

**Statement of
Deborah N. Pearlstein**

**Prepared Testimony to the
Subcommittee on Terrorism and Homeland Security
Committee on the Judiciary
United States Senate
July 28, 2009**

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

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Introduction

Chairman Leahy, Subcommittee Chairman Cardin, Ranking Member Kyl, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject. The Preliminary Report of the Obama Administration Detention Policy Task Force, issued July 20, 2009, announces the Administration's intention to use reformed military commission proceedings to try some fraction of the detainees currently held at the U.S. Naval Base at Guantanamo Bay.¹ As I recently testified before the House Judiciary Committee, while I continue to doubt that the use of a new military commission system going forward is a wise or necessary course of policy, I also believe that it is possible to conduct military commission proceedings for certain crimes in a way that comports with U.S. and international law.² Ensuring that any future proceedings meet those standards is now a critical responsibility of Congress.

The testimony that follows begins by briefly recalling the importance of the President's decision to close the detention facility at Guantanamo Bay. These comments

¹ Memorandum from Brad Wiegmann, Col. Mark Martins, Detention Policy Task Force, to the Attorney General and Secretary of Defense of the United States (Jul. 20, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/law-of-war-prosecution-prelim-report-7-20-09.pdf> [hereinafter DPTF Preliminary Report].

² My previous testimony on this matter, written and oral, was provided on July 8, 2009, to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in connection with its hearing "Legal Issues Surrounding the Military Commissions System." It is available at http://judiciary.house.gov/hearings/hear_090708.html.

are in response to recent statements challenging the wisdom of this decision – statements that fly in the face of the broad, bipartisan recommendation of leading military and civilian national security experts to the contrary, and ignore the compelling reasons why it is so important that Guantanamo be closed. A second section highlights a few key recommendations essential to help ensure that any military commission process going forward complies with applicable U.S. and international law. The final section discusses the proposed protocol put forward by the Detention Policy Task Force for determining whether criminal prosecution of Guantanamo detainees should proceed in an Article III court or in military commission. Although the protocol is right to note that prosecutors have traditionally enjoyed some discretion in choosing among lawful fora for criminal prosecution, much remains to be clarified in these exceptional circumstances to ensure that discretion is exercised consistent with the rule of law in the United States.

Closing Guantanamo

There should be no question that President Obama made the right decision in announcing the closure of detention facilities at Guantanamo Bay. Indeed, it is for powerful reasons that closure had been urged not only by President Obama and Senator McCain, but by the head of U.S. Central Command, General David Petraeus, and many other leading military and civilian authorities in U.S. national security.³ As the President

³ See, e.g., Radio Free Europe/Radio Liberty, “Transcript: RFE/RL Interviews U.S. Central Command Chief, General David Petraeus,” May 24, 2009, available at http://www.rferl.org/content/transcript_RFERL_Interviews_US_Central_Command_Chief_General_David_Petraeus/1738626.html; Jonathan Winer, “Bipartisan Experts Tell Congress to Let Guantanamo Detainees Come to United States,” Counterterrorism Blog, July 13, 2009, available at http://counterterrorismblog.org/2009/07/bipartisan_experts_tell_congre.php (signatories include M.E. (Spike) Bowman, former Senior Counsel for the Federal Bureau of Investigation and Deputy Director of the National Counterintelligence Center; Robert Hutchings, former Chairman of the U.S. National Intelligence Council; Dr. David Kay, former head of the Iraq Survey Group; Brig. Gen. Mark T. Kimmit,

emphasized in his recent speech at the National Archives: “Instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.”⁴ The consensus is overwhelming that Guantanamo has hurt U.S. national security more than it has helped. It would be irresponsible as a matter of national security to allow the problem to continue to fester.

While the policy goal is thus clear, it must be recognized that the task of closing Guantanamo has been made significantly more difficult as a result of the past seven years of treatment of the detainees now held at Guantanamo Bay – treatment that was in many respects unlawful. The past Administration neglected to adhere to U.S. obligations under Article 5 of the Third Geneva Convention to afford detainees a status hearing after capture,⁵ and the first orderly inquiries into detainees’ identities in many cases were thousands of miles and many years removed from reliable information about the original circumstances of detention.⁶ Some detainees were subject to torture and cruelty,⁷ and their statements – information that might otherwise have constituted evidence in a

Assistant Secretary of State for Political Military Affairs; Rear Adm. James E. McPherson, TJAG of the Navy 2004-06; Paul Pillar, former Deputy Chief Director of Central Intelligence’s Counterterrorist Center; William S. Sessions, former FBI Director; Philip Zelikow, former executive director of the 9/11 Commission); *Guantanamo’s Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40, available at <http://www.theatlantic.com/doc/200710/guantanamo-poll> (surveying a bipartisan array of leaders in U.S. foreign affairs and national security).

