UNITED STATES SENATE

COMMITTEE ON ARMED SERVICES

There will be a meeting of the Committee on

ARMED SERVICES

Tuesday, July 7, 2009

9:30 AM

Room SD-106
Dirksen Senate Office Building

OPEN

To receive testimony on legal issues regarding military commissions and the trial of detainees for violations of the law of war.

PANEL 1

Honorable Jeh C. Johnson
General Counsel
Department of Defense

Honorable David S. Kris
Assistant Attorney General
National Security Division
Department of Justice

Vice Admiral Bruce E. MacDonald, USN
Judge Advocate General
United States Navy

PANEL 2

Rear Admiral John D. Hutson, USN (Ret.)
Former Judge Advocate General of the Navy

Major General John D. Altenburg, Jr., USA (Ret.)
Former Appointing Authority for Military Commissions

Mr. Daniel Marcus
Fellow in Law and Government
Washington College of Law
American University

Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing Before the Senate Armed Services Committee
"Military Commissions"
Presented On
July 8, 2009

Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

I also thank this Committee for taking the initiative, on a bipartisan basis, to seek reform of military commissions. As you know, in his speech on May 21 at the National Archives, President Obama called for the reform of military commissions, and pledged to work with the Congress to amend the Military Commissions Act. So, speaking on behalf of the Administration, we welcome the opportunity to be here today, and to work with you on this important initiative.

Military commissions can and should contribute to our national security by becoming a viable forum for trying those who violate the law of war. By working to improve military commissions to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the law of war.

In May, the Administration announced five changes to the rules for military commissions that we believe go a long way towards improving the process. (I note that those changes were developed initially within the Defense Department, in consultation with both military and civilian lawyers, and have the support of the Military Department Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff). My Defense Department colleagues and I have had an opportunity to review the language this Committee has included in the Defense Authorization Act, and it is our basic view that the Committee has identified virtually all of the same elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the Administration and the Congress, reformed military commissions can emerge from this effort as a fully legitimate forum, one

that allows for the safety and security of participants, for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal court, and for the just resolution of cases alleging violations of the law of war.

There are several changes to the Military Commissions Act reflected in the proposed legislation which I would like to highlight here, and which the Administration supports:

First, consistent with the rules changes approved by the Secretary of Defense and submitted to Congress in May, the legislation codifies a ban on the use in court of statements that were obtained by interrogation methods that amount to cruel, inhuman or degrading treatment. In my view, this change is a big one. The most prominent criticism we hear of the current Military Commissions Act is that it permits the use of such statements, if obtained before December 30, 2005. The statutory change which eliminates this possibility -- by itself -- will go a long way towards enhancing the legitimacy and credibility of commissions.

Second, I note that the legislation amends current law to clarify the government's obligations to disclose exculpatory evidence to the accused, including evidence that would tend to impeach the credibility of a government witness, or serve as mitigation evidence at time of sentencing. As you know, this clarification of the government's obligations would be consistent with the obligations prosecutors have now in civilian courts.

Third, the legislation would modify the rules on hearsay evidence, more closely resembling the rules used in civilian courts and in courts-martial.

Fourth, the legislation codifies our rules change to provide the accused with more latitude in the selection of military defense counsel, again making commissions' rules closer to those in courts-martial.

Fifth, the legislation discontinues the use of the phrase "unlawful enemy combatant." We in the Administration, effective March 13, have also discontinued using the phrase in our court filings identifying who we believe we have the authority to detain at Guantanamo.

The Administration supports these changes to existing law, though you will note that we prefer somewhat different language in several instances. As I said before, we believe that reformed military commissions can and should contribute to national security by affording a venue for bringing to justice those who violate the law of war, and for doing so in a manner that reflects American values of justice and fairness. We believe these reforms serve that purpose.

When considering this legislation, the Administration asks that the Congress also consider the following:

First, in Section 948r, concerning statements of the accused that can be admitted at trial, we ask that you consider the express incorporation of a "voluntariness" standard that, consistent with current law, takes account of the unique challenges and circumstances of the battlefield setting. We do not believe that soldiers on a battlefield should be required or even encouraged to provide *Miranda*-like warnings to those they capture—and we note that the current legislation expressly states that Article 31 of the Uniform Code of Military Justice is not applicable to military commissions. As you know, Article 31 requires *Miranda*-like warnings prior to official questioning of service members regarding alleged crimes.

