Testimony of

Lt. Commander Charles Swift

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

SUPREME COURT DECISION ON DETAINEES:
"HAMDAN v. RUMSFELD"

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My name is Charles D. Swift. I am a Lieutenant Commander in the Judge Advocate General's Corps, United States Navy, and I am the detailed defense counsel in the military commission case of United States v. Salim Ahmed Hamdan. I thank the Committee for inviting me to testify today as you begin the vitally important process of determining the necessity of a legislative response to the Supreme Court's opinion in Hamdan v. Rumsfeld.

Critical to that consideration is the question of whether military commissions can ever actually deliver the full and fair trials promised by the President's order. Based on the past five years the inescapable conclusion is that the commission consistently failed to meet the President's mandate for full and fair trials. This isn't simply the view of a defense counsel who litigated in the commission system. It is also the view of some of the commission prosecutors. One of those prosecutors, Air Force Captain John Carr, wrote that in his experience, the commission system was "a half hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged." (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A) Another prosecutor, Air Force Major Robert Preston, lamented that "writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard - particularly when you want to call yourself an officer and a lawyer." (E-mail from Major Robert Preston to Colonel Fred Borch, attached at Tab A) The commission system, as these prosecutors concluded, was incapable of holding a fair trial.

Those of us who litigated cases in Guantanamo recognized that the military commission system was flawed in both design and execution. The military commission system's procedures were simply inadequate to ensure that trials produced accurate results. The system's many shortcomings included the following.
? The military commission system had inadequate rules to ensure that the Defense would receive exculpatory evidence in the government's possession. Providing the defense with exculpatory evidence in the government's possession promotes not only a tribunal's fairness, but also the

accuracy of its results. That is why the Supreme Court has held that an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 438 (1995). Yet in the military commission system, the Prosecution had no obligation to give the Defense exculpatory evidence in the possession of other government agencies. This was significant because, according to one former military commission prosecutor, government agencies intended to deliberately exploit this gap in discovery obligations to keep the defense from obtaining exculpatory evidence. Commission prosecutor Captain John Carr wrote to the commission system's Chief Prosecutor, "In our meeting with [a government agency], they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it." (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A)

Very simply, under the military commission rules the Prosecution had no obligation to disclose evidence from other government agencies suggesting the defendant was innocent.

? The military commission system's lax evidence admissibility standard allowed the Prosecution to obtain a conviction through the use of rank hearsay, including unsworn written statements and law enforcement agents' summaries of interviews. During the commission discovery process, it became apparent that major portions of the Prosecution's cases would consist of calling law enforcement agents to the stand who would then testify about what they heard from various witnesses they interviewed. The defendants would have no ability to cross-examine the actual witnesses against them, because those witnesses would never be called. Instead only the government's agents would be called.

This procedure contrasts sharply with the guidance of Justice Scalia's opinion for the Supreme Court in Crawford v. Washington, which noted that the Confrontation Clause was adopted in response to arguments that "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." The dissenting Justices in Hamdan were incorrect in maintaining that "Petitioner . . . may confront witnesses against him." The Defense could confront only those witnesses the Prosecution chose to present. In practice, this meant little or no confrontation right at all.

? The military commission system had no rule preventing the admissibility of statements obtained by coercion. As Chief Justice Roberts recently wrote for the Supreme Court, "We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable." Yet military commissions had no rule excluding such unreliable evidence unless the coercion rose to the level of torture. Even the prohibition against statements obtained by torture - belatedly adopted on March 24, 2006 and announced the day before the Supreme Court's oral argument in the Hamdan case - fails to provide a standard of proof or allocate who has the burden of proof to establish that statements were the product of torture. Perhaps the most glaring problem was that, as a practical matter, the rule barred tortured testimony only when it was torture in the eyes of the prosecution - and there was no provision at all guaranteeing to the defense any sort of discovery about coercion to obtain testimony.

