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Gregory P. Noone

Diana C. Noone

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THE MILITARY COMMISSIONS – A POSSIBLE STRENGTH GIVING WAY TO A PROBABLE WEAKNESS – AND THE REQUIRED FIX

Gregory P. Noone and Diana C. Noone†

I. Introduction

When the military commissions were first established by President Bush's Military Order of November 13, 2001, the authors cautioned that critics and champions alike should pause before offering either unqualified support or condemnation.[1] The primary concern was and still is that the military commissions be conducted in a fundamentally fair way because the United States is a principled nation dedicated to the rule of law. Today the authors still argue that the forums must be conducted fairly, impartially, and with transparency so that justice is done and seen to be done. Military commissions cannot be perceived as a fast and easy way to obtain convictions. The commissions must be seen as fair and impartial otherwise the United States war against terrorism will be undercut. The United States must not allow the legal use of U.S. presidential authority to be distorted. If this occurs the next generation of suicide bombers will emerge. Another concern with the use of military commissions is if a U.S. citizen will be detained and tried overseas by a "military court." If this is the case what type of treatment would they receive? Is the United States willing to make that trade off?

† Gregory P. Noone recently spent over three years at the United States Institute of Peace (USIP) as a Program Officer after completing over ten years on active duty as a U.S. Navy judge advocate. Mr. Noone's last military assignment was at the Office of the Judge Advocate General, United States Navy, International and Operational Law Division, in Washington D.C. He has also served as a military prosecutor and defense counsel. Mr. Noone is an adjunct professor at Roger Williams University School of Law and Case Western Reserve University Law School where he teaches International Law, International Humanitarian Law, U.S. Military Law and Legal Policies, and Genocide in the 20th Century. He is also a member of the Public International Law and Policy Group. Diana C. Noone, Ph.D., J.D., M.S.W., is an Assistant Professor in the Criminal Justice Department at Fairmont State University. Prior to joining the faculty there she spent over three years at the United States Department of Justice's National Institute of Justice. The views expressed in this essay reflect the views of the authors and do not represent the views of the United States government, the Department of Defense, the United States Navy, the USIP, or any other institution the authors are affiliated with. The authors would both like to thank Michael Scharf, Amy Miller, John Waszak and countless others for their assistance and thoughtful input.

[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

II. Initial assessment

From the beginning the greatest structural weakness of the commissions as originally established was the lack of independent review in the appellate review process, review of detention orders, and habeas corpus issues. The power of the commissions has from the outset of the process stayed vested in the President and the Secretary of Defense (SECDEF). Unfortunately, this legally unacceptable position could have readily been fixed but was not. The military has an appellate review process that is effective and can ultimately end at the U.S. Supreme Court. The military's highest appellate court, the Court of Appeals for the Armed Forces (CAAF), is comprised of civilian judges appointed by the president and confirmed by the Senate. The accused appearing before military commissions should have been provided the right of appeal to CAAF as the first level of appellate review. This straightforward remedy would have strengthened the credibility of the process. Another practical suggestion that would have built international and national support was to designate CAAF to review habeas corpus issues, detention orders, and rulings that close courts from the public, as well as any other interlocutory issues.

With that said, it was believed that the military commissions, although not the same as courts-martial under the U.S. military justice system, would certainly benefit from being a member of the same "family." Military lawyers understandably take great pride in the military judicial system. It is not perfect but no system is. The military justice system boasts of a mature and well-developed set of rules and procedures, a robust and fair discovery process, and a jury (or panel) comprised of the most experienced, worldly, intelligent, and vigilant in the American justice system. These obvious strengths could be matched only by the dedicated and hard working military lawyers who are ethical and zealous advocates—whether as prosecutors or defense counsel—determined to maximize the system's protections and procedures.

III. Today–independent review, commission composition, and discovery

Three years hence, the military commissions are rife with systemic weaknesses and few strengths. Chief among the weaknesses is the continued lack of independent judicial review. The executive branch has kept the process wholly within itself and as a result has done little to achieve the most basic and fundamental right of appeal. Even more unfortunate was the selection of the commission members (or jury) with either undue familiarity to the Appointing Authority, or with intelligence / other ground experience in Afghanistan to include familiarity with some of the detainees to be tried. This leaves the government open to charges of either being negligent, of having little regard how this could be viewed, or of trying to create an inside track for government victories. None of these

possibilities are acceptable. As a result, one of the hallmarks of the military justice system—a reliably independent jury—is denigrated. A related issue specific to the commissions is the fact that they do not have an independent judge assisting them with the law. Instead the military commissions have a president, but one who is not vested with the authority of a final arbitrator. As it stands now the commission's president is a judge advocate, as well as the only lawyer on the commission, and as a result the other members have been left asking even the most basic legal questions (for example, the applicability, if any, of the Geneva Conventions).

The challenging of commission members as well as other interlocutory questions has also proved to be dramatically different due to the lack of an independent judge as used in the military justice system. These issues are sent up to the Appointing Authority—an individual appointed by the Department of Defense—to make all necessary determinations.

