

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
TESTIMONY OF SCOTT L. SILLIMAN ON
DOJ OVERSIGHT: PRESERVING OUR FREEDOMS WHILE
DEFENDING AGAINST TERRORISM

Wednesday, November 28, 2001

Mr. Chairman, Senator Hatch and members of the Committee. My name is Scott L. Silliman and I am the Executive Director of the Center on Law, Ethics and National Security at the Duke University School of Law. I am also a senior lecturing fellow at Duke and hold appointments as an adjunct professor of law at Wake Forest University, the University of North Carolina, and North Carolina Central University. My research and teaching focuses primarily in the field of national security law. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department. During Operations *Desert Shield* and *Desert Storm*, I served as the senior Air Force attorney for Tactical Air Command, the major command providing the majority of the Air Force's war-fighting assets to General Schwarzkopf's Central Command.

I thank you for the invitation to discuss with the Committee some of my concerns with respect to the inherent tension which exists in successfully defending against terrorism while at the same time preserving our freedoms. In the event that members of al-Qaeda are captured or surrender incident to the military campaign in Afghanistan, or if individuals suspected of complicity in the attacks of September 11th are arrested in this country or elsewhere, there are several prosecutorial options available to the government. These are (1) trial in the federal district courts, as was done with regard to those responsible for the initial attack upon the World Trade Center in 1993 and upon our embassies in Kenya and Tanzania in 1998; (2) trial in the courts of any other country, under the principle of universal jurisdiction; (3) trial before some type of an international tribunal, either one currently in being or one to be established in the future; or (4) trial by military commission or other military tribunal established by the President in his capacity as Commander-in-Chief. None of these approaches is optimal; all have problems and limitations associated with their use. The President, however, has indicated his intent to pursue the use of military commissions and, accordingly, my comments will be restricted to the military order issued on November 13th which authorizes the detention, treatment and trial of certain non-citizens in the war against terrorism. In particular, I will discuss what I consider to be a weakness in the Administration's argument regarding the President's legal predicate for authorizing the use of military commissions with respect to the terrorist attacks on September 11th, a weakness which I believe needs to be remedied by the Congress through legislation. I will then discuss my policy concerns as to the overall breadth of the current order and how I believe it could adversely impact our international credibility as a nation under the rule of law.

Authority of the President to Authorize Military Commissions

The military order of November 13th lists three statutory provisions which, in addition to the President's constitutional powers, are cited as authority for the order. These are the Authorization for Use of Military Force Joint Resolution, signed by the President on September 18, 2001, and Articles 21 and 36 of the Uniform Code of Military Justice. As to the Joint Resolution, the key operative language is contained in Section 2(a) which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Section 2(b) declares that Congress, through this resolution, is satisfying its own requirements under the War Powers Resolution of 1973 regarding the need for a specific statutory authorization approving the use of our armed forces in this regard. There can be no doubt that the Joint Resolution is meant to buttress and affirm the President's right as commander-in-chief to use force in self-defense against a continuing threat, either from a state or a non-state actor. This inherent right of self-defense, clearly recognized in customary international law and codified (but not supplanted) by Article 51 of the United Nations Charter, was reiterated in United Nations Security Council resolutions 1368 of September 12th (Security Council Res. 1368, UN Doc. SC/7143) and 1373 of September 28th (Security Council Res. 1373, UN Doc. SC/7158), both of which referred directly to the attacks of September 11th. It should be noted, however, that although there are frequent references in the text of the Joint Resolution to "terrorist acts" and "acts of international terrorism", nowhere in the resolution, or in the presidential signing statement, is there any mention or characterization of the attacks of September 11th as acts of war. They are clearly denoted as *terrorist* acts.