⁴ The White House, Remarks by the President on National Security, May 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter National Archives Speech].

⁵ See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶ See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 52-56 (2003), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf> (summarizing status of Guantanamo detainees).

⁷ See, e.g., Neil A. Lewis & David Johnston, *New F.B.I. Files Describe Abuse of Iraq Inmates*, N.Y. TIMES, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subjected to temperatures freezing or “well over 100 degrees”).

criminal prosecution – are now tainted by the coercion to which they were subject. Many detainees have simply been held for years without ever being advised that they have any rights or hope of release, all but eliminating the possibility of obtaining from them any statement about their past conduct voluntary enough to be admissible in a criminal case.⁸

As a result of these actions and omissions, prosecution options that might ordinarily be available under existing U.S. and international law for the handling of terrorist suspects may now be foreclosed. This is not to suggest it is not possible to close Guantanamo Bay. On the contrary, the facility can and must be closed. It is, however, to caution that in resolving the particular policy disaster that is Guantanamo, we ought not also assume we are setting the standard for all U.S. terrorism trial practice going forward. The Administration and Congress should continue working to keep separate two different problems that must be faced in turn: (1) how best to resolve the cases of the Guantanamo detainees, whose options are uniquely limited by past mistakes, and (2) what kind of system is best used for terrorism trials going forward. In enabling the Guantanamo facility's closure, which must be the immediate goal, only the first question must be answered. The recommendations that follow are based on this understanding.

Military Commission Recommendations

In recent testimony before the House Judiciary Committee, I offered a series of specific recommendations for how the Military Commissions Act of 2006 should be amended if commission proceedings going forward are to comply with U.S. and

⁸ *See, e.g.,* *Lego v. Twomey*, 404 U.S. 477, 483 (1972) (recognizing it as axiomatic that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession”) (internal quotations omitted).

international law.⁹ Among other points, I urged that Congress clarify that *involuntary* statements – whether obtained through torture, cruel treatment, or any other method – not be admissible in commission proceedings.¹⁰ I also advocated that military commission judgments be subject to full review on appeal in Article III courts, with broad jurisdiction to review questions of both fact and law. These and other recommendations for amending the MCA are explained in greater detail in that testimony, and I ask that the previous testimony be incorporated by reference here. In addition to those recommendations, there is one centrally important point I wish to emphasize here.

Any new legislation regarding military commissions must include a sunset provision or other structural mechanism to ensure that the commissions are strictly limited in purpose and duration. Such structural limitations are essential not only to bolster the commissions’ already tarnished legitimacy, but also to ensure their constitutionality. As the Supreme Court has consistently recognized, our constitutional structure reflects a strong preference that determinations of guilt and innocence be carried out by independent courts created under Article III.¹¹ In keeping with this constitutional presumption, the extent to which the Supreme Court has approved the use of Article I military courts has been strictly limited. Congress’ Article I power “[t]o make Rules for the Government and Regulation of the land and naval Force” authorizes the extension of court martial jurisdiction over persons actually in the armed services, but not over those

⁹ See Deborah Pearlstein, Testimony to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, “Legal Issues Surrounding the Military Commissions System,” Jul. 8, 2009, available at http://judiciary.house.gov/hearings/hear_090708.html (written and oral statements) [hereinafter Pearlstein House Testimony].

¹⁰ See, e.g., *Lego v. Twomey*, 404 U.S. 477, 483 (1972) (recognizing it as axiomatic that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession”) (internal quotations omitted).+

¹¹ See, e.g., *Toth v. Quarles*, 350 U.S. 11, 15-16 (1955) (“The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.”).

who have been honorably discharged from service.¹² Likewise, Congress' power to punish "Offenses against the Law of Nations" has been recognized, albeit in a historically discredited opinion, to authorize the trial by military commission of individuals who commit offenses against the law of war, but only insofar as Congress' military commissions legislation of the time was read to be consistent with the common law and international law of war that applied.¹³ The Court's most recent views on the legality of military commissions, expressed in *Hamdan v. Rumsfeld* in 2006, should leave little doubt that any military commission structure, even with congressional authorization, may be subject to constitutional limits.¹⁴

What are those limits? While it is not clear how the current Court will approach a new Article I tribunal expressly authorized by Congress, the *Hamdan* Court emphasized that military commissions had been recognized historically at common law in just three circumstances: (1) as a substitute for Article III courts in situations of martial law, (2) as part of a temporary governing structure over territory occupied by U.S. military forces, and (3) as "incident to the conduct of war."¹⁵ Only the third circumstance is relevant

¹² *Toth v. Quarles*, 350 U.S. 11 (1955); *see also Reid v. Covert*, 354 U.S. 1 (1957).