As for being a member of the military justice system "family," the government has failed to make the commissions anything more than a very distant cousin. The military justice system developed over time with a wide diversity of comments and opinions, particularly from Congress, as well as the benefit from years of experience. The military commissions on the other hand were primarily the work of the White House Counsel's office, with very little outside input and a noticeable lack of military lawyers' involvement. As a result, instead of using the military justice system and deviating where necessary and making adjustments in areas such as chain of custody and perhaps hearsay—they have disregarded a reputable system in favor of an ad hoc one with some similarities. One could cynically believe that the lawyers who devised the commissions believed that criminal justice in the military context cannot be that hard, after all, junior lieutenants and young captains do it all the time.

Another point of contention, and a striking difference from the military justice system, has been the inability of the commission's prosecutors to hand over all of the investigations and documents that belong to agencies other than the Department of Defense because the U.S. government is not one big happy family. As a result, defense counsel seeking discovery are routinely told by prosecutors comments such as, "Based on documents in *our* possession there is no exculpatory evidence."[2]

IV. On the Cheap

Unfortunately there is widespread belief that after all of the political capital invested by this administration it appears they are intent on conducting the commissions on the cheap. All facets of the military commissions are understaffed—the prosecution team, the defense team, the

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[2] Emphasis added.

Appointing Authority, and the commission itself. In reality there should be scores of lawyers working full time on this mission in order to ensure that it is done correctly. There are approximately 3,500 lawyers in uniform among the services, at least that many in the reserves, and thousands available civilian attorneys if necessary. With that said, all of the personnel involved in the commissions are working extremely hard and the authors salute them. However, in a typical military court-martial there are only a handful of complex issues whereas with the commissions everything is novel and unique. The military lawyer's lack of experience in complex cases, especially national security type cases, could be a detriment to the process.

Among the most disturbing consequences of under funding have been the extraordinarily poor translation services during commission sessions, in interviews, and meetings with counsel. As a result, the reliability of the hearings, or worse, the reliability of investigations and witness statements may be placed in doubt. There must be a degree of confidence in all of these translations in order to ensure fundamental fairness. Indeed it is commonly accepted international law, as well as a requirement under the International Covenant for Civil and Political Rights (ICCPR) of which the United States is a party, that this occurs.[3]

V. Transparency

It is extremely rare not to open military courts to the public with the obvious exception being national security cases. In the military commissions the government should make every attempt to make the process public and not close it for any extended period. The commissions could act consistent with the Classified Information Procedures Act (CIPA), redact documents and close sessions when necessary. This is not unreasonable and, in fact, occurs quite regularly in national security cases both in the U.S. and abroad. However, a closed commission needs to be a legitimate exception rather than the rule. With that said, it is feared this will not be the case due to the new, and apparently ubiquitous, classification of "protected information." If the Appointing Authority stamps something "protected" the defense counsel are not allowed to talk about them publicly under legitimate fear of prosecution. Yet the government can disclose this information whenever they want so it appears to be more of an attempt to control the media message than anything else. Some examples of documents classified as "protected information" include many of the Appointing Authority's memoranda, as well as the letter to the military commission members stating that they should all wear black robes. So if

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[3] International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(3)(a), 6 I.L.M. 360, 372 (entered into force Mar. 23, 1976). We will leave aside for purposes of this article the issues of alleged coercion and torture and the United States' obligations under the Convention Against Torture.

there is very little transparency in the process of establishment what can be foreseen in the process of justice?

VI. Options and Concluding Thoughts

After stating all of these issues if these military commissions were in another country—would the United States of America accept or condemn such practices? The authors raise these points in order to offer constructive criticism as well as a prescription for how the commissions should proceed from this point.

The most drastic option is to scrap everything and start again with commissions based upon the Uniform Code of Military Justice and the U.S. military justice system while making the necessary modifications. Absent the "nuclear option," the U.S. government should take immediate steps that are imperative and yet virtually free of charge. Immediately insert the Court of Appeals for the Armed Forces as the reviewing authority for appeals, interlocutory questions, and panel challenges. Secondly, the current panel should be reconstituted due to appearance issues and the lack of legal expertise of most of its members. At the very least, three out of five panel members should be lawyers, but an even better solution would be a commission composed of all military lawyers / judges near retirement. This practice of using "untouchable" judge advocates is common to the services' criminal courts of appeal. It was a also a critical factor in ensuring fairness during the highly politically charged "Tailhook" trials in the early 1990s when the judge, Navy Captain William T. Vest, Jr., stood firm against enormous pressure from both inside and outside of the government. Other immediate actions would cost money but save the U.S. considerably in the long run. Funding must be increased in order to provide for more and better translators and increase the number of personnel provided to each facet of the commissions.

Lastly, more attention should be devoted to international law as if our own service members' lives depended on it. Military lawyers understand the importance of upholding the law. They also clearly understand that *all* treaties the U.S. is a party to, such as the ICCPR and the Geneva Conventions, become the supreme law of the land in accordance with the U.S. Constitution. The authors urge the military lawyers to continue their fight to protect our service members while recognizing the long term consequences of their decisions.

It was the authors' hope when we raised these issues three years ago and it remains so today that perhaps some of the suggestions and comments could strengthen the integrity and legitimacy of these commissions. Furthermore, it is hoped that with some modifications historians will not view these military commissions as a dark period in American justice.