Detention Policy Task Force

Washington, D.C. 20530

July 20, 2009

MEMORANDUM FOR THE ATTORNEY GENERAL
THE SECRETARY OF DEFENSE

FROM: Brad Wiegmann 20 Jul 09
Colonel Mark Martins MSM 20 Jul 09

RE: ***Preliminary Report***

The Detention Policy Task Force has thus far focused much of its work on developing options for the lawful disposition of detainees held at Guantánamo Bay. Important questions remain concerning our policies in the future regarding apprehension, detention, and treatment of suspected terrorists, as part of our broader strategy to defeat al Qaeda and its affiliates. We need to consider in greater depth how our military, intelligence, and law enforcement personnel will best support these activities; how we can work together more effectively to plan and execute these activities; what the rules and boundaries should be for any future detention under the law of war; how we can best reconcile our intelligence-gathering efforts with any such detention; how we can make both federal courts and military commissions more effective fora for prosecuting terrorists; how international law will apply in this future context; whether to revise our detention policies in Afghanistan in any respect; and how to incorporate reintegration programs into our detention and transfer policies, among other key issues. As it prepares to address this range of issues, the Task Force submits this preliminary report on two matters—military commissions and a process for determination of prosecution forum—on which significant policy decisions have been made.

Military Commissions

In the current conflict with al Qaeda, the Taliban, and affiliated forces, the unlawful activities of our adversaries can in many cases be fairly characterized both as violations of the law of war and as terrorism offenses under our federal criminal code. This reflects the nature of the conflict in which we are engaged, in which the enemy is a non-state actor and criminal enterprise bent on attacking innocent civilians on a massive scale. The President has concluded that, just as the defeat of al Qaeda will require employment of all instruments of national power—military, intelligence, law enforcement, and diplomatic—so too must we have the ability to hold our enemies accountable for their crimes in more than one forum, namely both federal courts and military commissions. The two systems are not mutually exclusive but should instead complement one another.

As the President has concluded, in cases where enemy terrorists have violated our criminal laws, we will, where feasible, prosecute them in federal court. Federal courts have proven on many occasions that they can successfully meet the challenges of international terrorism prosecutions, and the legitimacy of their verdicts is unquestioned. Although these cases can sometimes be complex and challenging, federal prosecutors have successfully convicted many terrorists in federal courts, including in cases involving extraterritorial crimes. A broad range of terrorism offenses with extraterritorial reach are available in the criminal code, and procedures exist to protect classified information in federal court trials where necessary. The evidentiary rules at trial are well-established, and experienced prosecutors can often find ways to overcome any challenges those rules may pose to introduction of critical evidence in specific cases. There are currently many individuals in our federal prisons who were tried and convicted for terrorism-related offenses in our federal courts, including such notorious figures as Sheikh Omar Abdel-Rahman and Ramzi Youssef, convicted in the 1993 World Trade Center bombing; Wadih El Hage, convicted in the 1998 East Africa Embassy bombings; Zacarias Moussaoui, convicted as a co-conspirator in the 9/11 attacks; and would-be shoe-bomber Richard Reid.

That said, it is also clear that federal courts have not traditionally been used to try violations of the laws of war, and that they are not always best suited to the task. In some cases, prosecutions of such crimes in reformed military commissions will offer a more appropriate forum, and in those instances, cases should be prosecuted there. Military commissions have been used by the United States to try those who have violated the law of war for more than two centuries. They have been used during World War II, the Philippine Insurrection, the Civil War, and the Mexican War, and precursor military tribunals were used even before the founding of the Republic by colonial forces during the Revolutionary War. As the Supreme Court explained in *Hamdan v. Rumsfeld*, military commissions were "born of military necessity" and may be convened "when there is a need to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." 548 U.S. 557, 590 (2006) (citing W. Winthrop, *Military Law and Precedents*, (2d ed. 1920)). The Court has made clear that "Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them." *Id.* at 645.

The prior Administration initially established military commissions without Congressional authorization to prosecute individuals who committed war crimes in the current conflict with al Qaeda, the Taliban, and affiliated forces. Many believed that the procedures for such commissions did not afford adequate process to the accused, and, as a result, the perceived legitimacy of the commissions system was undermined. In 2006, the Supreme Court struck down the commissions as unlawful. *See Hamdan*, 548 U.S. 557. Congress responded quickly by adopting the Military Commissions Act of 2006 (MCA), which provided a detailed statutory system for the commissions that addressed some of the shortcomings of the predecessor system while introducing other areas of controversy. Despite the benefit of Congressional involvement, the commissions still suffered from a perceived lack of legitimacy, in part because of the legacy of the prior system and in part because some of the provisions, such as those that allowed the use of evidence obtained through cruel and inhuman treatment, did not comport with fundamental fairness.

The President has committed to reforming the existing commissions to ensure that they both protect national security and afford due process. As he has concluded, military commissions can and should continue to be available as a forum for the prosecution of our enemies for violations of the laws of war, provided the system is fair, effective, and lawful. Properly reformed military commissions can allow for the protection of sensitive sources and methods of intelligence-gathering; allow for the safety and security of participants; and take into account the realities of the battlefield and the particular challenges of gathering evidence during military operations overseas, while also providing due process to the accused. For example, some of our customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct. Our soldiers should not be required to give *Miranda* warnings to enemy forces captured on the battlefield; applying these rules in such a context would be impractical and dangerous. 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.

