**Statement of**
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**Prepared Testimony Before**
**The Senate Committee on the Judiciary**

**Subcommittee on Terrorism and Homeland Security**

**"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"**

**July 28, 2009**

Chairman Cardin, Ranking Member Kyl, and distinguished members of the Committee, thank you for giving me the opportunity to testify on this important subject.[1] Both Presidents to address the question of prosecuting members of al Qaeda and the Taliban since the September 11th attacks have recognized the need for a military-based trial system, outside federal criminal

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[1] The views expressed herein are my own and do not reflect those of Gibson, Dunn & Crutcher LLP. The following biography is provided for the convenience of the Committee:

Michael J. Edney is of counsel in the Washington, DC office of Gibson, Dunn & Crutcher LLP, where he was also a lawyer between 2002 and 2005. His practice specializes in criminal and regulatory defense, complex civil litigation, and appellate and constitutional law. From 2007 to 2009, Mr. Edney served as a legal advisor and Deputy General Counsel to the National Security Council ("NSC") at the White House, where he provided legal advice to the NSC and its various committees, as well as senior White House policymakers, on national security related legal issues. Mr. Edney also chaired committees of lawyers from throughout the Executive Branch to address national security questions. From 2005 to 2007, Mr. Edney served in the United States Department of Justice, as a member of its Office of Legal Counsel. Relevant to the issues before this Committee, Mr. Edney participated in providing advice on the legal response to the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld* and on the drafting of the Military Commissions Act of 2006 and the ensuing Manual for Military Commissions. Mr. Edney also participated in arguments on behalf of the United States before military commissions and before the Court of Military Commission Review. Mr. Edney has been a law clerk to Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. He graduated with high honors from The University of Chicago Law School, where he was Articles Editor of *The University of Chicago Law Review* and was enrolled in the Order of the Coif. He received his B.A., *magna cum laude*, from the University of Notre Dame.

trials before Article III courts.[2] In 2006, the Congress passed the Military Commissions Act ("MCA"),[3] providing unambiguous authorization for military commissions trials for members of al Qaeda or the Taliban who violate the laws of war. The Senate passed the legislation by a margin of 65 to 34.[4]

The question arises to what extent the military commissions authorized by the Congress, either under the MCA or any later legislation that may be enacted, should be employed to address potential violations of the laws of war committed by certain persons currently held at the Guantanamo Bay facility. The Congress will have a role in resolving that difficult question. To assist the Committee in considering this important issue, I intend (1) to provide an overview of the history of using military commissions in the current armed conflict; (2) to discuss some of the legal challenges in prosecuting members of al Qaeda that military commissions, or an alternative to Article III criminal trials, were designed to address; and (3) to outline some of the legal consequences policymakers should consider in determining where trials for persons currently held at Guantanamo should be held.

## I. Background on the Application of Military Commissions to Al Qaeda and the Taliban

On September 11, 2001, nineteen armed al Qaeda agents took control of four civilian aircraft and used them as weapons to attempt attacks on several targets in the United States. Those attempts were successful on both towers of the World Trade Center in New York City and on the Pentagon in Arlington, Virginia. A fourth captured plane crashed in Shanksville,

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[2] Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569 (Sept. 6, 2006); Statement on Military Commissions, DAILY COMP. PRES. DOC. May 15, 2009 ("Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered.").

[3] Pub. L. No. 109-336 (codified in scattered sections of 10 and 18 U.S.C.) (2006),

[4] United States Senate, *U.S. Senate Roll Call Votes 109th Congress – 2nd Session*, Sept. 28, 2006.

Pennsylvania, killing all on board. As a result of those attacks, nearly 3000 innocent civilians and members of our Armed Forces perished. The Executive Branch was quickly faced with the question of how to hold accountable members of al Qaeda or the Taliban responsible for those attacks, as well as prior acts of terrorism against the United States, including al Qaeda's bombing of the U.S.S. Cole and our embassies in Kenya and Tanzania.