¹³ *See Ex Parte Quirin*, 317 U.S. 1, 29, 45 (1942) ("We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury....[P]etitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury."). The *Hamdan* Court described *Quirin* as "high-water mark of military power to try enemy combatants for war crimes." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597. Even Justice Scalia has described *Quirin* as "not this Court's finest hour." *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

¹⁴ *See Hamdan v. Rumsfeld*, 548 U.S., 557, 593 (emphasizing that *Quirin* had held only that Congress had "preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions").

¹⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 596 (2006) (quoting *Quirin*, 317 U.S., at 28-29); *see also Hamdan*, 548 U.S., at 597-98 ("The classic treatise penned by Colonel William Winthrop ... describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. ... [T]he offense charged 'must have been committed within the period of the war.' No jurisdiction exists to try offenses 'committed either before or after the war.' ... [A] military commission not established pursuant to martial law or an occupation may try only '[i]ndividuals of the enemy's army who have been guilty of

here. In this setting, where a new commission system is seen as functioning other than incident to the conduct of a particular recognized war – whether because the offenses charged are not war crimes recognized under international law, or because the commission itself appears to extend its mandate beyond events occurring “within the period of the war” as recognized by international law – it may be more vulnerable to challenge as exceeding Congress’ authority under Article I.¹⁶

In this respect, the current draft bill on military commissions circulating in the Senate may be read to omit key limitations in defining the jurisdiction of military commissions.¹⁷ While the provision setting forth who may be subject to military commissions properly recognizes that commission defendants must have “engaged in hostilities” against the United States, it does not in this section make clear that such “hostilities” must occur within the context of an armed conflict recognized under international law.¹⁸ Similarly, while the jurisdictional provision of the military commissions set forth in the draft bill properly (and necessarily) targets offenses against the “law of war,”¹⁹ it does not make clear that the offenses must be committed “within

illegitimate warfare or other offences in violation of the laws of war’ and members of one’s own army ‘who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.’ Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: ‘Violations of the laws and usages of war cognizable by military tribunals only,’ and ‘[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.’”) (internal citations omitted).

¹⁶ See, e.g., *Hamdan*, 548 U.S., at 596 (opinion of Stevens, J.); *Hamdan*, 548 U.S., at 603 (opinion of Stevens, J.) (“At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.”).

¹⁷ My comments in this regard are based on legislation introduced earlier this month in the Senate, S. 1390, and in particular Subtitle D thereof, available at <http://www.thomas.gov/cgi-bin/query/z?c111:S.1390>.

¹⁸ S. 1390, amending Chapter 47A of title 10, United States Code, at Section 948c. International law recognizes both international and non-international (internal or transnational) forms of armed conflict. *Hamdan*, 548 U.S., at 629-631. Section 950p(c) of the draft legislation may be intended to recognize this limitation in part (recognizing that offenses under the act are triable only if “committed in the context of and associated with armed conflict”). But this provision does not limit the durational authority of the commission structure as a whole. It is also less than clear what is intended by the phrase “*in the context of and associated with* armed conflict.”

¹⁹ S. 1390, amending Chapter 47A of title 10, United States Code, at Section 948d.

the period of the war” as defined by international law. As the *Hamdan* Court noted: “No jurisdiction exists to try offenses ‘committed either before or after the war.’”²⁰

Whether such jurisdictional limitations are reflected in new legislation by describing the particular conflict at issue (clarifying when it began and at least acknowledging that it will have an identifiable end), or whether they are reflected in a time limit provision per se, Congress would be wise to include them. Absent clearer formal recognition that “military commissions” cannot exercise jurisdiction over every crime committed at any time, Congress may not only exceed its constitutional authority, it will have created a standing national security court by another name.

