MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN v. RUMSFELD*

Prepared Statement of

Eugene R. Fidell

President, National Institute of Military Justice

and

Partner, Feldesman Tucker Leifer Fidell LLP

Washington, D.C.

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Committee on Armed Services

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Mr. Chairman, Senator Levin, and Members of the Committee:

Thank you for affording the National Institute of Military Justice an opportunity to testify this morning on the important subject of military commissions. I have a few points I would like to make in these opening remarks, but I will keep it brief in order to maximize the time available for questions.

First, a word about NIMJ. NIMJ was founded in 1991. Our directors and advisors include professors of law at several nationally-known law schools as well as private practitioners. All but one—a former federal prosecutor—has served on active duty, up to and including Brigadier General and Rear Admiral. We have two overall objectives: to foster the fair administration of justice in the armed services, and to improve public understanding of military justice. As you know, NIMJ circulated a discussion draft on July 6, 2006.

We do not feel that that draft is the last word, but we think it is a sound starting point for your consideration. The draft reflects our respect for the basic integrity of the Uniform Code of Military Justice ("UCMJ") and the traditional interplay of the Executive and Legislative Branch's shared responsibility for military matters.

NIMJ believes that the highest priority for military justice—either the subset that concerns good order and discipline within the armed services or the other subset with which we are dealing today that concerns how we prosecute crimes by an adversary—is the achievement of public confidence in the administration of justice. "Public confidence in the administration of justice" is not another way of saying we have 100% assurance—mathematical certainty—that every person who is charged will be convicted. Rather, it is a shorthand way of summarizing all of those deeply held values—values that reflect the

commitment of the generation of the Founders to due process of law and fundamental fairness. This sounds like an obvious proposition, but it bears repeating because there have been times, reviewing prior testimony taken here and elsewhere, when it has seemed that there are those who believe the military commission system rules must *ensure* convictions. I believe they must ensure *fairness*. If that means some who are guilty may not ultimately be convicted, that is the price we pay for having a legal system.

The basic approach of NIMJ's discussion draft is to strongly tilt military commissions in the direction of general courts-martial, our felony-level military court. This is consonant with the current *Manual for Courts-Martial*, which provides that military commission procedures will be "guided by" the rules for general courts-martial, while also recognizing the President's power to depart from that model. Our proposal seeks to cabin that power in several ways.

First, it requires that the President state with particularity those facts that render it impracticable to follow the general court-martial model on any particular point. This is consonant with the decision of the Supreme Court in *Hamdan*. "With particularity" is a phrase only a lawyer could love. But those words do have meaning. They mean the President will not have satisfied the requirement of the statute if his justification is filled with vague generalities that do not logically lead to the conclusion of impracticability. That was a vice in the President's Military Order of November 13, 2001, which made findings that were nebulous and disconnected from the Order's wholesale deviation from federal district court practice (which is the overall default model under Article 36 of the UCMJ).

Moreover, the proposal does not contemplate a blanket presidential determination that general court-martial rules

are impracticable across-the-board. These determinations must address specific provisions.

Second, our proposal requires that Congress be notified of any determination of impracticability. There used to be a reporting requirement for changes to the *Manual for Courts-Martial*, but it was a dead letter. NIMJ believes this new, revived reporting requirement should be more of a reality, and that Congress should stand ready to review impracticability determinations and intervene as necessary with legislation.

Third, NIMJ's proposal provides that the President's determination that some rule applicable to general courts-martial is impracticable in the military commission context is subject to judicial review for abuse of discretion or on the ground that it is contrary to law. These are real requirements, familiar to practitioners of administrative law as well as to federal judges. They are not window-dressing.

Whether any particular impracticability determination violates either of those tests would be litigable in the course of direct review of any military commission conviction.

