

Center for National Security Studies

Protecting civil liberties and human rights

Advisory Board Chair
Morton H. Halperin

Director
Kate Martin

Via Facsimile

Paul W. Cobb, Esq.
Deputy General Counsel
Department of Defense

Re: Military Commissions Order

Dear Mr. Cobb:

I appreciated the opportunity to speak with you and now write to outline further our suggestions regarding the procedures to implement the President's order authorizing the creation of military commissions.

Given the public and congressional concern about whether the procedures will be fair, we urge the Department to publish its proposed procedures in draft form and seek public comment before adopting final rules. Because there are individuals already in custody, whom the Department may be considering trying before commissions, the comment period could be short enough to enable the rules to be finalized quickly.

We will not outline here the extensive objections that have been made to the broad terms of that order, nor the legal authorities supporting those objections, other than to note that we share many of those objections. Instead we outline our main concerns and offer what we hope will be constructive suggestions for finding solutions to those problems identified by the administration as requiring the convening of military commissions.

Scope of the Order.

The use of military commissions should be limited to trials of persons captured overseas in Afghanistan or other regions of armed conflict, who are engaged in armed conflict against the United States and are charged with crimes of war or other crimes against humanity targeted against Americans. We welcome the recent statements by the administration indicating its intention to so limit the jurisdiction of commissions as well as the decision to indict Z. Moussaoui in federal district court.

Detention under the order should be limited to individuals awaiting trial before commissions. None of the authorities relied upon in issuing the Military Order authorizes military detention of civilians arrested in the United States. Moreover, the President has no authority to order such detentions because Congress, in enacting extensive legislation setting forth when aliens may be detained on terrorism charges, most recently in the USA Patriot Act,

has occupied the field to the exclusion of any residual executive authority. Finally, military detentions of uncharged civilians in the United States would be an extraordinary extension of current Defense Department responsibilities and inconsistent with the historical mission and constitutional role of the Department and the armed forces.

Procedures for military commissions must ensure due process.

Both the Constitution and international law require the United States to provide all individuals with fundamental due process when bringing criminal charges. The Military Order recognizes that individuals must be accorded a "full and fair trial" before any commissions.

We believe that the appropriate starting place for the analysis of what procedures meet constitutional and international law requirements is the Uniform Code of Military Justice. We understand that the rules applied in the *Quirin* case were quite similar to the military courts martial rules in effect at the time. It is important to note that nothing in that case would sanction a departure from either constitutional or international law requirements in setting procedures for commission trials.

Since the *Quirin* case, both U.S. domestic law and international law have evolved in spelling out the particulars of what is required to accord due process and ensure a fair trial. If the Department believes that there are exigencies requiring and justifying departures from the existing procedures of the Uniform Code of Military Justice, it should specifically spell out such departures and the reasons therefor. (In this connection, we note that we cannot conceive of a justification for not requiring a unanimous verdict before sentencing an individual to imprisonment or death.) In all events, the procedures must comply with the international legal obligations of the United States by meeting the minimum standards spelled out in the Geneva Convention and the International Covenant on Civil and Political Rights. There is no better authority for interpreting U.S. obligations under the Convention than the Protocols to that Convention spelling out due process procedures, which were negotiated and signed by the United States.

Protection of classified information.

The administration has explained that the use of military commissions may be necessary to protect the confidentiality of especially sensitive information and has talked about secret trials. We recognize the importance of protecting especially sensitive information, whose disclosure would interfere with the military efforts against terrorism or compromise sensitive, important intelligence sources and methods. At the same time, the Supreme Court has made clear that the Constitution commands that individuals not be deprived of life or liberty without an opportunity to confront the evidence against them and to be apprised of exculpatory evidence in the hands of the government. See *Jencks v. United States*, 353 U.S. 657 (1957); *Roviaro v. United States*, 353 U.S. 53 (1957). And it needs no citation that secret trials are anathema to our most fundamental values.

We suggest the following as a solution that protects both interests.

Classified evidence. All evidence to be introduced against the accused must be shown to the accused and his lawyer and all exculpatory evidence must be provided to the accused and his lawyer. Keeping the prosecutor's evidence secret or withholding exculpatory evidence violates an individual's right to confront the evidence against him in the first instance and in both instances would be a fundamental violation of due process. It is not adequate to provide the lawyer, but not the accused, with evidence because the lawyer may not have the necessary information to challenge it.

However, in narrowly defined circumstances, with adequate procedural protections, truly sensitive evidence introduced against the accused could be kept secret from the public. Doing so would protect the national security interests that would be harmed by public disclosure of the evidence. The confidentiality of the evidence may be further protected by ordering the defense attorney to keep silent enforced with appropriately severe sanctions, and by imposing restrictions on communications of the accused. In this connection, we note that the Bureau of Prisons has adopted measures to prevent inmates from communicating classified information or planning terrorist activities from their cells. These measures include limiting the inmate's communications and visits with both outsiders and other inmates and by monitoring his communications. It is not beside the point that any accused, who is convicted of a capital offense, is likely to be put to death after seeing the classified evidence.

It is essential that such an extraordinary rule allowing closure of portions of a trial be limited to cases involving truly sensitive information. A possible formulation would allow closure, where the Secretary of Defense or the Director of Central Intelligence personally certifies that disclosure of the specific evidence will cause identifiable harm to the prosecution of military objectives in Afghanistan or elsewhere; interfere with the capture of members of Al Qaeda; or cause significant, identifiable harm to secret intelligence sources or methods.

Public trials. Any trials conducted by such commissions should be open, consistent with the requirements of military security necessary to secure the safety of observers, witnesses, commission judges, lawyers or personnel. Such security requirements could include the banning of cameras, which are not allowed in any event in most federal courtrooms, and by limiting the number of media and public representatives allowed into the courtroom. It is not legitimate however, to attempt to silence the words of the accused offered in his own defense in order to deny him a "propaganda platform". Consistent with orderly court procedures, an accused has the right to be heard and the world at large the right to be informed of his statements. The message conveyed by an open and fair trial will outweigh in the end whatever calls to terrorism might issue from a defendant.

The trials could be briefly closed for receipt of sensitive information as discussed above, in which case a public summary of the proceedings should be issued and a classified transcript kept.

Although such an approach is not available in federal criminal trials, we understand that it is contemplated by Rule 505(i)(5) of the UCMJ.

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Pretrial proceedings and discovery. Consistent with the principles outlined above, rules for pretrial hearings and discovery can also be fashioned to protect both due process rights and sensitive information. As you know, that is the purpose of the Classified Information Procedures Act as incorporated in the Uniform Code of Military Justice and we are unaware of any instances in which those procedures failed to protect sensitive information. At the same time, discovery rules could be more flexible than in the usual cases and classified information could be shown to defense counsel but not to the accused, if it is not going to be admitted at trial.

Again, the starting point should be existing procedures under the UCMJ and any departures should be carefully justified with reference to the specific information at issue. The touchstone for all such procedures must be the basic requirements of due process: disclosure of exculpatory evidence and an opportunity to confront the evidence against one, including the information necessary to challenge its credibility or authenticity.

Thank you for your consideration of these suggestions. If we can provide further information or you would like to discuss these issues further, please call me or Morton Halperin at 202-994-7060 or during the next week, I can be reached at 202-244-1357.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kate Martin", with a long horizontal flourish extending to the right.

Kate Martin