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Military Commissions: Hamdan v. Rumsfeld: Testimony Before the S. Comm. on Armed Services, 109th Cong., July 19, 2006 (Statement of Neal Kumar Katyal, Prof. of Law, Geo. U. L. Center)

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Testimony of Neal Kumar Katyal

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Hearing: Detainee Trials Following Supreme Court Ruling in Hamdan v. Rumsfeld

July 19, 2006

U.S. Senate Armed Services Committee
Thank you very much, Senator Collins, Chairman Warner, Senator Levin and members of this committee for inviting me here. I appreciate the careful attention that the Congress is devoting to military commissions, and Chairman Warner in particular, I appreciate the opening remarks you made. I believe that this committee is pursuing exactly the right approach in last week and this week's hearing.

On November 28th, 2001, I testified before the Senate Judiciary Committee about the president's then two-week-old commission plan. I warned the Congress, not the president, must set this commission plan up, and if Congress did not the result would be no criminal convictions and a court decision striking these tribunals down; 1,693 days have elapsed since that testimony. During that entire time, not a single trial took place, nor was a single criminal convicted.

It took over two years before anyone was even indicted, and three weeks ago the Supreme Court invalidated this scheme. I do not come here to gloat. The decision to file a lawsuit against the president was the hardest one I have ever faced.

I had previously served as national security adviser at the Justice Department and my academic work extols the idea of a strong president and it bills on the unitary executive theory of the presidency. My work in criminal law centers on the need for laws to benefit prosecutors.

In the intervening four years, I have never once wavered from my belief that it is the prerogative of this body, the Congress, not the president, to set these rules. But I have also learned I was wrong when I testified in November 2001. I didn't know much about courts martial at the time, and so I emphasized in my testimony that until Congress acted, the baseline would be civilian trials.

But I've had the privilege of studying the military justice system now for the past four years, and I've learned why they are the envy of the world. The Supreme Court's Hamdan decision emphasized that both courts martial and civilian courts can try terrorism cases.
Justice Stevens' opinion put it simply, quote, "Nothing in the record before us demonstrates that it would be impracticable to apply court martial rules in this case."
Justice Kennedy agreed, quote, "Congress has prescribed these guarantees for courts martial, and there is no evidence practical need that explains the departures here."

Indeed, there have been 370 courts martial in Iraq and Afghanistan since 2002, compared to zero military commission trials. I would urge Congress to heed the views of the Supreme Court justices here for four reasons. First, we are talking about only a handful of people here.

Ten have been indicted thus far, and we hear different numbers. Today, one of the prosecutors told me maybe 30 more people would be indicted in the military commission system from Guantanamo. We would be wary of legislating for such a small group, particularly when there is no exigency.

As the Hamdan decision made clear, these individuals will continue to be detained under existing law as enemy combatants. And here we are talking about criminal trials, not detention. That's the issue before this committee, and the function of a trial, as Justice Douglas reminds us, is as follows, quote, "The function of a prosecutor is not to tack as many skins of victims as possible against the wall. His function is to vindicate the rights of the people as expressed in the laws and give the accused of crime a fair trial."

I don't believe we can say that about the existing military commission system. Second, there is no empirical evidence at all to show that the existing court martial system can't handle these cases. Before changing the rules, we should have a study and attempt to try to use the existing system that is particularly so because, as my prepared statement goes into detail on pages seven to 11, the criticisms about hearsay and other evidentiary claims that have been levied against the court martial system seem to me to be substantially overblown.
Third, any amendment to the UCMJ is bound to draw a legal challenge, and the greater the deviation from the structure and procedure of a regularly constituted court, the more likely it is that it will not only be challenged, but invalidated. Any such court challenge would delay or cast into uncertainty any trial conducted, and that will leave everything gummed up for yet another number of years.

In any such trial, moreover, the trial system would have to make up the rules as it went along, with all the inefficiencies and other problems that that entails. Because we are talking about the most awesome powers of government, the death penalty and life imprisonment, federal courts will carefully scrutinize these procedures, and the only way to ensure the system is not tossed out four years from now is to use one that is battle tested and approved already. Courts martial and civilian trials meet these tests. Military commissions do not.

And, finally, we should be wary of any attempt to create two tracks of justice, one for us and the other for them. I believe Senator McCain said it exactly right last week when he warned, quote, "If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners."

Three's a grave risk that adopting a different system for this handful of prisoners will dramatically undermine the image of the United States as a fair and just nation. It will look like victor's justice, a spoils system, instead of the rule of law.

Any claimed benefit from legislation has to be weighed against these practical difficulties. To those have to be added the sorry experience with the military commission experience, a system in which I have served now for several years, a system that its own prosecutors have said is fundamentally unfair.

By departing from the existing institution and, in particular, the court Court of Appeals for the Armed Forces, and the existing rules, delay, not bringing folks to justice, will be
the inevitable result. As the chairman has said repeatedly, the eyes of the world are upon us, and what Congress does here may establish a legal framework for generations to come.

This is a crucial moment, not just for this body, but for the nation as a whole, and in my judgment we should proceed with caution and study and do everything in our power to make sure we need a new system before gambling once again on an unproven one.

Given the existing numbers of different ways in which people can be prosecuted today in courts martial and civilian trials, and given the detention power which already exists and is given to the president, the first rule should be to do no harm. We have not had a military commission trial in 55 years. And if this body has to rush legislation through to meet an October deadline, it seems to me quite dangerous results may unfold.

The safest course, it seems to me, given the existing detention power, and given the existing prosecution alternatives, is to do no harm. Let's do it right the first, or I guess rather we could say the second time, at this point. And doing it right is also the fastest and best way.

My closing to you, Senators, is the same as my closing to the United States Supreme Court, which is to quote the great American patriot, Thomas Paine. "He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach onto himself." Thank you very much.