

PREPARED STATEMENT OF MICHAEL MERNIN
CHAIR, COMMITTEE ON MILITARY AFFAIRS AND JUSTICE
NEW YORK CITY BAR ASSOCIATION BEFORE THE U.S. SENATE

July 19, 2006

Thank you for the opportunity to appear today on behalf of the New York City Bar Association. The Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City, but also from around the United States and from 50 other countries. I am here today as chair of the Association's Committee on Military Affairs and Justice, which has in the past submitted reports and correspondence to your attention on a variety of issues related to military law.

I would like to focus on our straightforward recommendation which is born of the complexity of the matter at hand. In the wake of the *Hamdan* decision, we want to urge Congress to act quickly to establish an expert panel with a mandate to advise Congress and its committees about the appropriate means to establish a military commission system that would respond – in a transparent non-partisan manner – to the Supreme Court's decision. Legislation authorizing the panel's creation and the method of selecting its members would be relatively simple to draft, and there are existing analogs, in other areas, which we have highlighted in a recent letter to you. Once authorized, such a panel could begin its work without delay, and provide immediate useful advice and drafting assistance to Congress.

On November 13, 2001, the President issued an Executive Order establishing military commissions. The Military Order was adopted in haste without the active

participation of the Judge Advocates, consultation with Congress or public comment. The Association's Committee on Military Affairs and Justice issued one of the first reports studying that order. In our report, we offered criticism and advice as to how the commissions might better be structured to satisfy the competing goals of security, credibility and fairness, and we suggested that, instead of the proposed commissions, a forum based instead on the Uniform Code of Military Justice would be a reasonable starting point. Over time, the rules for military commissions were ameliorated, though many of its procedures remain controversial. Despite the initial haste, the commissions have yet to try a single case.

Now, almost five years later, Congress has been given a fresh opportunity to be heard on this front. We are mindful that the impulse to "get it done" is strong, and not without merit. But having witnessed the results of haste flowing from the November 2001 Executive Order, it should be Congress' goal here not just to get it done, but to "get it right." We firmly believe that a useful tool in getting it right would be to establish an expert panel of former JAGS, practitioners, scholars, and other attorneys who have devoted their careers to these important issues, whose expertise and insight would be the best guarantee that due consideration were given to the security issues, the due process issues, and the human rights issues. This process would serve the twin goals of establishing a workable system to prosecute and punish our enemies who have committed breaches of the law of war, and establishing a system which reaffirms the United States' role as a pre-eminent guarantor of the rule of law and human rights.

We are aware of the National Institute of Military Justice's proposed amendment to the Uniform Code of Military Justice to address this matter. Although the Association

has not yet performed a full review of the proposal, we applaud NIMJ's efforts and, in general, approve its approach. Within the context of the NIMJ proposal, we suggest that an advisory panel, similar to what we propose, could also prove useful to advise both Congress and the President about the modifications to the Uniform Code of Military Justice which could form the foundation of the new military commission system.

Any consideration of proposed legislation will require a thorough review at the time of introduction. While we await such opportunity, the Association has specific concerns about certain issues which will likely be relevant to Congress' consideration and debate, which I will summarize below:

Geneva Convention – Common Article 3

Our Association filed an amicus brief in *Hamdan* arguing for the application of Common Article 3. We could not be more pleased to see the Court recognize that application. Reading the Geneva Conventions in context it is clear that the rules for so called "non-international" conflicts refer to conflicts *not* between nations, as distinct from conflicts between states party to which the entire Conventions apply. Moreover, customary international law and the practice of our State Department and our armed forces have long recognized that Common Article 3 is the minimum safety net for all armed conflict. Whenever and wherever Americans, military or civilian, become captives in armed conflict, we will want to be able to count on those rights. It should be inconceivable for the United States to be the first country in history to turn away from the Geneva Conventions, the bedrock of the law of war.

Transparency

After the President issued the Military Order, of the ten or so follow-on directives establishing the detailed rules for Military Commissions, only one was released for public commentary. That directive concerned establishing the elements of offenses, and we offered comments as requested. The Department of Defense subsequently refused to make public the comments it received.

Procedures

Procedural issues tend to either be results-oriented or security-oriented. Some procedures do involve tough questions of balancing security interests with reasonable due process and fairness. Certain procedures will obviously require modification to accommodate the realities of the situation. For example, Miranda warnings are on their face inapplicable.

Appeals There is no imaginably better appellate tribunal to hear appeals from military commissions than the Court of Appeals for the Armed Forces, a well respected Article I court of civilian justices appointed for 15 year terms. Clearly this court could hear military commission appeals without breach of security. Barring only tribunals held in a theater of operations, we would favor using the CAAF and the intermediate service courts of appeals as recommended by NIMJ.

Evidence: We have no objection, in principle, to permitting more flexible rules of evidence consistent with battlefield conditions and international standards. However, much more specificity is necessary than the wide open concept of “all evidence of probative value.” The use of secret evidence, to which the defendant is denied any access, should not be permitted. The accused must ultimately have access in some form

to evidence supporting the charges against him, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence. As with the procedure used in our federal courts, we believe security redactions, where both court and defendant see only the redacted document, is a reasonable procedure. Any evidentiary disputes should be ruled on by the presiding legal judge before being made available to the members of the commission.

Thank you for considering our views. If you have the need for drafting assistance or further information in your consideration of this important matter, we would be glad to provide assistance to this Committee or to any other panel convened.