Under the Constitution, Congress was granted authority to make rules for the government of the land and naval forces (Article I, Section 8, Clause 14). It did so most recently through enactment of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801 et seq., in 1950. Article 21 of the Code, cited in the President's military order, mentions military commissions but does so only in acknowledging that the Code's creation of jurisdiction in courts-martial to try persons subject to the UCMJ, does "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, provost courts, or other military tribunals" (10 U.S.C. §821). A corresponding provision in Article 18 of the UCMJ, although not cited in the military order, provides that "(G)eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (10 U.S.C. §818). Articles 18 and 21 can only be read as reflective of Congress' intent, by enacting statutory authority for trials by courts-martial and providing for the concurrent jurisdiction of courts-martial with military commissions, not to divest the latter of the jurisdiction that they have by "statute or by the Law of War". The other provision of the UCMJ specifically cited in the military order is Article 36, 10 U.S.C. §836, which is a general delegation of

authority to the President to prescribe trial procedures, including modes of proof, for courts-martial, military commissions, and other military tribunals. This provision states that the President shall, “so far as he considers practicable, apply the principles of law and the rules of evidence” as generally used in criminal cases in federal district courts (10 U.S.C. §836). In the military order, the President makes a specific finding that using those rules would not be practicable in light of the “danger to the safety of the United States and the nature of international terrorism” (Section 1(f), Military Order of November 13, 2001). This provision, therefore, has relevance only to the rules for the conducting of military commissions, rather than to the authority for establishing them.

Has Congress legislated as to war crimes, other than in the UCMJ? Although the Constitution grants Congress authority to define and punish offenses against the law of nations (Article I, Section 8, Clause 10), it has done so only in a very limited manner through the War Crimes Act of 1996 (18 U.S.C. §2441). That statute makes punishable any grave breach or violation of common Article 3 of the Geneva Conventions, any violation of certain articles of Hague Convention IV of 1907, or a violation of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, when either the perpetrator or the victim is a member of the United States armed forces or a national of the United States. None of these treaty provisions, violations of which are proscribed under the Act, appear to be applicable with regard to the terrorist attacks. Therefore, since the only relevant statutory references to military commissions are contained in the UCMJ, and those only recognize jurisdiction with respect to offenses proscribed by statute (of which none apply here) or the law of war, a subset of international law, it is the law of war to which we must now turn.

Customary international law clearly recognizes the authority of a military commander to use military tribunals to prosecute offenses against the *jus in bello* occurring during an armed conflict. The *jus in bello*, regulating how war should be conducted, differs from the *jus ad bellum*, which governs when the use of force is permissible by one state against another. Our history is replete with instances of military tribunals being used to deal with violations of the *jus in bello* in times of armed conflict, with the trials of General Yamashita and the German saboteurs during World War II being the most recent examples.

My concern with regard to the legal predicate for the application of the President’s military order is that violations of the law of war—the *jus in bello*—do not occur within a vacuum; they must by definition occur within the context of a recognized state of armed conflict. I maintain that at shortly before 9:00 am on the morning of September 11th, we were *not* in a state of armed conflict and we did not enter into such a state until sometime thereafter. Therefore, with regard to the attacks of September 11th, the principal event prompting our armed response in self-defense against Osama bin Laden and the al-Qaeda organization in Afghanistan, these are clearly acts of terrorism in violation of international law, but not necessarily violations of the law of war. If my premise is correct, then it presents an impediment to using military commissions for the trial of those charged with or complicit in those particular attacks, as distinguished from charges relating to later events. Some may argue that the events of September 11th demand a reappraisal of existing customary international law concepts with

regard to the distinction between state and non-state actors and that, irrespective of whether the attacks were carried out by one, nineteen, or a greater number of terrorist non-state actors, these attacks should be considered, at the instant they occurred, as nothing short of an act of war. I am unwilling to concur in that argument and, as will be discussed later, I believe the answer to this problem lies in legislation rather than an instantaneous sweeping aside of longstanding principles of customary law.