President Bush signed a military order on November 13, 2001, designating a panel of military officers to preside over trials for members of al Qaeda or the Taliban who violated the laws of war.[5] President Bush was not first to authorize the use of military commissions: Instead, military commissions had been used throughout our Nation's history to prosecute violations of the laws of war. In 1780, during the Revolutionary War, General George Washington authorized a military commission to try British Major John Andre as a spy.[6] Commissions were used in the Mexican-American War, the Civil War, and World War II. Military commissions were convened to try the assassins of President Abraham Lincoln and their accomplices.[7] Importantly, Congress had long recognized the proper historical role for military commissions in the Uniform Code of Military Justice by providing that the creation of general courts martial "do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."[8]

The Secretary of Defense issued rules to govern the proceedings established by the President's military order, and soon six individuals held at Guantanamo Bay and designated as

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[5] Military Order of November 13, 2001, 3 C.F.R. 918 (2001).
[6] *See Ex parte Quirin*, 317 U.S. at 31, n.9; *Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780*, (Francis Bailey ed. 1780).
[7] *See Military Commissions*, 11 Op. Att'y Gen. (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).
[8] 10 U.S.C. § 821 (2006).

enemy combatants were charged.[9] These proceedings were immediately entangled in judicial challenge, which took more than two years to resolve.[10] In *Hamdan v. Rumsfeld*, the Supreme Court held that military commissions established by the President were contrary to statute.[11] This was not because they were military tribunals, or because they were established by presidential mandate, but because certain rules for the military commissions did not meet a statutory requirement that general court martial procedures generally be tracked or the requirements of Common Article 3 of the Geneva Conventions. The Court determined that Common Article 3 was applicable to the armed conflict between the United States and al Qaeda, and that the Uniform Code of Military Justice required that tribunals comply with Common Article 3, in armed conflicts to which it was applicable.[12]

On September 6, 2006, the President announced that fourteen high-level suspected al Qaeda operatives were being transferred to military custody at Guantanamo Bay, Cuba, and would be evaluated for trial by military commission. These men included the alleged mastermind of the September 11th attacks, Khalid Sheikh Mohammed, as well as al Qaeda leaders responsible for the attacks on the U.S.S. Cole and our embassies in Kenya and Tanzania. The President asked Congress to address the *Hamdan* decision and quickly to pass legislation authorizing military commission trials for these and other individuals held at Guantanamo Bay.[13] The Congress responded, and the MCA was enacted on October 17, 2006. It provided extensive statutory prescriptions for how military commission proceedings must be conducted and included a number of important changes from the system established pursuant to the President's

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[9] *Hamdan*, 548 U.S. at 569.
[10] *See generally, id.* at 569-573.
[11] 548 U.S. 557 (2006)
[12] *Id.* at 624-25.
[13] Remarks on the War on Terror, *supra* note 2, at 1573-74.

November 13, 2001, order. The trials would be presided over by a military judge, qualified to handle general courts martial.[14] Trial counsel and defense attorneys would be assigned by the Judge Advocates General.[15] Any conviction could be appealed to a new Court of Military Commission Review, also staffed by impartial military judges, the United States Court of Appeals for the D.C. Circuit, and ultimately the Supreme Court of the United States.[16]

The Secretary of Defense submitted to Congress rules for implementing the MCA on January 18, 2007. Three Guantanamo detainees were charged in coming months, and those prosecutions were stayed by an early jurisdictional challenge, which was rejected by the Court of Military Commission Review on September 24, 2007.[17] Military commissions were allowed to proceed thereafter, and new charges were issued. Ultimately, military prosecutors swore charges against 24 Guantanamo detainees. Notably, on May 9, 2008, the Convening Authority referred charges that Khalid Sheikh Mohammed, Walid bin' Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa al Hawsawi conspired to plan and to execute the September 11th attacks. Prior to January 2009, that case had substantially progressed through pretrial proceedings.

On January 22, 2009, President Obama issued Executive Order 13492, mandating that military commission proceedings be suspended pending determinations on whether to prosecute military commission defendants in federal courts and otherwise to dispose of the charges through modified military commission procedures, dismissal, or release.[18] A second order, issued the same day, established a multi-agency task force, chaired by the Attorney General and the Secretary of Defense, to make recommendations to the President on whether and in what form

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[14] Pub. L. No. 109-366, § 948j.
[15] *Id.* § 948k.
[16] *Id.* §§ 950f, 950g.
[17] *United States v. Khadr*, CMCR 07-0001 (Sept. 24, 2007).
[18] Exec. Order No. 13492 § 7, 74 Fed. Reg. 4897 (Jan. 22, 2009).

military commission prosecutions should go forward.[19] The task force recommendations were due on July 22, 2009, but the Attorney General and the Secretary of Defense granted an extension of 180 days.[20] Military judges presiding over commission proceedings have granted the Executive Branch's requests for continuances to implement the President's order. Military commission prosecutions are stalled.[21]

## II. Considerations for the Decision Between Federal Criminal Trials and Military Commissions

There appears to be emerging consensus among policymakers—the Congress and the President—that some alternative mode of prosecution separate from Article III criminal trials should be available for members of al Qaeda and the Taliban.[22] In addition, both Presidents to confront this issue agree that it arises in the context of a continuing war.[23] Even with these fundamental determinations, the Congress and the President now face two intertwined questions: (1) What criteria will guide the choice between federal criminal trials and military commissions for individual detainees?; and (2) What rules should govern those military commission proceedings?

In devising military commission procedures, the Executive Branch and, on the second occasion, the Congress have identified adjustments to federal criminal procedures necessary to

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[19] Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009).
[20] *See* Preliminary Report; *see also* Exec. Order No. 13493 § 1(g) (authorizing extensions at the discretion of the co-chairs)
[21] *See, e.g.*, Order Granting Second Motion for 120-day Continuance, *United States v. Khalid Sheikh Mohammed* (May 14, 2009) (granting a second continuance of the 9/11 prosecution until September 17, 2009).
[22] Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009; S. Amd. No. 1657 to S. 1390 CONG. REC. (Jul. 21, 2009) S7795 (amendment sponsored by Senator Lieberman and passed on a voice vote stating that "It is the sense of Congress that the preferred forum for trial of alien unprivileged enemy belligerents subject to this chapter for violations of the law of war and other offenses made punishable by this chapter is trial by military commission.").
[23] Remarks at the National Archives and Records Administration ("Now let me be clear: We are indeed at war with al Qaeda and its affiliates.").

address the special circumstances of prosecuting members of an enemy force during a time of continuing armed conflict. As policymakers address these key open questions, it is worth revisiting the justifications for two key categories of such adjustments: Procedures addressing classified information and special relaxations of hearsay and authentication rules for evidence collected on the battlefield or otherwise abroad. Any argument suggesting that federal criminal trials are the appropriate mechanism for trying members of al Qaeda held at Guantanamo Bay will have to address these concerns. In addition, policymakers should consider the consequences on the legitimacy federal criminal trials and military commissions of allocating defendants on a case-by-case basis between each system.

### A. Procedures for Handling Classified Information

Classified information is at the forefront of any trial against al Qaeda operatives. Al Qaeda is the subject of substantial U.S. intelligence activities: Whether or not the Government intends to present classified information at trial, it is a near certainty that the Government possesses classified information relating to the defendant. Military commissions were motivated, in part, due to difficulties of addressing classified information in terrorism trials before Article III courts. The 9/11 Commission recognized these difficulties in assessing the historical capabilities of the law enforcement system to prevent the September 11th attacks. During the trial of Omar Abdel Rahman, also known as the "Blind Sheikh," for his role in the 1993 World Trade Center bombing, the Government was required to disclose a list of unindicted co-conspirators to the defense. Within days, that list had been faxed to close associates of

Osama bin Laden, providing a roadmap as to which al Qaeda operatives the United States were tracking.[24]

Problems also arose in the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing. During live testimony in trial, it was revealed that certain evidence against Yousef was gathered through tracking the delivery of cell phone batteries between al Qaeda associates. That one piece of information, according to former Attorney General Michael Mukasey, alerted al Qaeda operatives that their cell phone communication network had been compromised. The operatives immediately discontinued its use, and a vitally important stream of intelligence was lost.[25]

A fundamental premise of the military commission rules was that holding al Qaeda terrorists to account was not entirely about determining who was responsible for a historical event.[26] Instead, each al Qaeda trial would have *prospective* consequences because of the continuing armed conflict against al Qaeda and the organization's unrelenting plans for future attacks against the United States. Classified information adduced at trial or disclosed before trial would not be as secure. Special military commission procedures for classified information were meant to avoid forcing the Government into a decision between revealing classified information to members of an enemy force during a continuing armed conflict and holding them accountable for violations of the laws of war.