The essential mission of our nation's military is to capture or kill the enemy, not to engage in evidence collection for eventual prosecution. However, in both American civilian courts and courts martial, statements of an accused are normally admitted only in the event they are found to be "voluntary." There is a concern that, as military commissions prosecutions progress, military commission judges and courts may apply this standard without taking adequate account of the critical circumstances. Thus, rather than jeopardize future prosecutions and convictions because a statement was admitted at trial that was not considered "voluntary," the Administration believes we should specifically codify a standard to assess voluntariness that, consistent with current law, accounts for the realities of military operations. This will decrease the likelihood that combat objectives may be confused with a law enforcement mission, while ensuring that valid convictions before military commissions will be sustained on appeal.

Second, we note that the legislation incorporates certain of the classified evidence procedures currently applicable in courts-martial, where there is relatively little precedent and practice regarding classified

information. We in the Administration believe that further work could be done to codify the protections of classified evidence, in a manner consistent with the protections that now exist in federal civilian courts. We believe that those protections would work better to protect classified information, while continuing to ensure fairness and providing a stable body of precedent and practice for doing so.

Third, concerning hearsay, while welcoming the Committee's further regulation of the use of such evidence, we in the Administration recommend somewhat different language for achieving this result that we look forward to discussing in more detail.

Fourth, we look forward to working with the Congress to ensure that the offenses that may be prosecuted in a military commission are consistent with the law of war. We note that Section 950p of the Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The Committee replaced the language currently in Section 950p with similar, but not identical, language. The Administration supports this type of statement, though we prefer the existing language in Section 950p. I note also that the Committee bill retains the offense of providing material support for terrorism. After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement.

We also believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we welcome the retention of that offense in the Committee bill. As a former prosecutor, it is my belief that by definition, many material support cases are also conspiracy cases.

With the removal of material support, we are supportive of recognizing the law of war origins of all codified offenses.

Fifth, we agree with the Committee that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that an appellate court paralleling that of the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the U.S. Court of Appeals for the D.C. Circuit, would best achieve the legitimacy and credibility we all seek,

In conclusion, I thank you again for taking the initiative in this important area of national security, and I look forward to your questions.

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ENTITLED

"MILITARY COMMISSIONS"

PRESENTED

JULY 7, 2009

Statement of
David Kris
Assistant Attorney General
Before the
Committee on Armed Services
United States Senate
For a Hearing Entitled
"Military Commissions"
Presented
July 7, 2009

Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you for the opportunity to discuss legislation that would reform the Military Commissions Act of 2006. As you know, a Task Force established by the President is actively reviewing the detainees held at Guantanamo Bay to determine whether they can be prosecuted or safely transferred to foreign countries. As the President stated in his May 21st speech at the National Archives, where feasible we plan to prosecute in Federal court those detainees who have violated our criminal law. Prosecution is one way — but only one way — to protect the American people, and the Federal courts have proven on many occasions to be an effective mechanism for dealing with dangerous terrorists.

The President has also made clear that he supports the use of military commissions to prosecute those who have violated the laws of war, provided that necessary reforms are made. Military commissions have a long history in our country dating back to the Revolutionary War. Properly constructed, they take into account the reality of battlefield situations and military exigencies, while affording the accused due process. The President has pledged to work with Congress to ensure that the commissions are fair, legitimate, and effective, and we are all here today to help fulfill that pledge. I thank this Committee for leading the effort to develop legislation on this important national security issue.

As you know, on May 15th, the Administration announced five rule changes as a first step toward meaningful reform. These rule changes prohibited the admission of statements obtained through cruel, inhuman, and degrading treatment; provided detainees greater latitude in the choice of counsel; afforded basic protections for those defendants who refuse to testify; reformed the use of hearsay by putting the burden on the party trying to use the statement; and made clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and legitimacy of the commission process without compromising our ability to bring terrorists to justice.