In many of the Administration's pronouncements in support of the military order of November 13th, the Supreme Court opinion in Ex Parte Quirin, 317 US 1 (1942), is mentioned. I submit that Ex Parte Quirin, the case involving the eight German saboteurs who, in 1942, landed on our shores in Florida and Long Island with intent to do damage to our defense facilities, bears closer scrutiny than it has been given by military commission proponents. The Supreme Court sanctioned the use of a military commission to try the saboteurs, but did so in the context where there was a formal declaration of war by Congress and the individual saboteurs had entered this country surreptitiously. Even though one of them, Haupt, claimed to be an American citizen by virtue of the naturalization of his parents while he was still a minor, the Court determined that such citizenship did "not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war" (Ex Parte Quirin, 317 U.S. 317, 37 (1942)). Throughout Chief Justice Stone's opinion, there are references to the power of the President as Commander-in-Chief *in time of war*. Ten years later, Justice Robert Jackson, in his concurring opinion in the *Steel Seizure Case*, would develop his oft-quoted analysis of presidential powers in relation to those of Congress and determine that the President's authority is at a maximum when he acts pursuant to an express or implied authorization of Congress (Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579, 592 (1952)). The Congressional declaration of war against Germany was just such a mandate for President Roosevelt, especially bearing in mind that the eight saboteurs breached our shores just seven months after the attack on Pearl Harbor where the vulnerability of this country to attack was shockingly realized. That realization of vulnerability also gave birth to the infamous internment camps for Japanese Americans which were established during this very same period and which were sanctioned by the Supreme Court in Korematsu v. United States, 323 US 214 (1944), an opinion which virtually no one claims has continued precedential value. Thus, I suggest that to draw authority from Ex Parte Quirin for the military order of November 13th is to take the case out of the context of the very specific circumstances in which it was decided, a declared war and a Supreme Court desiring to maximize the President's authority to act to defend our shores against an attack from state actors. No such context exists now, no matter how much we proclaim the "acts of war" of September 11th and try to make terrorists into state actors.

In conclusion of the first part of my statement, dealing with what I consider a weakness in the argument for the President's legal authority to use military commissions to prosecute terrorists for offenses against the law of war occurring on September 11th, I submit that this weakness can be remedied, certainly as to future acts of terrorism which do not reach to the level of being offenses against the law of war. If Congress were to enlarge the scope of Articles 18 and 21 of the Uniform Code of Military Justice by either changing the words "law of war" to "law of nations", thereby incorporating acts such as those of September 11th, or by inserting additional language setting forth

specifically denoted acts of terrorism, such an amendment would empower military commissions (Article 21) and courts-martial (Article 18) to prosecute acts of terrorism outside the context of a recognized state of armed conflict. As to the use of courts-martial, however, this would necessitate pretrial, trial and post-trial procedures, including modes of proof, as prescribed in the Manual for Courts-Martial, Exec. Order 12960, 63 Fed. Reg. 30065 (June 2, 1998), unless the President, acting under the Congressional delegation of Article 36 of the Code, were to modify those procedures, as he has done in the November 13th military order.

Policy Concerns Regarding the Use of Military Commissions

Mr. Chairman, my comments to this point have reflected a specific legal concern regarding the Constitutional predicate for the President to authorize the use of military commissions. I would now like to share with the Committee my more general policy concerns regarding the choice of military commissions as against other prosecutorial forums. I should say at the outset that my area of greatest concern is with respect to military commissions sitting in the United States and prosecuting resident aliens who entered this country legally and whose only offense might be that they are, or were at some time in the past, members of al-Qaeda.

I acknowledge the convenience and possible prudence of commissions sitting in overseas areas, especially in a theater of military operations, for the prosecution of those members of al-Qaeda who are captured incident to combat in Afghanistan, and I think an argument could certainly be made that the Supreme Court's opinion in Johnson v. Eisentrager, 339 U.S. 763 (1950) would preclude judicial review by the Article III courts over such commissions held overseas. The concept of military commissions sitting in this country is another matter.

The administration has evidenced frustration with what it perceives to be restrictions and limitations that seemingly hinder prosecutors in attempting to bring terrorists to trial in our federal district courts. Mention has been made of the rules governing disclosure which would compel release of sensitive intelligence information. The lengthy trials of those convicted of the 1993 bombing of the World Trade Center and the 1998 attacks upon our embassies in Africa are cited as examples of the inability of the federal district courts to adequately cope with trials of terrorists. Further, it is argued that a criminal justice system which incorporates rehabilitation and reincorporation into society as part of the sentencing process is ill-suited to deal with those whose zealous religious beliefs idealize martyrdom. I suggest that these arguments are not necessarily persuasive. Congress has provided tools for prosecutors to deal with classified information in criminal trials, notably the Classified Information Procedures Act, 18 U.S.C. App §1 et seq. (1980), and the two prior successful convictions of al-Qaeda terrorists are indicative that it can be done, no matter how problematic for prosecutors the trials may be.

As to the option of using international tribunals, I concede that no existing tribunal has jurisdiction over the terrorists. Neither the ad hoc tribunal for the former Yugoslavia, nor the one for Rwanda, could prosecute terrorists without the United Nations Security Council having to make

specific amendments to either of their respective charters. The International Criminal Court, a UN sponsored treaty-based tribunal, is not yet in existence and, even if a sufficient number of states were able to quickly ratify the Rome Treaty, that tribunal has only prospective jurisdiction. Lastly, although the United Nations Security Council could create yet another ad hoc tribunal for the specific purpose of dealing with terrorist acts, any such attempt would surely founder because of the inability of the international community to agree upon a definition of “terrorism”—a flaw that greatly restricts the feasibility of using any international tribunal for this purpose. Thus, international tribunals do not provide us with a current, viable forum for prosecuting terrorists.

The third option, trials by other countries under the jurisdictional principle of universality, is not well-suited to the United States for policy reasons. I agree with critics of this option that America needs to be directly or at least indirectly involved in the prosecution because the attack upon our people and our facilities occurred within our country and we clearly have the greatest interest in prosecuting those responsible for or complicit in the attacks. Further, the opportunity for capital punishment, and its arguable deterrence value, is greatly diminished when other sovereigns conduct the prosecutions within their own countries. This potential choice of forum is the least practical.

Acknowledging that none of the prosecutorial forums is optimal, but that the two most feasible are trials in our federal district courts and trials by military commission, the President clearly signaled his intent on November 13th to use the latter. I suggest that this choice may entail costs which outweigh the benefits, notably with regard to commissions sitting in this country. I believe we should be cognizant of a potential adverse impact upon our international credibility, as well as a tarnishing of the image of 50 years of military Justice under the UCMJ.

It was but five years ago that the United States roundly condemned the conviction by a military tribunal in Peru of New York native Lori Berenson on charges of terrorism. Through official channels, we requested that she be retried in a civilian court because of the lack of due process afforded her in the tribunal. Our cries of unfairness were echoed by United Nations officials who openly criticized Peru’s anti-terrorism military courts. There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President’s military order, and I believe this opens us to a charge of hypocrisy from the international community. The force of this criticism could be lessened if those who advise the Secretary of Defense counsel him to ensure a high level of due process in the regulations establishing the commissions, but the charge laid against us can never be totally ameliorated. Consequently, I believe our use of military commissions may result in a fracturing of the large and disparate coalition which has been put together to wage the long-term campaign against terrorism worldwide, a campaign which must necessarily involve far more than the use of military force.

As to my second point, my sense is that the American people do not accurately perceive the distinction between courts-martial under the military justice system and military commissions which could be empaneled under the President’s order. I have heard it said on radio talk shows that if military commissions are good enough for our servicemen and servicewomen, then they are certainly good

enough for terrorists. Even former Deputy Attorney General George Terwilliger, on this past Sunday's news program *Face the Nation*, said that "there is a fundamental misconception that somehow a military court cannot be just. Our own soldiers and airmen are subject to military justice on a regular basis. The military can provide fair trials." This suggests to me that a segment of the American people, having perhaps become acquainted with military justice through the portrayal of courts-martial on television or in the movies, believe that military commissions will generally follow the same rules of procedure and modes of proof. This Committee knows that is not so. There is a marked contrast in the protections afforded our service personnel under the military justice system, and the lack of due process in military commissions. To illustrate, there is a guarantee of judicial review under the former; that is specifically denied under the latter. Although courts-martial may, under certain circumstances be closed to the public, the evidentiary rules and burden of proof required for conviction are virtually identical to those in our federal district courts; that is not the case in military commissions. In other words, the two systems have little in common, and this must be made clear as the debate on the propriety of using military commissions continues.

In the final analysis, the decision is one for the President to make, and he has already indicated the probable path he intends to pursue. I believe, however, that hearings such as are being conducted by this Committee will allow for a broad and balanced airing of views on this issue, not only to hopefully better inform the Members in both chambers, but also to give the Administration the benefit of additional voices in the debate. This should, and must, be done before the first terrorist is brought to trial.

Mr. Chairman, Senator Hatch and members of the Committee, thank you again for inviting me to share my concerns with you. I look forward to answering any questions you might have.