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[24] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 472 n. 8 (2004).

[25] Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions*, WALL. ST. J. (Aug. 22, 2009). *See also* Remarks at the National Archives and Records Administration, *supra* note 19, at 5 (explaining that the Yousef case is a success story for federal criminal trials in the terrorism context).

[26] *Taylor v. Kentucky*, 436 U.S. 478 , 489 n.17 (1878) ("The only purpose of a criminal trial is to determine whether the prosecution established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.").

To this end, the MCA establishes a strong national security privilege to protect classified information as a general matter.[27] The MCA streamlines the procedures for asserting protections of classified information, providing that any person, not just the head of a department, may raise the national security privilege.[28] Importantly, the MCA provides special protections for intelligence sources and methods. The MCA allows the Government to introduce otherwise admissible evidence that was obtained through classified intelligence sources and methods, without disclosing those sources and methods to the accused or the members of the military commission. The military judge conducts an impartial evaluation of the sources and methods to determine whether the ultimate evidence is reliable.[29] To address the defendant's ability to test that evidence, the MCA requires that defendants be given an unclassified summary of such sources and methods that produced the evidence to the extent practicable and consistent with national security.[30] The rules are designed to provide an impartial check that the sources and methods are reliable, while not forcing the Government to lay bare intelligence activities by which it continues to gather information against an enemy force each time it seeks to prosecute a member of that force.

At the same time, the MCA safeguards the defendant's right to present a vigorous defense. All evidence provided to the members of the military commission—the ultimate triers of fact—is provided to the defendant. And any exculpatory evidence—classified or not—must be disclosed to the defense, unless the Government demonstrates that there are adequate

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[27] *See* 10 U.S.C. § 949d(f)(1) ("Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the proceeding applies to all stages of the proceedings of military commissions under this Chapter.").
[28] *See* 10 U.S.C. § 949d(f)(2)(C).
[29] *See* 10 U.S.C. § 949d(f)(2)(B).
[30] *Id.*

substitutes for the classified information through redactions, summaries, or admissions of fact by the Government.[31]

This is not to say that federal criminal trials lack any procedures for dealing with classified information. These procedures, however, were adopted for very different circumstances. The Classified Information Procedures Act ("CIPA") was enacted in 1980 to combat the threat of graymail in espionage prosecutions.[32] To that end, CIPA established elaborate, information-forcing procedures that require defendants to give notice before disclosing any classified information in open court.[33] As this Committee made clear when considering CIPA, the principal purpose of these procedures was to make manageable cases against U.S. government employees who possess classified information independently of anything that occurs in the criminal prosecution.[34] By requiring notice, the Government is given the choice whether to tolerate the disclosure of relevant classified information by the defendant or to dismiss the case.[35] CIPA does not provide special protections for intelligence sources and methods, however. While CIPA requires courts to consider adequate substitutes for classified

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[31] *See* 10 U.S.C. § 949j(d).
[32] *See* 18 U.S.C. app. 3 (2006).
[33] *See id.* §§ 2, 5-9.
[34] *See* S. Rep. 96-456, *Classified Information Procedures Act* (June 18, 1980), 1980 U.S.C.C.A.N. 4294, 4295. The Judiciary Committee's report of the bill explained the extensive study of "cases in which intelligence information had been passed to foreign powers through espionage or through leaks in the media." The key finding of the Committee's study was that "prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information that the law seeks to protect." The report never mentions special issues regarding classified information in the terrorism context or in a wartime setting.
[35] *United States v. Smith* 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*) ("Prior to CIPA, the government had no method of evaluating . . . disclosure claims before trial actually began. Oftentimes it would abandon prosecution rather than risk possible disclosure of classified information.").

information,[36] CIPA ultimately does not change the standard for disclosure and has been construed to require that the defendant be provided access to classified information that is relevant and helpful to the defense.[37] Moreover, CIPA contains no mechanism for a trial judge to make an independent but *ex parte* assessment of the reliability of intelligence sources and methods underlying otherwise admissible evidence. If the Government intends to present intelligence work product as evidence under CIPA, it must be prepared to allow a deep review and potential disclosure of underlying sources and methods.