These five rule changes were an important first step. This Committee has now taken the next step by drafting legislation to enact more extensive changes to the Military Commissions Act ("MCA") on a number of important issues. The Administration believes the Committee's bill identifies many of the key elements that need to be changed in the existing law in order to

make the commissions an effective and fair system of justice. We think the bill is a good framework to reform the commissions, and we are committed to working with you on it. With respect to some issues, we think the approach taken by the Committee is exactly right. In other cases, we believe there is a great deal of common ground between the Administration's position and the provision adopted by the Committee, but we would like to work with you because we have identified a somewhat different approach. Finally, there are a few additional issues in the MCA that the Committee's bill has not modified that we think should be addressed. I will outline some of the most important issues briefly today.

First, the Committee's bill would bar admission of statements obtained by cruel, inhuman, or degrading treatment. We support this critical change so that neither statements obtained by torture nor those obtained by other unlawful abuse may be used at trial.

However, we believe that the bill should also adopt a voluntariness standard for the admission of statements of the accused — albeit a voluntariness standard that takes account of the challenges and realities of the battlefield and armed conflict. To be clear, we do not support requiring our soldiers to give *Miranda* warnings to enemy forces captured on the battlefield, and nothing in our proposal would require this result, nor would it preclude admission of voluntary but non-*Mirandized* statements in military commissions. Indeed, we note that the current legislation expressly makes Article 31 of the Uniform Code of Military Justice inapplicable to military commissions, and we strongly support that. There may be some situations in which it is appropriate to administer *Miranda* warnings to terrorist suspects apprehended abroad, to enhance our ability to prosecute them, but those situations would not require that warnings be given by U.S. troops when capturing individuals on the battlefield. Voluntariness is a legal standard that is applied in both Federal courts and courts martial. It is the Administration's view that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional. Although this legal question is a difficult one, we have concluded that adopting an appropriate rule on this issue will help us ensure that military judges consider battlefield realities in applying the voluntariness standard, while minimizing the risk that hard-won convictions will be reversed on appeal because involuntary statements were admitted.

Second, the Committee has included a provision to codify the Government's obligation to provide the defendant with exculpatory evidence. We support this provision as well; we think it strikes the right balance by ensuring that those responsible for the prosecution's case are obliged to turn over exculpatory evidence to the accused, without unduly burdening every Government agency with unwieldy discovery obligations.

Third, the Committee bill restricts the use of hearsay, while preserving an important residual exception for certain circumstances where production of direct testimony from the witness is not available given the unique circumstances of military and intelligence operations, or where production of the witness would have an adverse impact on such operations. We support this approach, including both the general restriction on hearsay and a residual exception, but we would propose a somewhat different standard as to when the exception should apply, based on

whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts.

Fourth, we agree with the Committee that the rules governing use of classified evidence need to be changed, but we would do so in a fashion that is more similar to the system provided in the Classified Information Procedures Act ("CIPA"), as it has been interpreted by Federal courts. While CIPA may need to be revised and updated in important respects to address terrorism cases more effectively, we believe it has generally worked well in both protecting classified information and ensuring fairness of proceedings. Importing a modified CIPA framework into the statute will provide certainty and comprehensive guidance on how to balance the need to protect classified information with the defendant's interests. It will also allow military judges to draw on the substantial body of CIPA case law and practice that has been developed over the years.

We are concerned with a provision in the Committee bill that allows the use of traditional CIPA practices — the use of deletions, substitutions, or admissions — only after an agency head or original classifying authority has certified that the evidence has been declassified to the maximum extent possible. This provision has no analogue in CIPA or the Uniform Code of Military Justice ("UCMJ"), and it suggests a potentially burdensome process of declassification where the traditional alternatives would be more efficient and would adequately protect the rights of the accused. We also believe there are a number of elements of CIPA law and practice that would substantially improve the way classified information issues are dealt with by the commissions, including for example establishing clear guidance on the propriety of *ex parte* hearings on classified information issues and setting substantive standards for provision of classified evidence to the defense in discovery. We would be happy to work with you and your staff on these issues.

Fifth, we share the objective of the Committee to empower appellate courts to protect against errors at trial by expanding their scope of review, including review of factual as well as legal matters. We also agree that civilian judges should be included in the appeals process. However, we think an appellate structure that is based on the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the United States Court of Appeals for the District of Columbia Circuit under traditional standards of review, is the best way to achieve this result.

