Testimony of
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INTRODUCTION

Disclaimer: Thank you, Chairman Leahy and Members of the Judiciary Committee, for inviting me to speak to you today. My testimony is given in my capacity as a private citizen who formerly served as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of either the Department of the Air Force, the Department of Defense or any other entity.

> "*Terrorists can shake the foundations of our biggest buildings but they cannot touch the foundation of America.*" President George W. Bush, Sep 11, 2001

When former DoD General Counsel, William Haynes, appointed me Acting Chief Defense Counsel in the Office of Military Commissions in February 2003, I was assigned Pentagon office space in an area near the section that had been damaged during the attack of September 11, 2001. A plaque hangs in that section with the above words that President George W. Bush spoke on the night of September 11th. I view the rule of law as the cornerstone of the foundation of America. Unfortunately, many of our detention policies and actions in creating the Guantanamo military commissions have seriously eroded fundamental American principles of the rule of law in the eyes of Americans and in the eyes of the rest of the world.

I served 25 years as an active duty Air Force officer prior to my retirement as a colonel in 2005. I spent more than 19 years of that time as a judge advocate with the last two and a half years spent serving as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. As Chief Defense Counsel, I was responsible for screening prospective defense personnel, doing my utmost to promote a zealous defense for any detainees brought

before a military commission, promoting "full and fair trials," and overseeing the entire defense function for the military commissions.

While I will focus my attention on the military commissions, the United States government has taken several actions with respect to detainee policy in the post 9/11 era that have significantly eroded this nation's standing in terms of respect for human rights. Some of these actions are described below.

Article 5 Tribunals: Upon launching hostilities in Afghanistan, the President determined that all prisoners captured pursuant to that conflict (and the Global War on Terrorism) were unlawful enemy combatants who were not entitled to the protections of the Geneva Conventions. This was a major break with past law and policy as outlined in the Army Field Manual which called for all prisoners to be initially treated as enemy prisoners of war until a determination as to their status could be made. As a result of this decision, the Administration chose to forgo Article 5 tribunals, which are called for under the Geneva Conventions, whenever there is any doubt as to whether a person should be treated as a prisoner of war. [1] According to a DOD report, over 1,100 Article 5 tribunals were successfully conducted in Operation Desert Storm.[2]

Hidden Prisoners: For years the United States hid certain detainees from the International Committee of the Red Cross, operated undisclosed prisons, and transferred prisoners to third countries for questioning. (The Wall Street Journal, 5 April 2005).

Coercive Interrogations: While there has been a great deal of debate regarding what constitutes torture, there is no doubt that at least some detainees were exposed to interrogation methods that the U.S. has publicly decried when carried out by other nations. For example, while undergoing Survival Evasion, Resistance and Escape (SERE) training as an Air Force

[1] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
[2] DOD Persian Gulf Report, at 578.

Academy cadet in the 1970s, my classmates and I received instruction on what was then described as the inhumane practice of water boarding. This is a practice the Chinese employed against captured American soldiers during the Korean Conflict to coerce false confessions and a practice which the U.S. government has heretofore considered unacceptable. Remarkably, the U.S. government has used this technique in at least some cases in the aftermath of 9/11.

Overall Policy Shift on Geneva Conventions: While one can argue to what extent al Qaeda and Taliban prisoners were entitled to the protections of various aspects of the Geneva Conventions, the Administration decided to abandon policies used in Vietnam and elsewhere to treat enemy detainees in accordance with the Geneva Conventions regardless of their legal status. Deciding that al Qaeda and Taliban prisoners were not entitled to the legal protections afforded by the Geneva Conventions led to subsequent decisions that it was permissible to use coercive methods in an effort to obtain intelligence.

MILITARY COMMISSION CHALLENGES

When I became Chief Defense Counsel for the Military Commissions in 2003, one of my duties involved seeing to it that military commissions were "full and fair" in accordance with the Executive Order that created them after 9/11. After studying the military commissions system created by the Administration, I could conceive of only one fundamental way to conduct a fair military commission. Achieving a full and fair military commission would require prosecutors and other government personnel to exercise great restraint and not utilize many of the tools afforded them under the commission rules. This was the case because several of the rules and procedures constituting the military commissions system ran afoul of what we as Americans consider critical to having a fair legal system. While I had great respect for my military colleagues who were working to put together prosecutions, the rule of law and its perceived

fairness primarily relies on the soundness and inherent justice embedded in the laws being enforced as opposed to the discretion and restraint of individuals enforcing them.

