Testimony of

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Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to appear before you today to discuss some of the issues arising from President Bush¡¦s decision to provide for military commissions as one option for trying suspected terrorists. President Bush has strongly emphasized the need to ensure that defendants receive ¡§full and fair trials.¡¨ Military Order of November 13, 2001, section 5(c)2. In these remarks, I explore ways to do what everyone agrees is most essential ¡V to protect national security and to defeat terrorism ¡V while also ensuring basic fairness in the relevant trials. There is no reason to doubt that sensibly designed procedures can be fair and at the same time promote the President¡¦s basic goals: to ensure expeditious trials, to avoid a ¡§circus¡¨ atmosphere, and to keep sensitive information confidential.

I offer three basic suggestions, designed not as definitive solutions but as potential steps in the right directions. First, the President¡¦s order is intended to have a narrow scope, and steps should be taken to clarify and specify its anticipated range. Second, principles of procedural justice, adapted for the specific occasion, should be established for military commissions, so as to ensure against inequity and false convictions. Third, measures should be taken to ensure against the reality or appearance of unfairness in the relevant trials, perhaps through use of federal or state judges on military commissions, and perhaps through the creation of certain mechanisms for appellate review, either formal or advisory, by relatively independent officials.

Shared Goals and Concerns

There has been detailed discussion of the constitutionality of President Bush¡¦s military order of November 13, 2001. For present purposes I will assume, without discussing the point, that the order does not violate the Constitution. See Ex Parte Quirin, 317 U.S. 1 (1942). I will not engage the policy questions raised by the President¡¦s decision. I will also assume what is generally agreed: From the standpoint of both constitutional law and democratic legitimacy, it is far better if the President and Congress act in concert. As a general rule, the executive branch stands on the firmest ground if it acts pursuant to clear congressional authorization. With this point in mind, my major topic is how best to respond to a question raised both here and abroad: how to ensure (a) that people will be convicted in military tribunals only if they are guilty, and (b) that everyone will receive the basic justice to which the President, the Attorney General, and their various critics are simultaneously committed.

Some people appear to fear that military commissions, simply by virtue of their status as such, will not be capable of providing fair trials. But this fear, and the contrast between civil and military tribunals, should not be overstated in this setting. In the past, there have been numerous acquittals in military tribunals. Perhaps remarkably, both German and Japanese defendants were

acquitted in the aftermath of World War II. In any case civil courts would pose risks of their own: entirely neutral justice would not be altogether easy to assure for suspected terrorists, tried before an American jury. On the other hand, it would be wrong to dismiss the concern of those who are troubled by the idea of military trials in this context. History suggests that war crimes tribunals do not always provide fair procedures and indeed that there is inevitably some danger of a miscarriage of justice. See Evan Wallach, The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials, 37 Colum. J. Transnat¡¦l L. 851 (1999); In Re Yamashita, 327 U.S. 1 (1946). We do not have to say, in advance, that this is a serious risk in order to conclude that measures should be taken to reduce it. The key question, then, is how to design a system that will not compromise American security interests, but that will nonetheless ensure basic fairness. I outline several possibilities here.

Limiting the Scope of Military Commissions, Formally or Informally

An obvious possibility would be to limit the scope of military tribunals, either formally or informally, by making it clear that the discretion arguably authorized by the President¡¦s order will allow the use of military tribunals only on certain essential occasions, and not in every case in which the order¡¦s requirements might be met as a technical matter.

This idea appears to be fully consistent with the President¡¦s basic goals (as indeed recent informal statements suggest). The fundamental purpose of military commissions is to ensure an expeditious trial, one that does not compromise national security interests, for terrorists (a) captured abroad or (b) intimately involved with the planning and execution of attacks on the United States. It is not likely that the executive branch would seek many military trials of people lawfully within the United States, even if there is some reason for suspicion about their conduct. In short, the terms of the Military Order might be taken to apply in many cases in which the executive will not, in all probability, seek to use military tribunals. It would be useful to obtain clarification on this point ¡V certainly through continued informal assurances, and perhaps through Defense Department guidelines, narrowing the scope of the order as, for example, through guidelines embodying presumptions against military trials for people arrested within the territorial boundaries of the United States.