Forum Selection Protocol

In addition to the interim report, the Administration Detention Policy Task Force last week also issued a separate proposed protocol setting forth how the Administration intends to decide whether a case should be prosecuted in an Article III court or a military commission.²¹ The Task Force Protocol is right to recognize that federal prosecutors in the United States have traditionally been entitled to discretion in choosing among available prosecutorial fora. The Protocol also importantly makes clear that it is not intended to restrict the “exercise of independent discretion” by prosecutors involved in Guantanamo cases, and that federal court and commission prosecutors alike should be guided to the extent applicable by the traditional principles of federal prosecution set forth in the U.S. Attorneys’ Manual. The single biggest threat to the legitimacy of the

²⁰ *Hamdan*, 548 U.S., at 597-98 (opinion of Stevens, J.) (internal citations omitted).

²¹ See DPTF Preliminary Report, *supra*, note 1 (“Determination of Guantanamo Cases Referred for Prosecution”), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/tab-a-prosecution-protocol-7-20-09.pdf> [hereinafter Prosecution Protocol].

military commissions going forward is the danger that the commissions will function, in perception or reality, as a second-class form of justice for cases involving evidence insufficient to prevail in prosecution in a traditional Article III setting. Adhering as closely as possible to traditional forum selection principles that apply, and fiercely protecting prosecutorial independence so that prosecutors may, free from political influence, exercise their professional judgment about how best to proceed – these are indispensable safeguards if commissions are to move forward without the taint of illegitimacy that have so infected commission trials to date.²²

At the same time, the proposed Protocol raises a number of questions about the circumstances under which it is to be followed, and the relative weight the factors it identifies are to be accorded. In part, such questions might be addressed by the inclusion of guidance clarifying the limited extent to which the selection problem may arise. That is, military commission trials may only be considered *at all* in those cases in which prosecutors have probable cause to believe that a specifically defined *war crime* has been committed, and that evidence admissible in the commission forum will likely suffice to sustain a conviction.²³ In the absence of either one of those findings, none of the other considerations identified in the Protocol – the gravity of the alleged conduct, the relative efficiency of the fora, foreign policy concerns, etc. – are relevant to the prosecutorial decision. (It may be that the Administration understands and shares this view, but it is far from clear in the text of the Protocol itself.) Accordingly, independent, professional prosecutors must have arrived at clear and affirmative answers to these threshold

²² See Pearlstein House Testimony, *supra*, note 9, at pp. 3-8, 13-16.

²³ See U.S. ATTORNEYS' MANUAL, Sections 9-27.200 and 9-27.220, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (setting forth the relevant standards and their basis in federal law).

questions (i.e. probable cause of a war crime, and evidence sufficient for prosecution) before the Protocol is even invoked.

A second critical set of questions arises after it has been determined that commissions are lawfully available. The Protocol appropriately embraces a preference for proceeding in Article III courts, but leaves troublingly vague how and to what extent this preference is to be reflected.²⁴ The Protocol's failing in this respect is not a function of its recognition that many factors may be taken into account in making a selection decision; the choice of which among more than one lawfully available forum is appropriately informed by a range of concerns, and the exercise of some discretion is inevitable. The failing is in neglecting to make clear for prosecutorial decision-makers why and to what extent the "presumption" in favor of Article III courts exists. In my view, there are at least two critically important reasons. The first is that such a "preference" is most consistent with (perhaps compelled by) the structure of our Constitution. As the Supreme Court has emphasized:

"There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service Determining the scope of the constitutional power of Congress to authorize trial by [military court over non-servicemembers] presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'"²⁵

A strong reading of this caveat might lead to a selection criterion that *required* Article III trial unless there is no offense for which a defendant may be charged under ordinary federal criminal law.

²⁴ See Prosecution Protocol, *supra*, note 21 ("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. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there.").

²⁵ *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955) (internal citation omitted).

A second reason goes to the very real problem of ensuring that commission trials are legitimate, and perceived as such by Americans and others in the international community. The President's wise recognition that Guantanamo has had the effect of expanding the base of al Qaeda recruits has practical consequences in this regard.²⁶ Just as with the Guantanamo detention system in general, the taint of unfairness understandably extends to the military commission process in particular. As the commissions proceed through the inevitable set of challenges they will face in the courts, the Administration and Congress must recognize that whatever tactical gain may be achieved in trial-by-commission in the first instance will bring with it a strategic cost of conducting trials under a system many will likely continue to see as lacking in legitimacy. As the President himself appears to believe, the United States has already suffered significant strategic losses in the global struggle against terrorism. It is in the security interest of the United States to minimize those losses going forward.

Conclusion

It is still possible to create a lawful set of rules for the operation of military commission trials. But it remains a significant challenge for all three branches to see it done. I am grateful for the Committee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

²⁶ National Archives Speech, *supra*, note 4.