While CIPA may accidentally provide a method for handling classified information in the context of terrorism or wartime prosecutions, it was not a matter of close consideration by the Congress. The MCA has, and any amendments thereto will have, the distinct advantage of policymakers consciously adopting special procedures to handle classified information in the context of a continuing armed conflict. The overriding purpose of maintaining the confidentiality of classified information is to conceal it from an enemy foreign power during a time of war.[38] Protections for classified information when prosecuting the agents of such foreign powers should be more robust than in a typical criminal trial.

**B. Special Allowances for Evidence Collected Abroad or on the Battlefield.**

The unifying feature of prosecuting members of al Qaeda or the Taliban held at Guantanamo is that all are not U.S. persons and all were captured outside the United States. In some of the prosecutions, the alleged criminal acts had effects inside the United States. The prosecution of the 9/11 conspiracy stands as an example. Nevertheless, much of the conduct

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[36] *See* 18 U.S.C. app. 3 § 4.
[37] *See, e.g., United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008); *United States v. Smith* 780 F.2d 1102, 1107-10 (4th Cir. 1985) (*en banc*); *United States v. Rosen*, 557 F.3d 192 (4th Cir. 2009).
[38] Exec. Order 12958 (discussing standards for classifying information).

occurred outside the United States, and the evidence of the conduct is found in foreign lands or through intelligence surveillance. In other cases, both violations of the laws of war and all of the events occur entirely outside the United States. This is the case in the prosecution of Omar Khadr, who is charged with throwing a grenade at and killing Army Sergeant Christopher Speer. In these cases, much of the evidence comes from witnesses located in foreign lands interviewed during combat and physical materials gathered from the battlefield. The military and intelligence personnel responsible for gathering evidence often did not do so with criminal prosecution in mind, as domestic law enforcement investigating a crime inside the United States would. Instead, evidence was collected often during active combat with the object of predicting the next attack rather than establishing a chain of custody that could stand up to federal court scrutiny. Persons responsible for the evidence, or establishing its authenticity, are often active-duty military or deployed intelligence personnel, whose presence for trial may disrupt national security operations. Foreign nationals who have witnessed events abroad may have since become unavailable due to the instability of the region.

To adjust for such conditions, markedly different than those faced in the domestic law enforcement context, the MCA relaxed rules generally applicable in federal criminal proceedings barring hearsay evidence and establishing strict standards for the authentication of evidence. With regard to hearsay evidence, the MCA established a standard based on the reliability of the evidence and the opportunity to rebut it, rather than adopting the complex web of rules that defines inadmissible hearsay evidence in federal trials.[39] The MCA's rule was designed to allow judges to evaluate all the circumstances underlying the evidence and to make pragmatic judgments. May an out-of-court statement be sufficiently tested by the defense, even if the

[39] *Compare* 10 U.S.C. § 949a(b)(2)(E) *with* Fed. R. Evid. 801-07.

declarant is not cross-examined before the commission's members? Does an out-of-court statement bear other indicia of reliability?

There has been a debate about who should bear the burden to show the reliability of hearsay evidence, and whether additional procedural protections should be built into the military commission rules regarding hearsay.[40] Nevertheless, both the amendments to the MCA in the pending National Defense Authorization Act for Fiscal Year 2010 and the Administration's regulatory adjustments to the rules for military commissions recognize that the restrictions on hearsay evidence must contain an exception for information that can be demonstrated to be reliable. When considering whether federal criminal trials are up to the task of trying al Qaeda operatives for violations of the laws of war, how prosecutions can be reasonably conducted under the hearsay rules must be addressed.

### C. Protecting the Integrity of Both the Federal Criminal System and Military Commissions

There has been substantial debate about whether a presumption in favor of trying alien enemy combatants in Article III courts rather than military commissions is appropriate. Such a presumption is the current position of the Executive Branch, based on its preliminary policy review of the appropriate role of military commissions and Article III courts in handling charges against Guantanamo detainees.[41] The presumption would be rebutted when sources and methods

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[40] *See* S. 1390 § 1031 proposed 10 U.S.C. § 949a(3)(D); Preliminary Report of the Detention Policy Task Force (July 20, 2009) at 3 ("Similarly strict hearsay rules may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from the battlefield, which may be reliable, probative, and lawfully obtained.").

