

Testimony of

The Honorable Orrin Hatch

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Chairman Schumer, I want to thank you for convening this hearing to discuss military commissions. This issue has generated a good deal of attention, and I hope this hearing will enlighten Congress and the public again about the difference between the real issues and the alarmist rhetoric that has been swirling around Capitol Hill in the past few weeks.

I hope the participants in this hearing will keep in mind three basic facts about the President's Order. First, the Order is very narrow; the only people it allows to be tried by military commissions are non-citizens specifically determined by the President to be members of al Qaeda, supporters of al Qaeda, or people engaged in other international terrorist networks. Second, the Order is a military command; it instructs the Secretary of Defense, not the Attorney General, to develop rules and procedures for conducting fair trials for those whom the President designates. And third, the Order has not been utilized; as of today, the President has not determined that anyone will be tried by military commission, and the Secretary of Defense is still working on the rules and procedures.

These three points are essential to a useful discussion here today because they explain the two different avenues of questioning that have emerged. Our primary interest here is examining the legal and constitutional question as to whether that Order, by itself, is proper and allowed. I think the answer to that is yes, and I'll explain more about that in just a minute.

President Bush has made it abundantly clear that he regards the option of military commissions as a tool to be used only with the utmost discretion. After all, the President not only retained exclusive authority to determine who will be subject to trial by military commission - as opposed to delegating this authority - but also constrained himself by limiting the people he can designate essentially to non-citizen international terrorists. This is unlike the use of military commissions after World War II. The 1945 Order establishing military commissions for the trial of war crimes in the Pacific theater came from the pen of General MacArthur - not the President - and it stated that military commissions had jurisdiction over "all of Japan and other areas occupied by the armed forces commanded by the Commander-in-Chief, United States Army, Pacific." It delegated the decision of whom to try to "the convening authority" rather than the President. In contrast, President Bush's Order has a very narrow scope, and it ensures that decisions will be made at the very highest level of our government. I am completely reassured by these features of the Order.

And so is the American public, seven out of ten of whom believe the government is doing enough to protect the civil rights of suspected terrorists.

I do not mean to suggest that congressional oversight is inappropriate when the public has thought about, and accepted, an Administration plan. I am strongly in favor of congressional

oversight. But we should remember that the purpose of oversight is to make sure the Administration is doing its job. At some point, too many partisan hearings and too much hysteria only make it more difficult for the Administration to do its real job. In the Judiciary Committee alone we are holding four hearings in eight days. And these are multiple hearings on the same subjects - we talked about military commissions last week, we are talking about them today, and we will talk about them again with the Attorney General on Thursday.

Frankly, I think this Committee would better serve the public by looking for ways to help, instead of distracting the Administration, which has an enormous task on its hands and is doing a superb job under difficult conditions. One obvious way we could help is to confirm the nominees languishing in this Committee for important jobs including judgeships and positions at the Department of Justice and Office of National Drug Control Policy. As the Washington Post - not known for its membership in the vast right-wing conspiracy - editorialized last week, "[f]ailing to hold [judicial nomination hearings] in a timely fashion damages the judiciary, disrespects the president's power to name judges and is grossly unfair to often well-qualified nominees." In light of the nominations backlog we have, one is hard-pressed to understand the wisdom of holding hearings every other workday on whether Osama bin Laden should be able to avail himself of the intricacies of the hearsay exceptions in the event that he survives the bombs headed in his direction. Am I the only one who finds it ironic that, while no one questions the President's authority to instruct the military to drop bombs on his hideouts, there is a little group of outspoken critics who want to quibble over which set of evidentiary rules the Secretary of Defense should apply in Bin Laden's trial? To those who reflexively oppose the military tribunals, I ask, do we really want to litigate in a criminal trial whether the soldiers who apprehend Bin Laden should have obtained a search warrant before entering his cave? Or whether he understood his Miranda rights? Or whether he is not guilty by reason of insanity? I know that some are less worried about Bin Laden and more concerned about the reaction that our use of military commissions would engender in Europe and elsewhere around the world. Some have speculated that Spain and other countries will refuse to extradite suspects to the United States. To my knowledge, no country has made such a refusal yet. And any such refusal, if made without reviewing the actual rules and regulations that will govern our military commissions, would be based on speculation and distrust rather than facts. When the United States has criticized other countries for unfair military courts, it was because they were unfair, not because they were military courts.

Now I want to turn to the constitutionality question that I mentioned a minute ago. Despite the articulate explanation this Committee received last week from Assistant Attorney General Chertoff, some of my colleagues still question whether military tribunals are in fact permitted by the Constitution. The fact is that the Supreme Court has repeatedly upheld the constitutionality of using military commissions to prosecute individuals charged with crimes under the law of war. As the Supreme Court has explained, "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."

Furthermore, contrary to recent suggestion, military tribunals can be - and have been - established without further Congressional authorization. Because the President's power to establish military commissions arises out of his constitutional authority as Commander in Chief,

an act of Congress is unnecessary. Presidents have used this authority to establish military commissions throughout our nation's history, from George Washington during the Revolutionary War to President Roosevelt during World War II. Congress, for its part, has repeatedly and explicitly affirmed and ratified this use of military commissions. Article 21 of our Code of Military Justice, codified at section 821 of title 10 of the United States Code, expressly acknowledges that military commissions have jurisdiction over offenses under the law of war.

In closing, Mr. Chairman, I want to thank you again for convening this hearing because I think it is very important for the truth about these issues to be made public. I look forward to hearing from our witnesses.

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