Rules of Evidence, Fair Procedure, and (Appropriate) Openness

An additional possibility is to design rules of evidence and procedure that will ensure basic fairness. Of course the Department of Defense is actively investigating these issues, and it would not be sensible to attempt to provide a full catalogue here. The central goal should be to ensure compliance with minimal standards of procedural justice, adapted for the occasion. (I emphasize the need for adaptation: The ordinary principles of procedural justice, used in civilian proceedings, need not be carried over to this context, which obviously raises special considerations.) To achieve this goal, it would be desirable to build on the best of past practices by commissions of the kind proposed ¡V and to ensure safeguards against the worst of those practices.

Drawing on the past, I suggest the possible candidates for inclusion. See United Nations War Crimes Commission, Law Reports of Trials of War Criminals 190-200 (1949), for a detailed account, on which I build here. These possibilities include:

?Þ the presumption of innocence (emphasized, for example, by British law in the context of war crimes, see British Law Concerning Trials of War Criminals by Military Courts, Annex 1, United Nations War Crimes Commission, Law Reports of Trials of War Criminals (1997));
?Þ a standard of proof beyond the ¡§preponderance of the evidence¡¨ standard, ranging from ¡§clear and convincing evidence¡¨ to the conventional ¡§beyond a reasonable doubt¡¨ standard;
?Þ assurance of a neutral tribunal;
?Þ an opportunity to know the substance of the charge;
?Þ an opportunity to have the proceedings made intelligible by translation or interpretation;
?Þ an opportunity to know the evidence supporting conviction;
?Þ an opportunity to be represented by counsel;
?Þ the right to respond to the evidence supporting conviction, with the narrowest possible exceptions for reasons of national security (a relevant model here is the Classified Information Procedures Act) ;
?Þ the right to cross-examination of adverse witnesses;
?Þ the right to an expeditious proceeding and disposition;
?Þ the right to present exculpatory evidence;
?Þ specification of reasonable rules of evidence, designed to ensure admission only of material with probative value (see President Bush¡¦s Military Order, section 4(c)(3));
?Þ as much openness and as little secrecy as possible, including public availability of the transcripts of the trial, with the narrowest possible exceptions for reasons of national security.

Some of the most difficult issues here involve the conflict between the national security interest in maintaining secrecy and the traditional American antagonism to ¡§secret trials.¡¨ President Bush¡¦s Military Order has been criticized for requiring secrecy, but it does nothing of the kind. It remains to be decided how to handle the conflict between the relevant interests. Everyone agrees that as a strong presumption, trials should be kept public, to prevent injustice, to inform the public, and to provide some assurance that justice was in fact done. But in some cases, evidence that supports conviction is properly kept secret, certainly from the public and in truly exceptional cases from the defendant and defense counsel as well. It would be a terrible mistake, in this context, to force the executive branch to choose between (a) letting a terrorist go free and (b) disclosing material that is likely to threaten the safety of the nation¡¦s people. The Classified Information Procedures Act attempts to deal with this problem, but in a way that is perhaps inadequate for this domain. Perhaps it would be possible to redesign the Act in a way that would respond to the government¡¦s legitimate concerns.

Ensuring a Mix of Military and Nonmilitary Judges

There is no requirement that the judges on military commissions must be military personnel. In fact there is precedent, in the aftermath of World War II, for including ordinary state and federal judges on the relevant tribunals. Of course we have no reason to question, in advance, the independence and neutrality of military personnel; recall that military judges produced acquittals of both Japanese and German defendants. But there is reason to say that a mixture of judges, from diverse backgrounds, is likely to increase the reality and appearance of fairness. Nor would such a mix intrude on the executive¡¦s prerogatives or on the President¡¦s legitimate goals: preventing a ¡§circus¡¨ atmosphere, ensuring expedition, and ensuring against disclosure of classified information.