There are two additional issues I would like to highlight today that are not addressed by the Committee bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional

law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy. However, we believe conspiracy can, in many cases, be properly charged consistent with the law of war in military commissions, and that cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

Finally, we think the bill should include a sunset provision. In the past, military commissions have been associated with a particular conflict of relatively short duration. In the modern era, however, the conflict could continue for a much longer time. We think after several years of experience with the commissions, Congress may wish to reevaluate them to consider whether they are functioning properly or warrant additional modification.

In closing, I want to emphasize again how much the Administration appreciates the Committee's leadership, and the very thoughtful bill it has drafted. While there may be some areas of the bill on which we disagree with the approach taken or the specific language adopted, we think this bill represents a major step forward and we are optimistic that we can reach agreement on the important details. We would welcome the opportunity to conduct further discussions.

Thank you again for the opportunity to testify today, and I will be happy to answer any questions you have.

STATEMENT OF

VICE ADMIRAL BRUCE MacDONALD, JAGC, USN

JUDGE ADVOCATE GENERAL OF THE NAVY

BEFORE THE

SENATE ARMED SERVICES COMMITTEE

7 JULY 2009

Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you very much for giving me the opportunity to testify today on the subject of military commissions.

In 2006, when this Committee was working to establish a permanent framework for military commissions through the Military Commissions Act, I had the opportunity to share my views with the Senate Judiciary Committee and House Armed Services Committee. At that time, I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the Uniform Code of Military Justice should be used as a model for the commissions process. Although our experiences of the last few years have shaped my perspectives on some of the rules that should apply to military commissions, I am pleased to say that this committee's legislative proposal addresses the concerns I had in 2006. Overall, I believe that this legislative proposal establishes a balanced framework to provide important rights and protections to an accused while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

This legislation provides each accused with critical legal protections. These include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, along with an expanded

right to exculpatory, as well as mitigating and impeachment evidence.

- The right to be present during all sessions of trial when evidence is to be offered and the right to confront witnesses.

- The right to self representation and the right to be represented by detailed military counsel, an expanded right to counsel of the accused's own choice if reasonably available, and the right to civilian counsel at the accused's expense.

- The right to appellate review, to include a review of factual sufficiency identical to the type of review currently conducted for courts-martial under the UCMJ.

Prosecution of alien unprivileged enemy belligerents has proven a challenge over the last few years. Your legislation establishes a more balanced framework to prosecute accused by modeling the procedures used in general courts-martial under the Uniform Code of Military Justice while recognizing the exigencies that exist on the battlefield in time of war.

Specific highlights of the legislation that I support include:

- A requirement that the government prove its case beyond a reasonable doubt.

- Protection against double jeopardy.

- A requirement that the proponent of hearsay evidence establish its reliability to an extent required by rules long recognized in trials by general courts-martial.

- Exclusion of statements obtained through the use of torture or cruel, inhuman or degrading treatment. For other statements, permits the military judge to determine admissibility in the interests of justice based upon the reliability of the statement under a totality of the circumstances analysis.

- Establishes clearly defined criminal offenses.

- Continues to recognize and rely upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

In short, this legislation strikes the right balance between affording an accused the judicial guarantees recognized as indispensable by civilized people and our national security concerns.

In reviewing your legislation, I believe that there are two areas in which our practitioners would benefit from some additional clarity.

- Section 949d provides for the use of rules of evidence in trials by general courts-martial in the handling of classified evidence. This is consistent with our overall desire to use those procedures found within

the UCMJ and the Manual for Courts-Martial whenever possible. However, experience has shown that practitioners struggle with a very complex and unclear rule within the Military Rules of Evidence. The military rules do not have a robust source of informative or persuasive case law. Frankly, prosecutions using Military Rule of Evidence 505 are rare. In developing the rules for the handling of classified material during a military commission, it would be more prudent to rely upon the Classified Information Procedures Act (CIPA) used in Article III courts as a starting point. The use of CIPA as a touchstone for drafting provisions for use in the litigation of classified evidence in military commissions, complete with the definitional guidance that has developed over more than 20 years of jurisprudence in federal district courts, would provide practitioners with additional clarity in the area of classified evidence.