? Both the Presiding Officers, who performed the judicial function in the military commission

system, and the military commission panel members, who served as jurors, were selected by the Appointing Authority - the same official who approved the charges against the defendant. One of the military commission prosecutors, Air Force Captain John Carr, wrote that the Chief Prosecutor told him "the military panel will be handpicked and will not acquit these detainees." (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A) For the position of Chief Presiding Officer, the Appointing Authority picked a long-time friend who had retired from the Army five years previously, had not practiced law since his retirement, and had never been an active member of any bar.

? The Appointing Authority - the same individual who approved the charges and appointed the commission's members and its presiding officer - also performed a judicial role. Any interlocutory appeals were resolved by the Appointing Authority. So any ruling by the commission that would result in dismissal of the charges was forwarded to the Appointing Authority for his review. Thus, the same official who had begun the prosecution by approving the charges was allowed to overrule any determination that the charges should not go forward.

? The Review Panel, which was supposed to serve as the appellate body of the military commission system, was not impartial. One member - William T. Coleman, Jr. - attended a meeting in July 2003 during which the prosecution discussed its efforts and strategy and a discussion was held as to various legal authorities relevant to military commissions. (Exhibit 11 to Declaration of Christine S. Ricci, pages 47-50, Vaughn Index, NIMJ v. Department of Justice, No. 1:04CV00312 (RBW), attached at Tab B)

? The Defense had no right to call witnesses. The parties' ability to obtain witnesses to testify at military commission hearings was unequal. The Prosecution could obtain whatever witnesses it wished unilaterally, but the Defense was required to ask the Prosecution for permission to obtain any witnesses it wished to call. The Defense was required to give its opposing counsel a synopsis of the witness's expected testimony along with an explanation of how the testimony supported the Defense case. This resulted in the equivalent of a poker game in which the Prosecution's cards were dealt face down while the Defense cards were dealt face up. The advantage to the Prosecution was palpable. Additionally, while the Defense could seek the Presiding Officer's review of the Prosecution's denial of a witness request, in practice the Presiding Officers denied literally every Defense witness request on which they ruled. In all ten commission cases, in only a single case and then only in one instance has the Defense been permitted to call a witness. That witness - the only witness to ever testify at a military commission proceeding in Guantanamo - was allowed to testify under a pseudonym despite the fact that the same witness had previously provided a sworn affidavit concerning the same subject matter in which he identified himself in open Federal proceedings. Again, the Hamdan dissent was incorrect in claiming that "Petitioner . . . may subpoena his own witnesses, if reasonably available." In fact, the Defense had no ability to issue subpoenas and, with only one exception, no success in obtaining witnesses through the Prosecution or the Presiding Officer.

? Almost all of the documents that the defense counsel did receive through the discovery process could not be shared with the client. Most of the documents the defense received were "Protected Information" because the Prosecution made the discretionary decision to stamp them "For Official Use Only" or "Law Enforcement Sensitive." Protective orders in commission cases also severely limited the defense counsel's ability to discuss prosecution witnesses' identifies with the defendant. Preventing the defense counsel from discussing virtually all of the Prosecution's evidence with the defendant made effective case preparation almost impossible.

? The commission system not only prevented the defendant from preparing for trial by reviewing

the evidence with his defense counsel, but also allowed the defendant to be excluded from portions of his own trial. Any civilian defense counsel representing the accused could also be excluded from closed sessions. In two commission cases - United States v. Hamdan and United States v. Hicks - the defendant was removed from his own trial during voir dire. When a defendant or civilian defense counsel was excluded, commission rules prevented the military defense counsel from sharing with them what occurred during the closed session. In the history of Anglo-American jurisprudence, including that of military justice, I have only learned of one incident during the Civil War where this is documented to have occurred. In that case the Judge Advocate General of the Army summarily reversed the decision.

? Those few rules that did exist to govern commission proceedings were subject to constant revision. The rules could, and did, change after cases had already begun. Additionally, the power to make new rules was subdelegated all the way down to the Presiding Officers. The result was equivalent to allowing U.S. district court judges to make up new Federal Rules of Criminal Procedure and apply them to cases that had already started. The Presiding Officers on occasion abused this authority by adopting new rules that not only aggrandized their own power, but also prejudged matters that the parties were litigating before them by promulgating rules that codified the Prosecution's desired outcome.

? The system for assigning several defense counsel from the same office to represent alleged co-conspirators violated some defense counsel's state bar ethical rules. The Pennsylvania Bar Association advised the military defense counsel in one military commission case that she had "a disqualifying conflict of interest" due to the office's representation of multiple alleged co-conspirators. (Advisory opinion of Pennsylvania Bar Association, attached at Tab C)

? Even if the handpicked commission panel were to review all of the evidence and acquit the defendant, the defendant could nevertheless remain incarcerated. Secretary of Defense Rumsfeld stated, "Even in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over." If a detainee can be held indefinitely with or without a guilty verdict at a military commission, then why even bother?

When then-White House Counsel Alberto Gonzales promoted the concept of military commissions in a November 30, 2001 New York Times op-ed piece, he argued, "They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals." Almost five years later, not a single military commission has been completed. The ten that began were convened 8,000 miles from where our forces are fighting in Afghanistan. By contrast, during the same period the Army alone has held 373 courts-martial on the battlefields of Iraq and Afghanistan. These proceedings accomplished every one of the objectives laid out by the Attorney General in his op-ed.

In his dissent, Justice Thomas echoed the proponents of commissions and criticized Justice Stevens for ignoring the reality of the battlefield. Such criticism is unjustified. The court-martial was developed for both use on the battlefield and the protection of information vital to national security without compromising the essential substantive safeguards necessary for a fair trial. Judge Robertson, who issued the injunction requiring the use of courts-martial, and Justice Stevens and Justice Kennedy, who authored the opinions upholding Judge Robertson's opinion, are all former service members well acquainted with the realities of the battlefield. The reality of the battlefield is that our service members are best served by scrupulously following the laws of war, even when our enemies do not. Following the law of war protects our military in the field,

enhances our national reputation at home and abroad, and promotes the growth of the rule of law and democracy that in the end are our strongest weapons against terrorism.
To illustrate the potential damage to our national reputation posed by quick-fix legislation in the wake of the Supreme Court's decision, consider the following: Suppose that in order to protect our troops from false allegations of the murder of civilians by our enemies, military commanders invoked the historic requirement that the crime of murder cannot be prosecuted unless the prosecution can produce a body. A military prosecutor seeking justice for the victims and believing that the rule conflicts with both the modern law of war and the Uniform Code of Military Justice appeals the order all the way to the Supreme Court, ultimately prevailing. The decision is hailed around the world as evidence that the United States stands first and foremost for the rule of law. Under these circumstances, attempting to circumvent such a decision without proof that the existing rules were inadequate would not make sense. Hastily adopting legislation that revives the discredited commission system would similarly detract from our nation's reputation as the leading proponent of human rights in the world.

Four years and eight months ago, following the publication of the President's unilateral decision adopting Military Commissions, my co-counsel Professor Neal Katyal warned this committee that they would fail to produce convictions and eventually be struck down by the Supreme Court. Not only was Professor Katyal's legal analysis correct, but the practical benefits of commissions extolled by it proponents have failed to materialize. The commissions have completed not a single trial. No one was even indicted for almost three years, and when indictments finally came, a total of 10 have been made. Do we really want to change the entire legal regime - exposing us to untold criticism around the world for abrogating the Geneva Conventions - for 10 trials? Perhaps such a regime change makes sense if there is incontrovertible evidence that the current one has failed. But, as five Justices of the Supreme Court repeatedly emphasized in the Hamdan decision, the existing court-martial system provides a battle-tested way to try terrorists today. Before junking an existing system, we should give that system a try - particularly when making any changes will inevitably result in yet more litigation and uncertainty.

Trials that comply with the Uniform Code of Justice will cure all of the abuses I have identified for this committee. If on the other hand we again elect to stray from the tried and true path laid out in the Uniform Code of Military Justice that the Supreme Court returned us to, not only will these abuses continue, but I fear that we will find ourselves right back where we started yet again. Except this time, the situation will have deteriorated to the point that trials are no longer even possible. It is time for the American people to have their day in court. It is time to use courts-martial.