I do not discuss here the extent to which Congress should take an active role on this issue. My only suggestion is that to the extent that civilian judges are thought to offer certain safeguards, nothing in the President¡¦s order, or in past practice, is inconsistent with appointing civilian judges to serve on military commissions. Such appointments should be seriously considered as a way of counteracting the perceived risk of unfairness. Perhaps the civilian judges might be required to have had military experience, or experience in the military justice system, as in fact many have done.

Strengthening Review

Under American law, appellate review of criminal convictions is the rule, and exceptions are exceedingly rare. Of course the present context is one in which an exception, of one or another sort, might be well-justified. But it is also possible to imagine measures that would create at least some check on gross unfairness. I discuss two alternatives here.

Article III review. The first and perhaps most natural possibility would be to provide for some form of prompt appellate review from a specially designated panel of Article III judges. The purpose of such review would not be to retry the facts, but to ensure compliance with the minimal principles of procedural justice, as adapted for this occasion. There are many models for a procedure of this kind. This is the standard approach to Article III review of administrative action, with federal court review to ensure against arbitrariness and illegality. See Crowell v. Benson, 285 U.S. 22 (1932). It is also the standard approach to Article III review of the decisions of Article I courts, created by Congress for specialized purposes. See Northern Pipeline Construction Co. v. Marathon, 485 U.S. 50 (1982).

These precedents could be adapted to the context of an Article II tribunal of the sort contemplated here. Note that Article III review could be adapted to take account of the most serious concerns of the executive branch. A court could be asked to rule on any appeal within a specified time, thus ensuring expedition. Appellate review, unlike an ordinary trial, could reduce the risk of a ¡§circus¡¨ atmosphere. If necessary, such review could be conducted solely in writing, without oral argument. Most important, judicial review could be limited so as to ensure compliance with the minimum requirements of fairness: a chance to know the basis for the action, a chance to contest the evidence, an evidentiary standard sufficient to ensure against error. See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). To be sure, an issue might be raised, under the Commander-in-Chief Clause, of the power of Article III courts to review Article II courts without presidential authorization; but so long as the President accepted such limited review, I do not believe that this arrangement would be unconstitutional.

2. Informal advisory review. Appellate review by an Article III tribunal appears not to be contemplated by the President¡¦s Military Order. A more modest possibility would be to create a less formal system of review, not from an Article III Court, but from Article III judges specially constituted as a panel of advisers to the President. On this approach, the system of review contemplated by the existing order would be given an additional layer, consisting of people with a degree of independence and charged with exercising the reviewing functions I have just described. An approach of this kind would maintain greater continuity with the process that the President has outlined, because it would not take the adjudicative process outside of the

executive branch. But it would create an additional safeguard against the risk of arbitrary or unjustified action.

This approach might be thought to raise a constitutional question under Hayburn¡¦s Case, 2 Dall. 409, 1 L. Ed. 436 (1792), a case that forbids Article III judges from serving in an official capacity as executive branch officials, subject to review within the executive branch. But under Hayburn¡¦s Case, it appears to be acceptable to appoint judges in their personal rather than official capacity, and that is the arrangement I am describing here. The basic goal is to create a layer of review that would provide an expeditious but additional safeguard. If Article III judges are not to be used, for reasons of principle or policy, perhaps a panel of distinguished state court judges, enlisted for the purpose, could be used instead.

Conclusion

When national security is threatened, the nation¡¦s highest priority is to eliminate the threat, not to grant the most ample procedural safeguards to those who have created the threat. But whenever the United States is conducting a criminal proceeding, its highest traditions call for a full and fair trial, as President Bush has explicitly required. Those same traditions do not bar the use of military commissions under extraordinary circumstances; but they do require that steps be taken to ensure against gross unfairness and conviction of innocent people. I have attempted to outline several imaginable steps here. My basic suggestion is that it should ultimately be possible to design a system that responds to the legitimate concerns of the President and the nation, and protects the country¡¦s security, while also complying with the basic requirements of procedural justice.