- Section 948r provides a test for determining the admissibility of allegedly coerced statements. I recommend you include a list of considerations a military judge should use in evaluating the reliability of those statements. Those considerations should include the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether and to what degree the will of the person making the statement was overborne.

Once again, thank you very much for this opportunity to share my personal views on your legislation. I look forward to answering your questions and working with the Committee on this important endeavor.

John D. Hutson
Senate Armed Services Committee
July 7, 2009

I am the Dean and President of the Franklin Pierce Law Center. I served as a Judge Advocate in the United States Navy from 1973-2000 and as the Judge Advocate General of the Navy from 1997-2000. I am very aware of the honor and privilege of testifying before this Committee on the matter of military commissions. I thank the Committee for this opportunity.

Even greater than democracy itself, the greatest export of all from the United States is Justice. Daniel Webster once said, "Justice, Sir, is the greatest interest of man on earth. It's the ligament which holds civilized beings and civilized nations together." But Justice is fragile and easily disparaged. It must be nurtured and handled with great care.

I was an early and ardent supporter of military commissions. Initially, I was drawn to their historical precedents and, more importantly, I was confident that the United States Armed Forces could and would conduct fair trials even of reprehensible defendants. My own experience gained during 28 years in the Navy and our long history of providing due process while trying our own military personnel in courts-martial gave me this confidence.

Unfortunately, as it turned out, the commissions that were created did not live up to the traditions of the Uniform Code of Military Justice. Predictably, they became a significant distraction for the military. I hasten to add that this was in spite of the stalwart, honorable effort of many, many military personnel themselves. Indeed, that is one of the great tragedies of this saga, and largely makes one of the points that I wish to underline.

The primary role of the military is to fight and win our Nation's wars or, stated more precisely, to provide the time and space necessary for real solutions—economic, cultural, social, religious—to take place. Prosecution of miscreants is an occasionally necessary sidebar to that mission but shouldn't distract from it. We have the UCMJ and the military court-martial system to expedite the legitimate role of the military, not interfere with it.

If a sailor on a ship is alleged to have committed a crime, we must expeditiously and fairly resolve that problem. Otherwise, it can fester and interfere with unit cohesion and impede an effective fighting force. The UCMJ and the Manual for Courts Martial serve that purpose alone. They solve problems for the armed forces; not create them. Our recent history with military commissions has been the opposite. I've come to realize that even a perfect commission regime would be a distraction for the military. It's simply not part of its mission. I am very concerned when the military is called upon to perform functions outside of its core mission even when I'm confident that it can do it well. Preserving and ensuring justice in the United

States is the primary mission of the Department of Justice, not the Department of Defense.

If there will be criticism of our prosecution of alleged terrorists—and there will be—the Department of Justice and the U. S. Federal Court system are equipped to deal with that criticism. Indeed, it is part of their responsibility to face it, address it, and resolve it.

Notably, the criticism will come not only critics outside the judicial process such as the media, foreign allies and enemies, and domestic commentators but also from the legitimate appeal process. Some of the criticism may actually be justified or, at least, defensible. There is no reason in law or logic for the military to be the target of that. Convictions from military commissions will be appealed until Dooms Day just because of the forum of the conviction. Federal courts are impervious to that.

It is decidedly not the responsibility of the Department of Defense or the U.S. military to deal with criticism of such prosecutions. It would, in fact, be detrimental to the military mission. There are valid and important reasons why our military is the most highly respected institution in America. One of them certainly is that the military limits itself to its mission and performs that mission very well. Taking on duties outside of that core mission on an ongoing basis will surely undermine the public's confidence in the military...and divert important resources, human and otherwise, from that mission in order to take on the new one.

We already have proof of this. Besides being a distraction to the vital mission of DoD, military commissions have, to a large extent, become a discredit in spite of the valiant and highly credible efforts of many, many people in uniform. Rather than showcasing the military justice system of which we all are justifiably proud, commissions represent something else entirely. They have not worked often or well. "Fixing" them would help, but won't eliminate undeserved but inevitable criticism.

