

Testimony of

General Thomas W. Hartmann

December 11, 2007

Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security
Tuesday, December 11, 2007
226 Dirksen Senate Office Building
Statement of Brigadier General Thomas W. Hartmann
Legal Advisor to the Convening Authority for the Office of Military Commissions

Madam Chairwoman, Ranking Member Kyl, thank you for inviting me to participate in this morning's hearing. I am the Legal Advisor to the Convening Authority for the Military Commissions. In this role, I am responsible for providing legal advice to the Convening Authority, an independent quasi-judicial figure who administers the Office of Military Commissions. I also supervise the Chief Prosecutor's Office.

Today's military commissions are the result of the Executive, Legislative and Judicial branches of our government working together to answer the central question of this hearing: "Detainees rights, what are they?"

Just over a year ago, this chamber sent the Military Commissions Act to the President. In that legislation, Congress made clear its view that even persons alleged to have committed the most heinous and egregious of war crimes should enjoy certain fundamental rights. The rights guaranteed to detainees include many of those we recognize as essential for service members under the military justice system and for our own citizens in civilian courts. The rights guaranteed to an accused in a military commission include the right: to be present for all proceedings; to have detailed military defense counsel at no cost, obtain civilian counsel at no cost to the Government or represent himself; to trial by jury before a competent judge; to review and respond to all of the evidence the members of the commission (or jury) will see; to have the members of the commission instructed that the accused is presumed innocent until proven guilty beyond a reasonable doubt; to call witnesses and present evidence on his own behalf; and to question and to challenge the impartiality of the presiding judge and the members of the commission. A detainee cannot be compelled to testify against himself. An accused may have a foreign consultant present and, with concurrence of the judge, be seated at the defense table during commission proceedings. The attorney-client, husband-wife, and clerical privileges are also respected in the rules of evidence governing the proceedings.

Indeed, in the recent Khadr and Hamdan trials we have seen most of these rights exercised. For example, Mr. Hamdan had five counsel at his table, one detailed military defense counsel, two civilians from a law firm, one DOD civilian detailed defense counsel and one other civilian counsel.

Commissions are transparent and provide a window through which the world can view military justice in action during war. The press has been allowed, even encouraged, to attend commission hearings. Nearly 30 members of the press corps attended the recent hearings in Khadr. Five Non-Governmental Organizations (NGOs), Amnesty International, Human Rights First, Human Rights Watch, The American Civil Liberties Union (ACLU) and The American Bar Association (ABA), are regularly invited to attend commission proceedings.

Military commissions are anchored in court-martial practice. When an accused walks into a commission courtroom, he is protected by the M.C.A., the commission rules of evidence and procedure, the military judge (appointed by the TJAGs), and the zealous representation of the military counsel detailed to defend him, along with any civilian counsel.

Post-trial rights deserve mention as well. As in a court-martial, if an accused is convicted, he is permitted to submit material to the Convening Authority for her to review. In submitting the additional information, the accused is not hindered by admissibility or other evidentiary rules. As legal advisor to the Convening Authority, I am required to

conduct a comprehensive review of the record and provide legal advice on the trial's result. The Convening Authority has the complete and unencumbered discretion to approve, reject, or reduce the commission sentence as well as set aside a finding of guilty, or change a finding of guilty to a lesser included offense. The Convening Authority's review is unique to military justice. As such, it is a right available to a commission accused that is unavailable even to an American citizen.

If the Convening Authority approves the sentence, the conviction is automatically reviewed by the Court of Military Commission Review (C.M.C.R.), another right that does not exist in civilian judicial systems but which derives from court-martial practice. This appellate court consists of seasoned military and civilian judges. Already active, the C.M.C.R. heard arguments in August regarding the jurisdictional provisions of the M.C.A. Like any appellate court, the C.M.C.R. committed itself to an examination of the facts and the law in rendering its opinion. It did that in Khadr, and rendered an opinion within 90 days of the appeal.

Further, an accused may appeal the final decision of a military commission to the U.S. Court of Appeals for the D.C. Circuit if his conviction is sustained by the C.M.C.R. From there, a Writ of Certiorari is available for review by the Supreme Court. In total, after conviction, an accused has four levels of review and appeal.

Critics often pick at the seams of the commission process. Few of them, however, acknowledge the extensive layers of protection for the accused that exist within the system and ensure that no one will be convicted and punished except after a manifestly fair proceeding in which guilt has been proven beyond a reasonable doubt to extensive post trial review.

Senators, I ask that you evaluate these extraordinary detainee rights and privileges at a commission trial in light of the ongoing hostilities. We are prosecuting these cases in the midst of a "hot war." No other tribunal, from Nuremburg through Sierra Leone, can make that claim. The U.S. is trying alleged alien unlawful enemy combatants as the global war on terror continues. While our military forces engage the enemy abroad, we provide military attorneys to represent these individuals at no cost to the accused. While our intelligence operatives penetrate deep into the al Qaeda network, we provide volumes of documents to suspected al Qaeda members and their counsel in pre-trial discovery. While our brave men and women give their lives to advance the cause of freedom and to protect ours, we bestow upon our enemy the rights we, and others, deem fundamental to a fair process under the rule of law. That is what makes America the most benevolent nation in the history of warfare.

But we continue to try to improve. We are conducting an exhaustive internal review of the Manual for Military Commissions, the Regulation for Trial by Military Commission, the Military Commission Trial Judiciary Rules of Court, and the Court of Military Commission Review Rules of Practice for compliance with the M.C.A. and for internal consistency among documents.

In summary, Senators, let me answer this subcommittee's question directly. Detainee rights before military commissions are clearly articulated in the M.C.A., are expounded upon in the Manual for Military Commissions, and are protected and enforced by the military judges and counsel in the commission courtroom and throughout the appellate process. They are unprecedented. They are fair. They are factual. They are open and transparent.

Chairwoman Feinstein, Senator Kyl, I thank you again for holding this important hearing and for permitting me the opportunity to testify. I look forward to answering your questions.