NATIONAL INSTITUTE OF MILITARY JUSTICE

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

Discussion Draft Rev. 1, July 6, 2006

A Note from NIMJ

On July 5, 2006, the National Institute of Military Justice ("NIMJ") circulated proposed amendments to the Uniform Code of Military Justice ("UCMJ"). The purpose was to stimulate discussion and help focus the issues for congressional consideration. We have already received a number of thoughtful and constructive suggestions. Some are reflected in the following revision. Others we decided did not need to be resolved in this legislation.

Hamdan v. Rumsfeld addressed a host of important issues. This proposal does not attempt to address them all. Our focus is on the UCMJ, and our objective is to preserve the integrity of the statute and keep any surgery to the absolute minimum. While we refer at one point to the Detainee Treatment Act, we have not attempted to address detention-related issues raised by the Supreme Court's decision.

NIMJ has always placed a high priority on the need to foster public confidence in the administration of military justice. It is equally critical that the public have confidence in the legislative process. Only if Congress acts on the basis of a

fully-developed record of hearings, without undue haste, with an eye to the Constitution, and with a full explanation of and open debate on the conclusions reached will the result gain the confidence of the public.

In the following text, matter to be deleted from the UCMJ is ~~struck-through~~. Matter to be added is double-underscored.

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Text

Sec. 821. Art. 21. ~~Jurisdiction of courts-martial not exclusive~~ Military commissions and provost courts

In time of war or pursuant to an authorization for the use of military force, the President may establish military commissions and provost courts consistent with international law, including the law of war. The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions~~,~~ and provost courts~~, or other military tribunals~~ of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions~~,~~ or provost courts~~, or other military tribunals~~.

Sec. 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, ~~military commissions and other military tribunals,~~ and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) Pretrial, trial, and post-trial procedures, including modes of proof, for military commissions and provost courts may be prescribed by the President by regulations which shall, so far as he considers practicable and with the exception of section 832 of this title (article 32), apply the principles of law and the rules of evidence prescribed for general courts-martial, but which may not be contrary to or inconsistent with any applicable rule of international law. He shall state with particularity the reasons for any determination of impracticability under this subsection, and his determination shall be subject to review only for abuse of discretion or violation of law.

(~~b~~c) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress. Any determination of impracticability under subsection (b) of this article shall also be reported to Congress.

Sec. 866. Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial, military commission, and provost court cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial, military commission, or provost court—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed

Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

(i) The President shall determine which Court of Criminal Appeals will have jurisdiction over a military commission or provost court case.

Comment

The first purpose of the proposal is to state directly, for the first time, the President's power to establish military commissions. At present, military commissions are referred to in several articles of the Uniform Code of Military Justice ("UCMJ"), but the statute in effect simply acknowledges their existence rather than affirmatively authorizing them. This is a function of legislative fortuities dating back to 1916, and is long overdue for correction. The amendment is not intended to disturb rulings such as *Ex parte Milligan*, 71 U.S. 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), that limit the use of military commissions and provost courts. The "time of war" clause is intended to governed by the same standard as is currently found in Rule for Courts-Martial 103(19): "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists . . . ."

The second purpose is to tie military commission procedures to court-martial procedures except to the extent the President determines that court-martial procedures are unworkable. At present, Article 36(a) addresses conformity with district court procedures, but leaves open what the rules may provide if and to the

extent the President determines that district court procedures are unworkable. For military commissions, this is currently addressed only in ¶ 2(b)(2) of the *Manual for Courts-Martial*, which speaks in what can be read as precatory terms, providing that military commissions "shall be guided by" court-martial rules, and then only if there are no contrary regulations and "applicable rules of international law."

The proposal would establish a presumption in favor of using general court-martial procedures, but permits the President to make exceptions based on a particularized statement of reasons. General courts-martial are the highest level of trial court in the military justice system. Reference to their procedures is consistent with Article 18, which confers on general courts-martial jurisdiction over persons who are subject to the law of war. On the other hand, the proposal explicitly exempts military commissions and provost courts from the requirement for an investigation under Article 32, inasmuch as such investigations result in only a recommendation, which the convening authority is free to accept or reject.

Hamdan v. Rumsfeld did not articulate precisely what level of deference applies to presidential determinations of impracticability. The plurality "assume[d] that complete deference is owed to [an Article 36(a)] determination" (slip op. at 60), while Justice Kennedy (slip op. at 5)—the fifth vote—is less clear on this score. He observed that the textual differences between the practicability clauses of Article 36(a) and (b) suggest, "at the least," that determinations under the latter are

entitled to "a lower degree of deference." The proposal seeks to clarify this with respect to presidential determinations not to apply general court-martial procedures in military commissions. Proposed Article 36(b) provides for abuse-of-discretion and contrary-to-law judicial review based on a required presidential statement of reasons. These standards of review are appropriate because the President is entitled to deference on matters committed to his discretion, while questions of law are typically freely reviewable in the courts. The proposal is not intended to authorize the President to establish rules that are inconsistent with treaty obligations. This is consistent with the current text of the *Manual for Courts-Martial.*

To the extent that it permits the President to apply different rules to courts-martial on the one hand and military commissions on the other, the proposal liberates the President from the constraints imposed by the uniformity clause in the present Article 36(b), as understood by the *Hamdan* majority. The effect of the uniformity clause in proposed Article 36(c) would be to require that rules for courts-martial be uniform, to the extent practicable, as among the armed services, and that rules for military commissions also be uniform, to the extent practicable, as among the armed services.

Until 1990, Article 36(b) required that changes in the *Manual for Courts-Martial* be reported to Congress. "The power to repudiate a *Manual* provision has never been exercised, and indeed, it appears that the responsible committees of

Congress have never played a significant role with respect to oversight of the President's power under" Article 36(b). Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216 n.12 (1997). The reporting requirement was repealed as a paperwork reduction measure. The proposal restores the requirement and would apply to rules for military commissions and provost courts as well as those for courts-martial. It would also require reporting of Article 36(b) presidential determinations (including the reasons therefor) to depart from general court-martial procedures in military commissions.

The proposal draws directly on the current *Manual for Courts-Martial*, and deletes obsolete references to "other military tribunals."

The third purpose is to provide for appellate review of military commissions. The UCMJ provides for three stages of appellate review: by a service Court of Criminal Appeals, by the United States Court of Appeals for the Armed Forces, and by the Supreme Court of the United States. Because decisions of the Courts of Criminal Appeals are subject to review by the other courts just mentioned, only the grant of appellate jurisdiction to the Courts of Criminal Appeals in Article 66 of the UCMJ needs to be adjusted. The proposal would render superfluous the Review Panel created by the Department of Defense's Military Commission Order, and require a conforming amendment to repeal the Detainee Treatment Act's grant

of limited military commission appellate jurisdiction to the United States Court of Appeals for the District of Columbia Circuit.

The proposed amendment to Article 66 would require the President to designate which of the Courts of Criminal Appeals will have jurisdiction over a military commission case.

A suitable name for the proposed legislation would be "The Military Commissions Act of 2006."

Sources

1. *Manual for Courts-Martial, United States* (2005 ed.)

2. Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAW., December 2005

3. Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049 (1976)

4. Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003

5. David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003)