On the other hand, during the same period, U.S. District Courts have successfully prosecuted literally hundreds of terrorists who now reside in Federal prisons around the country, keeping all Americans safer. Federal courts, including judges, prosecutors, marshals, and other court personnel have decades of experience in these cases. They have developed a justifiable and universally held reputation for fairness, and consequently, they are largely immune to criticism.

There is also now a large body of law that has been developed over the years in the Federal court system. It would take an equal number of cases and decades of trials for DoD to match the Federal precedent contained in the Federal Reporters.

Military judges, prosecutors, and defense counsel rotate out of one assignment into another every three years or so. Without significant changes to longstanding DoD personnel policy, none of them will ever, ever gain the experience in these cases that

is enjoyed by scores of their civilian federal counterparts. We could do that, we could change longstanding DoD personnel policy but again, if we did we would have the tail of terrorist prosecutions wagging the warfighting dog.

It is not only unnecessary, it is inappropriate for DoD to operate a system of justice in parallel to DoJ. The UCMJ and the courts-martial it creates are absolutely necessary to ensure our effective fighting force. But for some of the same reasons that the Posse Comitatus Act prevents the military from enforcing laws against U.S. civilians, we should resist the temptation of using the military to prosecute foreign criminals when DoJ can perform that critical function quite well.

Let us not forget, these are not legitimate warfighters. They are common criminals. They are thugs, cowards who target innocent civilians. We should treat them as such and not elevate their status to that of legitimate enemies. They don't belong in the same category as Major Andre or the German saboteurs.

We don't ask DoJ to fight wars. We shouldn't ask DoD to prosecute terrorists.

If the point of this exercise is to create a court system that will ensure convictions of alleged terrorists against whom we don't have sufficient admissible evidence, then we have missed the point. You can't have a legitimate court unless you are willing to risk an acquittal. If you aren't willing to accept the possibility that a jury will acquit the accused based on the evidence fairly presented, then it isn't really a court. It's a charade.

The corollary to that is that you can't have a real court if the rules of evidence and procedure are so stacked against the defendant that he has no real chance to present his case or defend against the government's case. The admissible evidence against him based on the facts may be so overwhelming that conviction is assured but that must be the consequence of facts, not rules of evidence tilted in favor of the prosecution.

Over the years, federal courts have displayed remarkable ingenuity, flexibility, and resourcefulness in prosecuting terrorists. The Federal Rules of Evidence and Procedure are sufficiently adaptable to accommodate the vagaries of trying those individuals who are captured overseas by military personnel in the midst of performing military operations. I believe the image of the "strategic corporal" having to give Miranda warnings after risking his life to break into the bunker is a red herring.

If you as members of this Committee believe or suspect that the Federal Rule of Evidence or the Federal Rules of Criminal Procedure should be amended to accommodate certain cases and situations, it is preferable to superimpose modest new rules on an extant, tried and true judicial system than to create a whole new system—particularly in light of recent efforts.

It might be wise to set up a task force of experienced judges, prosecutors, and defense counsel to make recommendations to Congress in this regard.

However, if we create yet another military commission system that "contains all the judicial guarantees considered to be indispensible by all civilized peoples" as required by Common Article 3 of the Geneva Conventions, then we have essentially duplicated our own Federal courts. There is no logical reason to create a system that mirrors one already in existence and is functioning so well. We should strive for the minimum change necessary to accomplish the purpose, not a wholesale change to an already effectively functioning system.

Clearly and undeniably, the Administration and this Committee are dedicated to untying this Gordian knot in a way that serves the very best interest of the country. We are now operating under the Military Commission Act of 2006 which many find to be badly flawed. I very much respect and admire your effort to improve it. My recommendation, however, is to repeal it rather than improve it. In the process, I urge you to express this body's preference to prosecute alleged terrorists in federal court and thereby demonstrate to the world, friend and foe alike, what kind of Justice the United States wishes to export.

Tuesday

July 7, 2009
9:30 AM

To receive testimony on legal issues regarding military commissions and the trial of detainees for violations of the law of war.

