conducted in the Phillipines during the Phillipine insurrection against American rule. These commissions were convened mid-way in the 100 year history between General Scott's original commissions and the World War II commissions upon which the former Administration, and now the current Administration as well, relies to justify its approach to commission procedures. These commissions and their rules were characteristic of the conduct of commissions during this entire history, and are cited solely as examples. Similar examples from General Scott's military commissions and "councils of war" (his name for what we would now call "law of war military commissions") could also be cited.

The precedents and rulings from the Phillipine insurrection demonstrate that, traditionally, military commissions were not only dedicated to remarkable standards of impartiality and fairness in the face of a bloody and brutal enemy, but specifically committed to the constitutional values that underlie the common law of evidence, values which are overturned in the current MCA and proposed Senate bill.

For instance, in one case – involving the murder of five United States soldiers -- a commission conviction was overturned for failure to abide by the hearsay rules:

> "In th[is] case the surprising error occurs of admitting as evidence the report of a board of officers, which had investigated the cause of disappearance of the soldiers. . .. *Every officer, even of a year's service, should be presumed to know that mere written ex parte statements are wholly inadmissible as evidence, and grossly irregular in a capital case*."

Headquarters, Division of the Philippines, Gen. Order No. 36 (Feb. 19, 1902) (emphasis added). This statement, from a military commission over 100 years ago, is an embarrassment to the hearsay provisions of the Senate bill.

The history speaks in the same voice when it comes to the admissibility of involuntary statements. Such statements were inadmissible under the common law of evidence as inherently unreliable (this evidentiary rule was the precursor of the modern constitutional requirement of voluntariness), and, accordingly, military commissions have traditionally been equally vigilant about the prohibition on coerced statements, requiring proof of voluntariness before they were admitted in evidence, and being reversed when they failed to abide by that rule. *See e.g.*

Headquarters, Division of the Philippines, Gen. Order No. 232 (Aug. 22, 1901), in 2 Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 (1902), at 363.

In sum, the actual history and tradition of the military commission stands for something quite different than how it has been presented over the past eight years. As one commission summed up its understanding of its role:

> "That it is better that many guilty men should escape punishment than an innocent one suffer is too well grounded in the administration of justice to pass unheeded by military commissions. So, too, it is better that no person, innocent or guilty, should be convicted unfairly, in violation of his legal rights and privileges, or in defiance of the well-established and equitable laws of evidence without which the evolution of [our] system of law and justice would be impossible."

Headquarters, Division of the Philippines, Gen. Order No. 365 (Nov. 25, 1901), in 2 Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 (1902), at 305.

As against this 100 year-long consistent history of respect for the rule of law and constitutional values in military commissions, proponents of the controversial and unconstitutional deviations from court-martial procedure have generally focused solely on two World War II precedents: *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946). But, as the leading historical work on military commissions has definitively demonstrated, these precedents are historical anomalies. See David Glazier, "Precedents Lost: The Neglected History of the Military Commission," 46 Va. J. Int'l L. 5 (2005). It is worth noting that, after *Korematsu v. United States*, 323 U.S. 214 (1944), these are two of the most harshly criticized of the Supreme Court's precedents in the past 100 years.

Most important, that criticism has come from the Supreme Court itself, leaving the precedential status of both cases – at least insofar as they stand for the constitutionality of military commissions that deviate from the practices of courts-martial in ways that facially violate the Constitution – very much in doubt. *See e.g. Boumediene v. Bush*, 128 S.Ct. 2229, 2271 (2008) ("[T]he procedures used to try General Yamashita have been sharply criticized by Members of this Court. *See Hamdan*, 548 U.S., at 617, 126 S.Ct. 2749; *Yamashita, supra*, at 41-81, 66 S.Ct. 340 (Rutledge, J., dissenting). We need not revisit [Yamashita and Qurin], however."); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2774 (2006) ("We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions."); id., 126 S.Ct. at 2788-9 ("The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial.. . . .The force of that precedent, however, has been seriously undermined by post-World War II developments. . . . The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., joined by Stevens, J., dissenting) ("The case [*Quirin*] was not this Court's finest hour.").

Because they are in effect a new system of criminal justice that deliberately dispenses with protections embodied in the Constitution for well over 200 years, there is little doubt that any convictions arising from the new military commissions -- especially any capital convictions -- will be reviewed by the Supreme Court as a matter of course. It is a gamble at best that *Quirin* and *Yamashita*, insofar as they suggest that the fact that the mere invocation of "military necessity" – especially given the misuse to which that term has been put – will be enough to justify these kinds of wholesale and (as demonstrated above) unprecedented changes in American military justice – will withstand renewed scrutiny by today's Court. See e.g. *United States v. Robel*, 389 U.S. 258, 263 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."). Congress thus proceeds at its own risk if the discredited history of the World War II military commissions will be sufficient to uphold the current Senate bill.

(2) It is Entirely Illogical to Apply the Rules of "Battlefield Evidence" and Other Battlefield Conditions to Court Proceedings that Take Place Many Years and Thousands of Miles Away from the Battlefield

In his testimony before the House Armed Services Committee, VADM MacDonald suggested that the TJAGs' proposed "reliability" test would incorporate the traditional voluntariness as one factor. That voluntariness factor, however, would be subject to a "sliding scale," whereby the further away from the battlefield the interrogation took place, the more important voluntariness became as a determining factor of the "reliability" test. Specifically, VADM MacDonald testified, in his view, all statements taken in Guantanamo should be evaluated under the voluntariness test alone because of these interrogations' distance – presumably in both time and location – from the battlefield.

