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I am the Dean and President of the Franklin Pierce Law Center. I served as a Judge Advocate in the United States Navy from 1973-2000 and as the Judge Advocate General of the Navy from 1997-2000. I am very aware of the honor and privilege of testifying before this Committee on the matter of military commissions. I thank the Committee for this opportunity.

Even greater than democracy itself, the greatest export of all from the United States is Justice. Daniel Webster once said, "Justice, Sir, is the greatest interest of man on earth. It's the ligament which holds civilized beings and civilized nations together." But Justice is fragile and easily disparaged. It must be nurtured and handled with great care.

I was an early and ardent supporter of military commissions. Initially, I was drawn to their historical precedents and, more importantly, I was confident that the United States Armed Forces could and would conduct fair trials even of reprehensible defendants. My own experience gained during 28 years in the Navy and our long history of providing due process while trying our own military personnel in courts-martial gave me this confidence.

Unfortunately, as it turned out, the commissions that were created did not live up to the traditions of the Uniform Code of Military Justice. Predictably, they became a significant distraction for the military. I hasten to add that this was in spite of the stalwart, honorable effort of many, many military personnel themselves. Indeed, that is one of the great tragedies of this saga, and largely makes one of the points that I wish to underline.

The primary role of the military is to fight and win our Nation's wars or, stated more precisely, to provide the time and space necessary for real solutions—economic, cultural, social, religious—to take place. Prosecution of miscreants is an occasionally necessary sidebar to that mission but shouldn't distract from it. We have the UCMJ and the military court-martial system to expedite the legitimate role of the military, not interfere with it.

If a sailor on a ship is alleged to have committed a crime, we must expeditiously and fairly resolve that problem. Otherwise, it can fester and interfere with unit cohesion and impede an effective fighting force. The UCMJ and the Manual for Courts Martial serve that purpose alone. They solve problems for the armed forces; not create them. Our recent history with military commissions has been the opposite. I've come to realize that even a perfect commission regime would be a distraction for the military. It's simply not part of its mission. I am very concerned when the military is called upon to perform functions outside of its core mission even when I'm confident that it can do it well. Preserving and ensuring justice in the United

States is the primary mission of the Department of Justice, not the Department of Defense.

If there will be criticism of our prosecution of alleged terrorists—and there will be—the Department of Justice and the U. S. Federal Court system are equipped to deal with that criticism. Indeed, it is part of their responsibility to face it, address it, and resolve it.

Notably, the criticism will come not only critics outside the judicial process such as the media, foreign allies and enemies, and domestic commentators but also from the legitimate appeal process. Some of the criticism may actually be justified or, at least, defensible. There is no reason in law or logic for the military to be the target of that. Convictions from military commissions will be appealed until Dooms Day just because of the forum of the conviction. Federal courts are impervious to that.

It is decidedly not the responsibility of the Department of Defense or the U.S. military to deal with criticism of such prosecutions. It would, in fact, be detrimental to the military mission. There are valid and important reasons why our military is the most highly respected institution in America. One of them certainly is that the military limits itself to its mission and performs that mission very well. Taking on duties outside of that core mission on an ongoing basis will surely undermine the public's confidence in the military...and divert important resources, human and otherwise, from that mission in order to take on the new one.

We already have proof of this. Besides being a distraction to the vital mission of DoD, military commissions have, to a large extent, become a discredit in spite of the valiant and highly credible efforts of many, many people in uniform. Rather than showcasing the military justice system of which we all are justifiably proud, commissions represent something else entirely. They have not worked often or well. "Fixing" them would help, but won't eliminate undeserved but inevitable criticism.

On the other hand, during the same period, U.S. District Courts have successfully prosecuted literally hundreds of terrorists who now reside in Federal prisons around the country, keeping all Americans safer. Federal courts, including judges, prosecutors, marshals, and other court personnel have decades of experience in these cases. They have developed a justifiable and universally held reputation for fairness, and consequently, they are largely immune to criticism.

There is also now a large body of law that has been developed over the years in the Federal court system. It would take an equal number of cases and decades of trials for DoD to match the Federal precedent contained in the Federal Reporters.

Military judges, prosecutors, and defense counsel rotate out of one assignment into another every three years or so. Without significant changes to longstanding DoD personnel policy, none of them will ever, ever gain the experience in these cases that

is enjoyed by scores of their civilian federal counterparts. We could do that, we could change longstanding DoD personnel policy but again, if we did we would have the tail of terrorist prosecutions wagging the warfighting dog.

It is not only unnecessary, it is inappropriate for DoD to operate a system of justice in parallel to DoJ. The UCMJ and the courts-martial it creates are absolutely necessary to ensure our effective fighting force. But for some of the same reasons that the Posse Comitatus Act prevents the military from enforcing laws against U.S. civilians, we should resist the temptation of using the military to prosecute foreign criminals when DoJ can perform that critical function quite well.

Let us not forget, these are not legitimate warfighters. They are common criminals. They are thugs, cowards who target innocent civilians. We should treat them as such and not elevate their status to that of legitimate enemies. They don't belong in the same category as Major Andre or the German saboteurs.

We don't ask DoJ to fight wars. We shouldn't ask DoD to prosecute terrorists.

If the point of this exercise is to create a court system that will ensure convictions of alleged terrorists against whom we don't have sufficient admissible evidence, then we have missed the point. You can't have a legitimate court unless you are willing to risk an acquittal. If you aren't willing to accept the possibility that a jury will acquit the accused based on the evidence fairly presented, then it isn't really a court. It's a charade.

The corollary to that is that you can't have a real court if the rules of evidence and procedure are so stacked against the defendant that he has no real chance to present his case or defend against the government's case. The admissible evidence against him based on the facts may be so overwhelming that conviction is assured but that must be the consequence of facts, not rules of evidence tilted in favor of the prosecution.

Over the years, federal courts have displayed remarkable ingenuity, flexibility, and resourcefulness in prosecuting terrorists. The Federal Rules of Evidence and Procedure are sufficiently adaptable to accommodate the vagaries of trying those individuals who are captured overseas by military personnel in the midst of performing military operations. I believe the image of the "strategic corporal" having to give Miranda warnings after risking his life to break into the bunker is a red herring.

If you as members of this Committee believe or suspect that the Federal Rule of Evidence or the Federal Rules of Criminal Procedure should be amended to accommodate certain cases and situations, it is preferable to superimpose modest new rules on an extant, tried and true judicial system than to create a whole new system—particularly in light of recent efforts.

It might be wise to set up a task force of experienced judges, prosecutors, and defense counsel to make recommendations to Congress in this regard.

However, if we create yet another military commission system that “contains all the judicial guarantees considered to be indispensable by all civilized peoples” as required by Common Article 3 of the Geneva Conventions, then we have essentially duplicated our own Federal courts. There is no logical reason to create a system that mirrors one already in existence and is functioning so well. We should strive for the minimum change necessary to accomplish the purpose, not a wholesale change to an already effectively functioning system.

Clearly and undeniably, the Administration and this Committee are dedicated to untying this Gordian knot in a way that serves the very best interest of the country. We are now operating under the Military Commission Act of 2006 which many find to be badly flawed. I very much respect and admire your effort to improve it. My recommendation, however, is to repeal it rather than improve it. In the process, I urge you to express this body’s preference to prosecute alleged terrorists in federal court and thereby demonstrate to the world, friend and foe alike, what kind of Justice the United States wishes to export.