Military commissions that take into account these concerns are necessarily somewhat different than our federal courts, but no less legitimate. The principal factors that make military commissions a distinct and appropriate forum lie in the military character of the proceedings and the nature of the offenses subject to their jurisdiction (i.e. violations of the law of war). Their jurisdiction is substantially narrower than our federal courts: they are properly used only in connection with an armed conflict, and only to prosecute offenses against the law of war committed in the course of that conflict. Like federal court prosecutions, however, military commission prosecutions are ultimately subject to Supreme Court review and must afford process to the accused sufficient to withstand judicial scrutiny. As Justice Kennedy has noted, the question of what process is "due" takes into account the "particular context." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). In this context, we recognize that the Court may apply certain due process protections for the accused, while also affording a measure of deference to the political branches with regard to rules that acknowledge national security interests.

If military commissions are to serve as a legitimate part of the U.S. justice system, significant reforms are appropriate to ensure that they are lawful, fair and effective. On May 15, the Administration announced five rule changes—developed with the support of the Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff—as a first step toward meaningful reform of the commissions established by the MCA. These rule changes prohibit the admission of statements obtained through cruel, inhuman, and degrading treatment; provide detainees greater latitude in the choice of counsel; afford basic protections for those defendants who refuse to testify; reform the use of hearsay by putting the burden on the party trying to use the statement; and make clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and the legitimacy of the commission process without compromising our ability to bring terrorists to justice.

In late June, the Senate Armed Service Committee (SASC) took the next step by reporting to the full Senate legislation (section 1031 of S.1390) to reform the MCA. As

Administration officials stated in their testimony before the Committee on July 7, the Administration believes that the SASC bill has identified most of the key elements that need to be changed in existing law and is a good framework for reforming the commissions. In many areas, the Administration fully supports the provisions adopted by the SASC, while in others the Administration has identified a somewhat different approach, and is committed to working with the Committee and other members of Congress to address these limited differences. Among the important changes to the MCA that the Administration supports are: (1) codifying in law a prohibition on use of statements obtained through cruel, inhuman and degrading treatment; (2) further regulating the use of hearsay, to bring the rule more in line with the rules in federal court or courts-martial while preserving an important exception pertaining to the unique circumstances of military and intelligence operations; (3) adopting a "voluntariness" standard for the admission of statements of the accused, while taking into account the challenges and realities of the battlefield; (4) incorporating classified information procedures that are more similar to those applicable in federal court, but appropriately modified for the military commissions context, and to reflect lessons learned in terrorism prosecutions; (5) reforming the appellate process to give reviewing courts more authority to correct both legal and factual errors at the trial level; (6) adopting clear rules requiring the government to disclose exculpatory evidence to the accused; (7) ensuring that the offenses charged in military commissions are law of war offenses; and (8) including a sunset provision requiring Congress to reevaluate the legislation after a term of years. We believe these and other changes will make it possible to have military commissions that are fair, effective, and lawful, without compromising our ability to bring terrorists to justice.

Statutory and rule changes alone are not sufficient to ensure that military commissions function fairly and effectively, however. We continue to work to ensure that military commissions prosecutors and defense counsel have the resources necessary for their work, including adequate translation services, timely hearing transcripts, and expert witnesses. We are also focused on whether defense lawyers detailed to represent detainees accused of capital crimes, in particular, have adequate resources and training. The Administration is committed to responding to these concerns and ensuring that both defense counsel and prosecutors are provided sufficient resources to perform their functions, consistent with their professional obligations. We note that military commission defense counsel, prosecutors, judges, and other officials have amply demonstrated their professionalism, integrity, and independence in the cases that have been litigated thus far.

Prosecution Forum Decisions

As with the overlapping jurisdiction of federal and state courts, or U.S. and foreign courts, the availability of both federal courts and military commissions to prosecute al Qaeda and affiliated forces will create choices for prosecutors. These must be fact-intensive and case-by-case determinations, based on a broad set of factors, in keeping with standards traditionally used by federal prosecutors. Accordingly, the Departments of Justice and Defense have developed a set of criteria for determining when a case should be prosecuted in a reformed military commission rather than in federal court. See Tab A. These criteria include the nature of the offenses to be charged; the identity of victims of the offense; the location in which the offense occurred and the context in which the defendant was apprehended; evidentiary issues; and the extent to which the forum would permit a full presentation of the accused's wrongful conduct,

among others. Decisions about the appropriate forum for prosecution of Guantánamo detainees will be made on a case-by-case basis in the months ahead.

****

Justice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed. Prosecution is one way, but only one way, to protect the American people from such attacks. Where appropriate, prosecution of those responsible must occur as soon as possible, whether in federal court or before a military commission. Justice cannot be done, however, unless those who are accused of crimes are proved guilty beyond a reasonable doubt in a court of law that affords them a full and fair opportunity to contest the charges against them.