The NIMJ proposal singles out one part of the UCMJ as inapplicable to military commissions. That is Article 32, which deals with the pretrial investigation that is a precondition for a general court-martial. We recognize that Congress may conclude that other parts of the statute may similarly be dispensed with. For example, Congress might conclude that the right to individual military counsel—the right under Article 38(b)(3)(B) to select your own uniformed defense counsel—is part of the deluxe version of military justice that need not be extended to enemy combatants in the context of a military commission. Similarly, Congress might conclude that the first stage of appellate review—review in a service court of criminal appeals—is inessential in military commission cases, although if it did so, I would

recommend giving the United States Court of Appeals for the Armed Forces authority to review military commission findings and sentences on the same broad grounds currently applicable to court of criminal appeals review of courts-martial. This would require an amendment to Article 67.

Just as there are some court-martial-related provisions of the UCMJ and the *Manual for Courts-Martial* that Congress might be disposed to affirmatively direct *not* be applied to military commissions (thus rendering an impracticability determination unnecessary), the Committee might also conclude that some provisions are so critical to public confidence in the administration of justice that they should be placed beyond the President's power to make exceptions on grounds of impracticability. For example, should there be an explicit ban on the use of coerced testimony in military commissions (*see* Article 31(d), UCMJ), or should the right to see all evidence the government seeks

to put before the trier of fact, or the right of self-representation or the right to attend all sessions be stated in so many words?

NIMJ did not include such a provision—a kind of military commission due process floor—in our discussion draft. However, some of the testimony that has been presented on behalf of the Administration has seemed to reflect such intransigence that the Committee may not be disposed to leave the question of departures from the court-martial norm as much in the President's hands as our proposal does, even with the substantial procedural protections we have recommended. The Committee is in a better position than we are to make that determination, but it does seem fair to state that to this extent the situation is somewhat different from what it was at the time we framed our proposal.

My final remark has to do with the process by which determinations of impracticability are arrived at. I will leave it to others to discuss how the Defense Department conducts its internal deliberations, but I do believe public confidence in the end product would be directly served if any proposed departures from the general court-martial norm (and the supporting detailed justification) were made available in draft so the public can comment on them. The Department already does this when it recommends changes in the *Manual for Courts-Martial*, *see* DoD Directive 5500.17, MCM (2005 ed.), App. 26, at A26-8 (¶ E2.4), and its failure (with limited exceptions) to use notice-and-comment procedures when promulgating military commission rules has been a continuing disappointment. *See* Peter Raven-Hansen, *Detaining Combatants by Law or By Order? The Rule of Lawmaking in the War on Terrorists,* 64 LA. L. REV.

831 (2004); Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2d 379 (2003).

NIMJ appreciates the opportunity to participate in this hearing. I will be happy to respond to questions and to work with the Committee as consideration of these important matters continues.

EUGENE R. FIDELL

Mr. Fidell has been president of the National Institute of Military Justice since 1991. He served on active duty as a judge advocate in the United States Coast Guard from 1969 to 1972 and has headed the Military Practice Group of the Washington, D.C. firm of Feldesman Tucker Leifer Fidell LLP since 1984. He is a graduate of Queens College, Harvard Law School, and the Naval Justice School.

Mr. Fidell has taught military law at Harvard and Yale Law Schools and is currently an Adjunct Professor of Law at American University's Washington College of Law. He edited NIMJ's *Annotated Guide to the Procedures for Trials by Military Commissions* and volumes 1 and 2 of the *Military Commission Instructions Sourcebooks*. His law review article on *Military Commissions and Administrative Law* appeared in 2003, and another article he, Colonel Dwight H. Sullivan and Professor Detlev F. Vagts wrote on *Military Commissions Law* appeared in the Army Lawyer in 2005. His current work in progress (with Professor Elizabeth Lutes Hillman and Colonel Sullivan) is *Cases and Materials on Comparative Military Justice*.

Mr. Fidell is a member of the ABA's Task Force on Treatment of Enemy Combatants and Standing Committee on Law and National Security; the board of directors of the International Society for Military Law and the Law of War; and the American Law Institute. He has previously served on the Code Committee on Military Justice, the Advisory Board on the Investigative Capability of the Department of Defense, and the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces.