Testimony of

Lieutenant Commander Charles D. Swift

Defense Council
Office of Chief justice Counsel
June 15, 2005

STATEMENT OF
LIEUTENANT COMMANDER CHARLES D. SWIFT, JAGC, USN
BEFORE THE SENATE COMMITTEE ON JUDICIARY ON
DETAINEES

JUNE 15, 2005

Senator Specter, Senator Leahy, Committee Members:

My name is Charles D. Swift. I am presently commissioned as a Lieutenant Commander in the United States Navy, Judge Advocate General's Corps. I would like to thank the Committee for inviting me to testify regarding the critical issue of the procedures and fairness of Military Commissions. My testimony today is made in the context of my assignment as Military Defense Counsel of Salim Ahmed Hamdan, a Yemeni National facing trial by Military Commission. As such, it does not necessarily represent the views of the United States Navy or the Department of Defense.

I have had the honor of serving my country in the United States Navy for over 18 years and the privilege to be a member of the United States Navy Judge Advocate General's Corps for the past 11 years. My experiences in the JAG Corps have convinced me beyond any doubt of the truth of F. Lee Bailey's statement that if he were innocent of a crime, he would rather be tried by a court-martial, but if he were guilty, he would rather take his chances in a civilian court.

Of course military justice has not always been synonymous with fairness. Prior to the establishment of the Uniform Code of Military Justice (UCMJ) military proceedings often deserved the analogy that military justice was to justice what military music was to music. Such an unfavorable view arose from the fact that military justice placed the interests of the military commander in a paramount position to the protection of the accused, lacked an independent decision-maker to ensure impartiality of the proceeding, and in contrast to a core value of our founders, relied on individuals instead of the rule of law to ensure the system's fairness.

The advent of the UCMJ and its subsequent revisions corrected these faults and put military justice in step with American values, while still maintaining the necessary flexibility to cope with the realities of the military's central function: defense of our nation. For more than 50 years the UCMJ has been a cornerstone of a system of military justice that has proven not only its fairness, but unique adaptability to the requirements of national security, the realities of the battlefield, and the necessities of military operations.

Instead of focusing on American values inherent to the UCMJ, the ad hoc, on-the-fly military commission process rules focused on the lack of values of our enemy. That focus has caused the Military Commission to abandon the "rule of law." By running roughshod over the UCMJ, we have lost site of our fundamental values to the point that Mr. Hamdan faces judgment for allegedly violating the law of war in a tribunal that fails to live up to the standards of justice required by that same law. In recounting my experience in the Military Commissions it is not my intention to lay blame for the present situation; rather I hope to spur a return to the tried and trusted path of the UCMJ.

Chronology

I was nominated to serve as a Defense Counsel in the Military Commissions by the Judge Advocate General of the Navy in early March of 2003. I reported to the Chief Defense Counsel Military in mid-March 2003, on the premise that Commissions were imminent.

When I reported to the Commissions though, I found quite a different mood. No one involved in the Commission

process appeared eager to begin the process. In my first meeting with Mr. Haynes, the Department of Defense General Counsel, he thanked me for agreeing to serve and told me that my service would be valuable even if we chose never to do a commission. He also recounted advice he had received from Mr. Lloyd Cutler, who had served as one of the junior prosecutors in the Nazi Saboteur Case, Ex Parte Quirin, 317 U.S. 1 (1942). Mr. Cutler cautioned that the Quirin case was the only episode of his legal career of which he was not proud. After reading the rules for Military Commissions it was not hard to understand why there was considerable reluctance to begin them.

Despite internal reluctance, on July 3rd of 2003, the President began the Military Commission process by finding that six detainees were subject to trial by Military Commission. The plan was to begin Commissions with guilty pleas. Two weeks after the President's finding, a request to detail Military Counsel to Mosem Begg of Great Britain and for David Hicks of Australia believed to be likely candidates for guilty pleas was made. I was tasked by the then-Acting Chief Defense Counsel Colonel Will Gunn to draft letters detailing Lieutenant Colonel Sharon Shaffer, USAF to represent Mosem Begg and Major Dan Mori, USMC to represent David Hicks. Literally minutes before Colonel Gunn was going to sign these letters, he received word that counsel was not to be detailed to either man.