[41] *See* Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009 ("First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided by the United States Constitution."); Preliminary Report of the Detention Policy Task Force (July 20, 2009) at App. A ("There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution.").

require protection or evidentiary issues counsel in favor of trial by military commission.[42] Others disagree with this approach. The Senate passed by voice vote on July 23 a sense of the Congress resolution that all "alien unprivileged belligerents"—a group defined as members of al Qaeda and the Taliban who have engaged in hostilities against the United States—should be tried by military commission.[43]

There are consequences in not choosing one system or another—federal criminal trials or military commissions—for the prosecution of offenses that would violate the laws of war committed by alien Guantanamo detainees. The proposed presumption that most al Qaeda members who have violated the laws of war should be tried in federal court, except when the evidence makes such trials difficult, poses a threat to the integrity of both the federal criminal system and the military commission system. Using military commissions as a safety valve when federal criminal prosecutions become difficult would strip the procedural safeguards in the federal criminal process of some meaning. Those procedural protections, such a practice would suggest, are justified only to the point of prosecutorial convenience. Similarly, military commission outcomes would be viewed as a second best alternative, of lesser legitimacy. The existence of the proposed rebuttable presumption would cast a pall over military commission proceedings as a collection of cases with weaker evidence. Atmosphere counts in litigation. Sorting defendants between federal criminal trials based on evidentiary considerations would weaken the Government's defense of military commission rules before the appellate court.

Determining that an entire class of cases would be tried in one system or the other, by contrast, would enhance the legitimacy of both systems. A rule that alien members of an enemy

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[42] *Id.*

[43] S.1650, proposed 10 U.S.C. § 948e, 155 CONG. REC. S8003-8005 (daily ed. July 23, 2009) ("It is the sense of Congress that the preferred forum for the trial of alien unprivileged enemy belligerents . . . is trial by military commission").

force captured abroad, who have committed violations of the laws of war, should be tried by military commission could be supported by reference to history and tradition. The rules governing such trials could be defended as an appropriate balance of procedural protections and sensitivity to national security in an ongoing armed conflict. Differential treatment for U.S. citizens or aliens members of an enemy force captured on U.S. soil could be justified by the distinct constitutional rules applicable to those groups.[44] Similar benefits—in terms of systemic legitimacy—would be realized if entire classes of offenses or defendants were handled through the federal criminal system. Sorting individual cases, however, based on evidentiary challenges may be the least preferable option.

## III. The Location of Military Commission Trials

The decision whether to hold military commission trials in the territorial United States or at Guantanamo Bay, Cuba, will have substantial legal consequences. On January 22, 2009, the President issued Executive Order 13492, requiring that the Guantanamo Bay detention facility be closed "as soon as is practicable, and no later than one year" from the order. Fewer than six months remain in the allotted time for carrying out that order. Nevertheless, 229 persons associated with the armed conflict remain detained at the Guantanamo Bay facility.

The difficulties in reducing the population at Guantanamo are understandable. The last Administration made reducing the population at Guantanamo a high priority, but encountered significant challenges. For some, the United States could not obtain sufficient guarantees from the detainee's home country that he would be held or monitored in manner consistent with a realistic assessment of the detainee's threat. For others, there was an intolerable risk that their home countries would mistreat them upon return. The policy of the United States is not to return

[44] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (discussing the constitutional status of U.S. citizens abroad and aliens present in U.S. territory).

any person from Guantanamo Bay, Cuba, to a country where it is more likely than not he will be tortured. For still others, assembling the evidence necessary to make informed prosecution decisions takes time.

The slow pace of transferring Guantanamo Bay detainees to foreign countries over the last six months has led to an inescapable conclusion: A large portion of the detainees currently at Guantanamo will need to be transferred to the United States, unless the timetable set forth in Executive Order 13492 is extended. The President recognized in his May 21, 2009, address that a certain portion of the detainees at Guantanamo Bay "cannot be prosecuted yet [ ] pose a clear danger to the American people."[45] For that class, the President suggests detention without criminal charge—before military commission or Article III courts—presumably under the authority to hold combatants until the end of hostilities. This category of detention—if it is to occur on United States soil—will pose a new set of challenges, and the Executive Branch will need to adhere to legal standards whose applicability at Guantanamo was at least uncertain.