Major General John D. Altenburg, Jr., USA (Ret.)
Former Appointing Authority for Military Commissions

NO ELECTRONIC TESTIMONY SUBMITTED.

STATEMENT OF DANIEL MARCUS

Senate Committee on Armed Services
July 7, 2009

Chairman Levin, Senator McCain, and other Members of the Committee: Thank you for inviting me to testify on one of the most important of the difficult set of issues facing Congress and the Administration with respect to the detainees held at Guantanamo Bay: In what forum should detainees who are believed to have committed war crimes be tried – Article III courts, courts-martial, or military commissions?

Unlike my colleagues on this panel, I am not an expert on military justice. But as a Government official and a law professor, I have been following these issues closely for the last six years – first, as General Counsel of the 9/11 Commission, and since 2005, teaching National Security Law and Constitutional Law at the Washington College of Law, American University. Before that, I was for many years a partner in the law firm of Wilmer, Cutler & Pickering, and I served in the White House Counsel's Office and in several positions at the Department of Justice, including Associate Attorney General, from 1998-2001.

The questions surrounding detention and trial of the Guantanamo detainees have become more complicated than they looked in late 2001 and early 2002, when the first detainees were captured in Afghanistan and sent to Guantanamo. In the wake of the 9/11 attacks, Congress had quickly enacted the Authorization to Use Military Force, essentially authorizing the President to conduct an armed conflict against Al Qaeda and the Taliban. Pursuant to the AUMF, the President had sent thousands of U.S. troops to Afghanistan to depose the Taliban as the de facto government of Afghanistan and to

capture or kill the Al Qaeda fighters and leadership. While the opponents in this armed conflict were not nation-states, the conflict seemed very much like a traditional armed conflict or "war."

In the years since then, however, we have come to the realization that this is a different kind of war that is not so easy to define or limit, territorially or temporally. While the traditional battlefield is in Afghanistan (and to some extent, arguably, the adjacent western border areas of Pakistan to which Al Qaeda and the Taliban have fled), Al Qaeda continues to operate in other parts of the world, either directly or through other, loosely affiliated organizations. And it has become clear that this conflict is one of indefinite duration, which will not end with a truce or surrender. Finally, we have learned that even on the Afghanistan battlefield itself, it is not nearly as easy as in traditional wars against uniformed members of regular armed forces to determine who is and is not an enemy combatant.

These problems have been compounded, in my view, by some serious mistakes and over-reaching by the last Administration in the years immediately following the 9/11 attacks – the reliance on strained legal arguments to minimize or avoid entirely the application of the Geneva Conventions and the Convention Against Torture; the effort to deny the Guantanamo detainees any opportunity to challenge the determination that they were enemy combatants; and the creation of a system of military commissions that almost no-one outside the Administration believed provided anything close to a fair process for trying detainees for war crimes. This last mistake has delayed for years bringing the Guantanamo detainees to justice for their crimes.

Thanks largely to the Supreme Court and the Congress (in the Detainee Treatment Act and the Military Commissions Act), there has been significant progress in correcting these mistakes and providing a legal process for the detainees that can be defended as consistent with the basic principles of our military and civilian justice systems. But more remains to be done, and there are important decisions that this Congress and this Administration still have to make. I congratulate this Committee for taking the initiative in addressing these issues.

So, where should we go from here with respect to trials of the detainees? Some argue for abandoning the military justice model (if not the entire law of war paradigm) and prosecuting the detainees only in Article III district courts (or perhaps some new special national security court staffed by Article III judges). I believe there is a role for Article III courts in some types of cases and that our U.S. district courts – in cases such as Moussaoui and Padilla – have shown themselves capable of trying major terrorism cases. I also believe that it is inappropriate to use military tribunals to try U.S. citizens (such as Padilla) or others lawfully in the United States (such as al-Marri) who are arrested by law enforcement authorities in the United States, far from any traditional battlefield. The same is true for some of the Guantanamo detainees who were captured, not in Afghanistan, but in countries such as Bosnia or Algeria, and whose alleged crimes are unrelated to the events of 9/11 or the war in Afghanistan. A good example is Ahmed Khalfan Ghailani, who was recently transferred from Guantanamo to a federal prison in New York for trial in U.S. District Court on charges arising out of his alleged participation in the bombing of the U.S. embassies in East Africa in 1998. He is charged

with a very serious terrorist act, but not one properly regarded as a war crime triable by a military commission or court-martial.