Subsequently, I watched as diplomatic talks between Great Britain and the United States attempted to reconcile the Commission procedures with what Great Britain considered to be the minimum standards of due process for criminal justice required by the Anglo Saxon tradition and international law for a criminal proceeding.

Ultimately, the Department of Defense released the British detainees rather than accede to Britain's demands concerning the commissions. That the decision to charge an individual was at least in part dependent on nationality and political concerns raises the specter of selective prosecution and undue command influence, and has further compromised the perception of the Commissions' fairness at their onset.

As talks with Britain were reaching an impasse, it was decided to skip the British defendants and move on in an attempt to demonstrate the legitimacy of Commissions. Still determined to begin the commission with guilty pleas, Mr. Hamdan was substituted for Mr. Begg on the belief that he too would agree to plead guilty. On or about December 12th, 2003, Mr. Hamdan was moved into "pre-commission segregation," and held in solitary confinement in Camp Echo. On December 16th, the Chief Prosecutor requested that Military Counsel be detailed to Mr. Hamdan. I was subsequently detailed to represent Mr. Hamdan on December 17, 2003.

At the onset of my representation of Mr. Hamdan, I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of "negotiating a guilty plea" to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea.

Despite my reservations about representing a client whose only choice was to plead guilty I believed it was prudent to meet with Mr. Hamdan based on the Prosecutions representations that Mr. Hamdan in fact desired to plead guilty. But, at my first meeting, I knew I had to tell Mr. Hamdan that if he decided not to plea guilty, he may never see me again.

In an effort to offset what I believed to be a clear attempt to coerce Mr. Hamdan into pleading guilty my legal team drafted an authorization for him to sign permitting me to serve as "next friend" in a lawsuit. By so doing, I hoped to offset Mr. Hamdan's fears that if he did not agree to plead guilty he would never be heard from again and rendered incommunicado in a legal black hole.

The lack of a translator prevented me from meeting with Mr. Hamdan until January 30th, 2004. Upon meeting with Mr. Hamdan I was immediately confronted with the fact that the realities of his pretrial confinement did not live up to then-Assistant Attorney General Chertoff's promise of humane conditions of pre-trial detention, including the free exercise of religion. During the initial period of his pretrial confinement, Mr. Hamdan was held in isolation for more than seven months in violation of the Geneva Convention. Mr. Hamdan cell lacked both natural light and ventilation. For approximately the first 60 days of that pretrial detention, Mr. Hamdan was only permitted only a half-hour of exercise and then only at night. For the first 90 days of his confinement in pretrial isolation, Mr. Hamdan was not permitted any reading material beyond the copy of the Koran. Federal courts have found that solitary confinement for even a handful of days to constitute violations of the Constitution, let alone seven months. Contrary to the promise of free exercise of religion, Mr. Hamdan was not permitted to participate with other detainees in Friday Prayers, nor was he provided basic standard Islamic text found in any American Mosque including the Tafsir (a basic interpretation of the Koran), and Stories of the Prophet continue to be denied him.

My personal observation of the impact of the above conditions caused me serious concern for his well being. To mitigate these concerns, I demanded a speedy trial on Mr. Hamdan's behalf and an independent medical examination. Both of these requests were denied.

Despite Attorney General Ashcroft's assurances to Senator Edwards that the President's Military Order would not be used to detain a person for an unlimited period of time, General Hemingway rejected Mr. Hamdan's request for a speedy trial, finding that he had no right to a speedy trial and could be held indefinitely.

Mr. Hamdan's request for independent medical evaluation was rejected in favor of a cursory twenty minute psychiatric

examination. When an independent exam was finally permitted in March of this year by Dr. Emily Kerham, a noted forensic psychiatrist, the extent of the damage done to Mr. Hamdan by the conditions of his confinement and the methods utilized in his interrogations was able to be determined. Dr. Keram found after conducting a medical exam in accordance with accepted standards of care that to a medical certainty Mr. Hamdan suffered from Post Traumatic Stress Disorder as a result of the abuse he had suffered during his detention and had experience of major depression during his solitary confinement.

Although I was permitted to continue to meet with Mr. Hamdan subsequent to his refusal to negotiate a guilty plea, the decision to charge two other detainees expected to plead not guilty instead of Mr. Hamdan in combination with the flat refusal to give Mr. Hamdan a speedy trial caused me to fear that the only way Mr. Hamdan would see a Commission was if he agreed to plead guilty. After four month's in solitary confinement Mr. Hamdan was on the verge of being coerced into a guilty plea or deteriorating mentally to the point that he would be unable to assist in his defense if he ever came to trial.