The planned closure of the Guantanamo Bay facility will also affect the policy options open to the Executive Branch and the Congress with regard to military commission trials. If the decision were made today to resume military commission proceedings, many would not be complete until after January 22, 2010. That decision, of course, will not be made today. The Attorney General and the Secretary of Defense extended the deadline for the Detention Policy Task Force report on these matters until January 22, 2010.[46] Moreover, if amendments to the MCA are enacted into law, a substantial overhaul of the rules for military commissions will be

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[45] Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009

[46] Department of Justice Press Release, *Detention Policy Task Force Issues Preliminary Report* (July 20, 2009).

required.[47] Accordingly, absent a revisiting of Executive Order 13492, any future military commission trials likely will be held on U.S. soil, a feature that will have legal consequences.

*New Constitutional Restraints on Military Commission Rules.* First, locating military commission trials within the territorial United States will affect the constitutional provisions applicable to such trials. In *Boumediene v. Bush*,[48] the Supreme Court held that the Suspension Clause of the Constitution applies at Guantanamo Bay, Cuba. The Court's analysis included a detailed survey of the geographic scope of the writ of habeas corpus in 1789, as Supreme Court precedent required.[49] The Court determined that Guantanamo, though outside the territorial United States, was sufficiently similar to areas where the writ has historically extended and shared qualities of *de facto* sovereignty so that the Suspension Clause applied. The applicability of the Suspension Clause narrowed the form of legislation by and circumstances under which Congress could foreclose access to habeas corpus at Guantanamo. The Court explicitly did not reach the question whether other constitutional rights apply at Guantanamo.

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[47] One provision alone in pending legislation will require a detailed review of the Manual for Military Commissions. Under current law, the Secretary of Defense has wide discretion in establishing rules for military commissions to depart from the rules applicable for general courts martial, and the Secretary of Defense in many instances had done so. *See* 10 U.S.C. § 949d(a) ("Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and rules of evidence in trial by general courts-martial." (Emphasis added)). Pending legislation would require adherence to the rules for general court martial, absent explicit statutory mandate to the contrary. *See* S. 1390 § 1031, proposed 10 U.S.C. § 949a ("Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter."). Whatever the merits of the provision, a substantial review of military commission rules will be necessary.

[48] 128 S. Ct. 2229 (2008).

[49] *Id.* at 2244-51; *see also INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

The Court historically has limited the extraterritorial reach of other constitutional provisions.[50] If the question of what other constitutional provisions apply at Guantanamo arises, the Supreme Court may very well not apply the full range of constitutional rights enjoyed in the territorial United States. Instead, a potential outer perimeter of constitutional rights at Guantanamo is the analysis applied in the *Insular Cases*, where the Court held that certain fundamental constitutional protections applied in unincorporated territories of the United States.[51] If applied to Guantanamo, the *Insular Cases* analysis would provide the courts with "functional" flexibility to determine whether protections in military commissions violated certain "fundamental" guarantees.

If military commission trials were held in the United States, the *Insular Cases* would provide no such judicial discretion in applying constitutional guarantees. There would be substantial questions about whether even the least controversial military commission procedures could withstand scrutiny under constitutional provisions applicable in United States territory. For example, the Confrontation Clause of the Sixth Amendment requires that "in criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court recently has determined that the Confrontation Clause bars the admission of testimonial hearsay if the defendant has not had a chance to cross-examine the

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[50] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to a search and seizure by United States agents of property owned by a nonresident alien located in a foreign country); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens")

[51] *See Dorr v. United States*, 195 U.S. 138, 143 (1904); *Downes v. Bidwell* 182 U.S. 244, 293 (1901) (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations with the United States"). The Court in *Boumediene* hinted at using this rubric for determining the scope of constitutional rights at Guantanamo Bay. *See Boumediene*, 128 S. Ct. at 2254.