I have become convinced, moreover, that while the federal courts can try many terrorism cases, there are some cases in which it would be very difficult to try Guantanamo detainees in federal court. Of course, I am not privy to the evidence that the Government has gathered with respect to any detainee. But I gather that there are two main reasons why it is difficult to try some detainees in federal court: First, in some cases the key evidence of guilt is statements of the defendant that could not be introduced in federal court because they were made without prior Miranda warnings or were the "fruit of the poisonous tree" of coerced statements. Of course, some of these statements would not be admissible under the MCA or this Committee's bill, but a significant number would.

Second, and perhaps more important, the more public nature of trials in federal court – where it is extremely rare to close any proceedings to the public – and the hearsay rules that apply in federal courts make it very difficult to conduct a trial involving certain kinds of highly sensitive national security information. The prime example of this is where important evidence against the detainee is from an intelligence source whose identity cannot be made public. These difficulties are also present, to a large extent, with court-martial trials. Under the MCA as it would be amended by this Committee's bill, however, and under changes in military commission procedures already adopted by the new Administration, some hearsay evidence found reliable by the presiding Judge could be admitted. And the greater flexibility that the Military Judge has to close portions of a

military commission trial (with the defendant and his counsel still present) will enable the fair presentation of more sensitive national security information.

I was initially of the view that it would be preferable to try all detainees by court-martial (or in Article III courts) – not because I thought military commissions could not be conducted in a fair manner that adequately protected the rights of defendants, but because I thought that the original military commission regime that was held unlawful by the Supreme Court in its 2006 Hamdan decision had given military commissions such a bad image around the world that we ought to choose some other forum to try the detainees. But I have become convinced that an *improved* system of military commissions, while not the ideal choice, is the best – or perhaps one should say the least worst – of the alternatives before us for trying many of the detainees.

In opting for an improved military commission system, I am also influenced by the interrelationship of this issue with the very difficult issue of indefinite or preventive detention of those detainees who cannot be tried or safely released. President Obama came into office, it appears, hoping that we could not only close Guantanamo, but also try (and convict) or release all the Guantanamo detainees. It seems likely, however, that the Administration will conclude that this cannot be done – that because of evidentiary problems and national security sensitivities, there will be some "guilty" and dangerous detainees who cannot be tried in any forum and who therefore should continue to be detained under the law of armed conflict (with periodic court review and additional safeguards). Such a longer-term detention system may be necessary, but it is certainly undesirable from a civil liberties standpoint. And one reason I conclude that improved military commissions are our best option for trying many detainees is that I believe it will

result in more detainees being tried, thus reducing the number of detainees who continue to be detained without trial.

Finally, let me list some of the important ways that the commission system established by the MCA can and should be improved, bringing it closer to the standards of courts-martial. (Some of these are already addressed in the Committee's bill.):

- The overbroad definition of "enemy combatant" should be narrowed to be more consistent with the law of armed conflict and the traditional battlefield concept.
- The list of offenses triable by military commissions should be revisited, to assure that it can be defended as consistent with the law of armed conflict. In particular, a fresh look should be taken at whether "material support of terrorism" and conspiracy can be deemed war crimes.
- Hearsay evidence should be admissible under more limited circumstances, with the burden on the prosecution to establish the reliability of the evidence.
- Statements obtained as a result of all cruel, inhuman, or degrading treatment, regardless of when that treatment took place, should be excluded. Only statements that meet basic standards of voluntariness should be admitted.
- There should be more robust requirements for disclosure by the prosecution of potentially exculpatory and mitigating evidence to the defense.
- The reviewing court (whether it is the Court of Appeals for the Armed Forces or the Court of Appeals for the District of Columbia Circuit) should have full appellate authority to review the military commission's judgment and findings, comparable to that of a federal court of appeals reviewing a district court judgment of conviction.

- Habeas actions should be available to defendants in military commission cases to the same extent that they are available to court-martial defendants.

Thank you for the opportunity to testify. I would be happy to answer your questions.