At Mr. Hamdan's request and out of belief that I had no other options left in April 2004, I filed and have maintained since, a petition for Writ of Mandamus and or Habeas Corpus challenging both the lawfulness of procedures and the jurisdiction of the proceeding. The lead counsel in this action is Professor Neal Katyal of Georgetown University Law Center and who has previously testified before this Committee on this subject. In addition to Professor Katyal, the law firm of Perkins Coie has served as co-counsel. The tireless efforts of Professor Katyal and Perkins Coie have brought the issues of jurisdiction and legality of Military Commissions front and center before the Federal Courts. Their efforts have served not only Mr. Hamdan, but the public's interest as well.

The Department of Justice, contrary to then-White House Counsel Alberto Gonzalez's public assurances and that of Attorney General Ashcroft, Assistant Attorney General Chertoff and Department of Defense General Counsel Haynes to this Committee that detainees could challenge the jurisdiction of military commissions via writs of habeas corpus, has continuously opposed the resolution of the merits of Mr. Hamdan's claim. Initially the Department of Justice argued that court should abstain until the Supreme Court determined whether Secretary of Defense Rumsfeld had by virtue of holding Mr. Hamdan and other detainees in Guantanamo Bay successfully avoided Habeas challenge altogether.

After the Supreme Court determined that detention in Guantanamo Bay was not a bar to Habeas Corpus, the Prosecution hastily referred a single charge of conspiracy against Mr. Hamdan. Based on the decision to charge Mr Hamdan with conspiracy the Department of Justice now argues that the Federal Courts should defer to the Commission. The use of a Military Commission to try Mr. Hamdan on a charge of conspiracy, however, exceeds assurances made to this Committee that only war crimes would be heard by the Commissions.

Colonel Winthrop's definitive treatise on Military Law explicitly states that crimes of intention are not within the jurisdiction of a Military Commission. Conspiracy is not listed as a crime in any of the treaties governing the law of war. The Nuremburg Tribunals rejected conspiracy as a war crime cognizable against minor actors. Finally, just this year the International Committee for the Red Cross published its exhaustive study of the common law of war, and it does not list conspiracy.

The Department of Justice maintains that three military officers, two of which have no legal training or experience, are better suited to determine a Commission's lawful jurisdiction than a federal court. This argument flies not only in the face of the representations to this Committee but also in Attorney General Biddles' observation in Quirin that "I cannot conceive that a Military Commission composed of high officers of the Army, under a commission signed by the Commander- In -Chief, would listen to arguments in the question of its power under that authority to try these defendants....[L]et me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts."

Apart from the question of whether the Commissions are a lawful exercise of Presidential power, the proceedings against Mr. Hamdan are not going to keep the promise of a full and fair trial. Consider the following:

? The Prosecution is currently seeking to enter more than a thousand pages of investigative reports and interrogations of the accused and other detainees into evidence before the Commission. Yet it has not identified the agents that have compiled the report, the translators if any utilized in the interrogations, and any other individual present.

? Indeed, the prosecution has never disclosed the conditions under which the interrogations have been made. Public statements by General Miller, the former Commander of the Joint Task Force Guantanamo, indicated that the lack of evidence surrounding the interrogations in questions was intentional effort to avoid preserving evidence that may be used by Defense Counsel. These facts in combination with numerous reports in the media, FBI memorandums, internal reports, and internal investigations, of abusive and coercive tactics in the interrogation of detainees cast considerable doubt as to the truth and voluntariness of the statements principally relied on by the Prosecution to support the charge against Mr. Hamdan.

? Unlike every other court with which the United States is familiar, the military commissions do not prohibit testimony

obtained by torture. Indeed, the military commission rules permit the introduction of tortured testimony without notice of how it was obtained. As the entire military commission defense team and Professor Katyal wrote, in a letter to this Committee dated June 1, 2004:

the Department of Defense has sought and attempted to build a legal black hole wherein it can conduct both physically and psychologically abusive interrogations and impose penal and potentially capital sanctions subject only to the will of the Executive and the Department of Defense and not the rule of law. Such a purpose is in no way in keeping with our countries fundamental tenet, enshrined by our nation's great Chief Justice John Marshall in 1803, that we are a "government of laws, and not of men." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

? Military prosecutors have no authority to force the disclosure of how statements of purported members of al Qaeda from the intelligence agencies that obtained them and the Military defense counsel have no ability to demand the production of such witness.