There is a real logic to VADM MacDonald's analysis of the TJAGs' "reliability" test, but it is unclear why he limited this logic to the question of voluntariness alone. In fact, the farther away in time and distance from a battlefield a trial occurs, the less sense it makes to deviate from the traditional constitutional norms that govern any other criminal trials in this country. Indeed, one of the traditional limitations on the jurisdiction of "law of war" military commissions like those at issue in the Senate bill was the requirement that they actually be conducted on the battlefield itself and before the end of the war, because that geographical and temporal proximity to war-time conditions were the only possible justification for those deviations from court-martial procedure that sometimes occurred in military commissions, despite the general rule of following court-martial practice whenever possible. *See e.g.* Winthrop, *Military Law and Precedents* 836-841 (2nd ed. 1920); *Hamdan*, 126 S.Ct. at 2777 & n.29.

These criteria are not arbitrary; they were designed by common law courts to ensure that military commissions remain the exception rather than the rule of criminal adjudication, and are limited to only those exigent situations where they are actually necessary to the conduct of the military's mission. As the Supreme Court put it, these prerequisites were "designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal." *Hamdan*, 126 S.Ct. at 2777.

These criteria are thus logical as well as historical. As VADM MacDonald recognized, the further away in time and space from the battlefield that a trial occurs, the less justification there is for holding trials conducted as if the bombs were falling and the only evidence available for use is that obtained, to use his example, by soldiers' kicking doors down and questioning enemy insurgents at the point of a rifle. That is hardly the case with respect either to the current military commissions or the amended versions provided by the Senate bill. In every respect, these trials will resemble, from the perspective of military exigency or "necessity," a trial in any other jurisdiction in the United States.

Thus, MCA tribunals serve a very different purpose than do genuine law-of-war military commissions. As the Supreme Court has explained the law-of-war commission, "its role is primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war." *Hamdan*, 126 S.Ct. at 2776. That is, genuine law-of-war commissions are convened only after perpetrators are caught red-handed on the battlefield (as in *Yamashita*) or behind the lines (as in *Quirin*). Its function is thus limited to the relatively minimal "factfinding" required to assure the military commander (who, being "typically on the battlefield itself," is in no position to guarantee more than this) that the accused is in fact subject to his war-crime jurisdiction and in fact perpetrated the crime. That underlying reality explains both the extremely brief time period between capture and trial typical of the World War II commissions, as well as the far less formal evidentiary and procedural rules employed by genuine commissions.

The MCA military commissions, by contrast, are held far away from the exigencies of the battlefield, and long enough after the crime that there is more than enough time – as the current commission cases amply demonstrate – for traditional law-enforcement fact-finding techniques, including both traditional law-enforcement interrogations and other more sophisticated methods typical of modern prosecutions in other American criminal courts. How and why the logic of the battlefield should apply to proceedings that in every way resemble ordinary court proceedings in which the Constitution governs is a mystery to which no boiler-plate invocation of "military necessity" or "battlefield evidence" provides more than a fig-leaf of an answer.

In short, because there is no logical reason *not* to treat military commission trials like the fundamentally ordinary criminal trials that they are ("ordinary," at least, in every sense that matters to the only legitimate justifications for deviation from the Constitution and court-marital procedure), the Constitution ought to apply to them equally as well as every other criminal trial. VADM MacDonald's logic proves more, perhaps, than he intended, but it remains a valid basis for invoking the entire Constitution, and not just the constitutional proscription against the use of involuntary statements, once trials are as removed from the battlefield in time and space as the trials contemplated by the Senate bill.

CONCLUSION

In summary, any revised military commissions statute must provide the defense adequate resources to ensure trials that produce verdicts that are both reliable and fair to the accused.

Equality of arms between prosecution and defense must be the norm. The standard of fairness that should be applied to military commission trials is compliance with both Common Article 3 of the Geneva Conventions and the United States Constitution in full. Any new commissions system must be one that we would feel comfortable in trying our own servicemen and women for violations of the law of war. An accused should not be given fewer rights or opportunity to defend himself by virtue of a prosecutor's choice of forum - that is the antithesis of a "regularly constituted court."

Peter R. Masciola
Colonel, USAFG
Chief Defense Counsel

Attachments:

A. Letter from Col Peter R. Masciola, Chief Defense Counsel, OMC, to Mr. Jeh Johnson, General Counsel of the Department of Defense, and Mr. Eric Holder, Attorney General of the United States, dated 13 July 2009, Re: Request for Adequate Resources

B. Expert Requests filed by OMC-D Counsel to the Convening Authority, dated 21 July 2009

C. Letter from Col Peter R. Masciola, Chief Defense Counsel, OMC, to Mr. Jeh Johnson, General Counsel of the Department of Defense, and Mr. Eric Holder, Attorney General of the United States, dated 9 June 2009, Re: Request for Adequate Resources

D. *Ex Parte* Order, *United States v. Ahmed Khalfan Ghailani*, 98 Cr 1023 (LAK), U.S. District Court, Southern District of New York (25 June 2009)

Cc:
Mr. Jeh Johnson
Mr. Paul Koffsky
LTG Scott Black
Lt Gen Jack Rives
VADM Bruce MacDonald
BGen James Walker
Colonel Mark Martins
Mr. Brad Wiegmann
Mr. David Kris
AG Eric Holder