witness.[52] The Court specifically rejected a test that would allow trial judges to admit such out-of-court testimonial statements if deemed "reliable." As explained above, such a safety valve based on reliability is a common feature of special rules for hearsay in military commissions, whether in the MCA or the proposed amendments for reforming the military commission rules. Under a June 25 Supreme Court decision extending the constitutional bar on hearsay to expert reports, additional questions would be raised about the admissibility of intelligence reports under the Confrontation Clause.[53]

Arguments would still be available that a military commission does not qualify as a "criminal prosecution" for purposes of the Sixth Amendment.[54] It is unclear whether such arguments would be successful, especially in the appellate courts holding that Confrontation Clause applies to military proceedings, specifically general courts martial.[55] At a minimum, however, the discretion of political branches in crafting rules for military commissions would be narrowed if the trials were held in the territorial United States. Specifically, the political branches would be deprived of some arguments protecting their judgments on well recognized needs for wartime trial. No longer would the political branches be able to assert that constitutional provisions lack extraterritorial reach or are not among the fundamental constitutional rights applicable to certain associated territories outside the United States.

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[52] *See Crawford v. Washington*, 541 U.S. 36 (2004).
[53] *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).
[54] The Supreme Court held in *Ex parte Quirin* that neither the Sixth Amendment jury trial right, nor the mandate in Article III of the Constitution that "the trial of all Crimes, except in cases of Impeachment, shall be by Jury" applies to military commission proceedings. 317 U.S. 1, 39-46 (1942). The Court did not address the applicability of the Confrontation Clause.
[55] *See United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960); *see also U.S. v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007) (specifically applying the rule in *Crawford* to general courts martial). Notably, S. 1390 would direct all appeals from military commission convictions to the United States Court of Appeals for the Armed Forces.

*Post-Conviction / Acquittal Dispositions.* Holding military commission trials inside the United States would also affect the options available to the Congress and the President for addressing disposition of detainees after a military commission trial. The political branches must be prepared to address the risk that a military commission may disagree that a charged defendant is guilty of a violation of the law of war or may assess a sentence insufficient to incapacitate the defendant in a manner consistent with the threat he poses. For military commission trials held at Guantanamo, the remedy for courts may be an order of release, triggering an obligation on the part of the Executive Branch to find a willing foreign country into which to transfer the defendant. This process can be difficult.

One remedy that is likely unavailable to a military commission or a federal court reviewing the habeas petition of a person held at Guantanamo Bay is ordering his release into the United States. In this regard, the United States Court of Appeals for the D.C. Circuit recently held that a federal court cannot order the Government to bring Guantanamo detainees into the United States, outside the framework of federal immigration laws.[56] This ruling was not a departure from Supreme Court precedent or constitutional text. The Constitution explicitly grants Congress the authority to establish "an uniform Rule of Naturalization."[57] The Supreme Court consistently has interpreted the Naturalization Clause to give Congress exclusive control as to who is permitted entry to the territorial United States.[58] To order the release of a Guantanamo detainee into the United States without statutory authorization, the Supreme Court

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[56] *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).
[57] U.S. Const. Art. I, § 8, cl. 4.
[58] "For more than a century, the Supreme Court has recognized the power to exclude aliens as 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers -- a power to be exercised exclusively by the political branches of government.'" *Kiyemba*, 555 F.3d at 1025 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

would be required to overturn or carefully to distinguish more than a century of prior decisions.[59] As the Court has put it, there is "not merely 'a page of history, . . . but a whole volume' reaffirming the exclusive power of the political branches in this field."[60]

Moving military commission trials to the United States would therefore narrow the discretion of the Congress, and whatever authority Congress delegates to the President, as to *where* as opposed to *whether* a military commission defendant should be released. Whatever the merits of holding military commission trials in the United States, the Congress should be aware that doing so likely will impose a judicial check on its decisions as to where detainees currently at Guantanamo are released after an acquittal or the completion of sentence.

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Thank you again for the opportunity to discuss this important issue with the Committee. I am prepared to answer the Committee's questions.

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[59] *See Demore v. Kim*, 538 U.S. 510, 521-22; *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst*, 408 U.S. at 765-66; *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Young Yo v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

[60] *Galvan*, 347 U.S. at 531 (quoting *N.Y. Trust Co. v. Eisner*, 256 345, 349 (1921)).