? A complete set of rules for the conduct of proceeding has never been promulgated. The failure to publish a trial guide after more than three and half years has created the situation in which counsel were required to prepare for proceedings whose procedures were published literally an hour in advance of the hearing. The Appointing Authority and the Presiding Officer have acknowledged that they are in the process of developing the rules for Military Commissions even as they conduct them. In the best of lights, Mr. Hamdan's Military Commission must be seen as an experiment in justice conducted on a living human being.

? Mr. Hamdan was removed from hearing portions of the Commission Member's voir dire without any effort to mitigate his removal by providing unclassified summaries of the testimony as promised. What is more striking is that the issue could have been easily avoided in advance. The closed testimony centered around one of the member's activities regarding the war in Afghanistan and another member's role in determining classification and transportation of detainees to Guantanamo Bay. The Appointing Authority certainly could have chosen members who did not have a direct involvement in decisions concerning Mr. Hamdan, thereby avoiding the issue altogether.

? The Prosecution indicates that during trial, they intend to seek Mr. Hamdan's exclusion from one to two days of the trial proceedings. As a mitigating measure the Department of Defense has stressed that Military Defense Counsel will be permitted to be present during the presentation of this evidence but will not be able to consult with his client or reveal the content of the evidence or testimony to his client.

As a practicing Military lawyer for eleven years, I can say without reservation, that the presence of Defense Counsel in these hearings does nothing to mitigate the prejudice to the accused. The accused explanation of direct evidence against him is paramount in the preparation of cross examination, proffer of rebuttal evidence and the accused's determination of whether to testify. For this reason, the accused presence at trial is among the oldest of the traditions of Anglo Saxon jurisprudence.

Military commissions have historically required the presence of the accused during the substantive portions of his trial. Even the Quirin Commission, cited repeatedly to this Committee for the lawfulness of Military Commissions, did not exclude the accused at any point of hearing the testimony against them. The Quirin saboteurs were present throughout their trial, despite the fact that the evidence then contained critical information regarding the United States' defenses and its vulnerabilities.

Likewise, as NYU Professor Noah Feldman, who drafted the Iraqi Constitution under assignment from the Department of Defense, pointed out in his amicus brief in support of Mr. Hamdan, the rules developed by the United States for the trial of Saddam Hussein and all other war criminals in Iraq required the defendant's presence during every substantiate phase of his trial. To argue that Mr. Hamdan maybe excluded for security purposes from his own trial when the Quirin saboteurs were not and Saddam Hussein will not be so excluded does not live up to the promises made to this Committee that Commissions would be reflective of American values.

Even if hearing proceedings are modified to require the presence of the accused in accordance with international law and the Uniform Code of Military Justice, it is highly doubtful that the international community will come to see Commissions as full and fair trials as promised to this Committee by the Assistant Secretary of Defense. The erosion of confidence in interrogations techniques utilized by United States and foreign agents of detainees combined with evidentiary rules that the drafters contend permit the admission of coerced statements and the lack of an independent and unbiased judiciary to review the appropriateness of evidence makes it highly unlikely that the international public will consider the Military Commissions to be full and fair as promised. Indeed, as alluded to the above, Great Britain from whom we draw our tradition of Anglo Saxon jurisprudence refused to continence the trial of its citizens before the Military Commissions as they are currently composed.

We believe that the Supreme Court of the United States will ultimately find these Military Commissions unlawful. But I am here today not to argue a legal case to you, but to underscore the tremendous failure that the Commissions have been. It has been nearly four years since the horrific attacks of September 11, 2001. Not a single person has been prosecuted in the Military Commission. Only four people have been charged. Of those four, none can be said to be a

high-ranking member of al Qaeda or anything close to it. As of the end of July 2005, the Office of the Chief Defense Counsel will be reduced to only one full time defense counsel and incapable of representing the handful of individuals currently before commissions. The Military Commission process, regardless of how the federal courts rule, is an exercise in futility. It tries to reinvent a vibrant system of law, the American court-martial, without considering its fundamental features: balancing of rights of defense and prosecution, and compliance with international law and the United States Constitution.