The system I encountered had several drawbacks which generated controversy, diminished the U.S.'s prestige at home and abroad, and fueled widespread perceptions that the system was unfair. Some of these challenges have been addressed by subsequent events, including three Supreme Court decisions, but many problems remain. These problems include:

Creating Rules and Procedures From Scratch: Rather than using rules and procedures for courts martial found in the Manual for Courts Martial and Uniform Code of Military Justice, Administration officials sought to establish a new and distinct system for military commissions. Establishing new rules and procedures has contributed to delay and confusion such that only one military commission has been completed in the nearly seven years since military commissions were authorized. That lone commission, United States v. David Hicks, was only completed as a result of a plea agreement that allowed the Australian detainee to be released before he ever would have seen a trial under the ever-evolving commissions system.

Use of an Untested System Based on an Outdated Model: The United States last conducted military commissions more than 60 years ago in the period immediately following World War II. The commissions conducted at that time followed procedures that closely tracked the military justice system of that period. When the President authorized military commissions for detainees in November 2001 and the Secretary of Defense issued his initial procedural guidance in early 2002, the system that was announced more closely resembled the military commissions of the 1940's as opposed to 21st century courts martial. For example, neither the military commission system of the 1940s nor the pre-MCA (Military Commissions Act of 2006) military commissions system featured a military judge, neither system permitted independent

judicial review of commission results, and both systems sought to preclude such review. The MCA adds a military judge to the commissions and creates a military commissions appellate court but the Act has other problems and falls short of courts martial protections. Accordingly, besides the challenge to the denial of habeas corpus presented in Boumediene v. Bush, several of the MCA's provisions will undoubtedly be further challenged in Federal Court and additional delays can be expected.

Lack of an Independent Chain of Command for Defense Counsel: The military commission system has been criticized because the defense counsel in the system did not have an independent reporting chain. As Chief Defense Counsel, I reported to a senior career civilian attorney in the DOD Office of General Counsel, who in turn reported to the DOD General Counsel. While defense counsel have repeatedly shown a willingness to zealously represent their clients and to do what they deemed to be in the interests of justice to pursue their clients' interests, the failure to create an independent supervisory structure for defense counsel made it more difficult to win the confidence of detainees and created the perception among many that the system was a sham. This same reporting structure remains in place.

Ability to Exclude Civilian Counsel and the Accused: One of the most glaring shortcomings in the original military commissions system was the possibility of excluding the accused and civilian defense counsel, who lacked required security clearances, from the proceedings when they concern classified information. The MCA attempts to deal with this problem such that now a civilian counsel must receive the necessary security clearance level before being allowed to take the case and the military judge must seek alternatives to classified information. The MCA does not expressly permit the accused to be excluded due to the handling of classified information. However, as described below, the accused can still be denied the

opportunity to confront evidence against him and the option of excluding the accused presumably remains open if the military justice cannot find a suitable alternative. Under generally accepted principles, the ability to confront witnesses and participate in one's own defense are considered critical elements of fair proceedings. Ironically, courts martial and federal court proceedings have long dealt successfully and fairly with the issue of handling classified information by using the provisions of the Classified Information Procedures Act (CIPA).

Use of Hearsay and Coerced Testimony: In normal jurisprudence, hearsay evidence is not admitted unless its proponent demonstrates that it fits within certain defined exceptions considered reliable. Coerced testimony is never admissible. However, under the MCA, the prosecution is allowed to present hearsay evidence which denies the accused the ability to cross-examine and confront the witnesses against him. The MCA shifts the burden with respect to the use of hearsay to the party opposing such use. See Section 949a of the MCA. The rules go further to make it possible for evidence that is the fruit of coercion to be admitted. See Section 948r of the MCA. Thus, the government can introduce coerced statements made by the accused, as long as they are considered probative, without ever allowing the accused the opportunity to confront the person to whom the statement was made. Even if the detainee's statements were obtained by torture--cruel, inhuman, or degrading treatment—they can still be admitted providing they were obtained prior to the passage of the Detainee Treatment Act in 2005, a time long after most Guantanamo detainees were in custody. These provisions are a long way from traditional American notions of fairness and justice.

Government Monitoring of Attorney Client Communications: The initial rules permitted the government to monitor attorney-client communications. This provision was later narrowed

to require that defense counsel be informed prior to any monitoring by the government and to establish a wall between the prosecution function and the intelligence function conducting the monitoring. During my tenure none of the defense counsel assigned to the Office of the Chief Defense Counsel were ever informed that the government was listening in on their client meetings. However, the fact that the Government held out the possibility of doing so fueled the view among many that the system was rigged and patently unfair.

Disregarding Common Article 3 of the Geneva Conventions: Common Article 3 of the Geneva Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Section 948b (f) of the MCA states that the military commissions created by the Act are regularly constituted courts "affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." However, simply saying it does not make it so.

The original military commissions as envisioned by the Administration and the commissions authorized by the MCA seek to eliminate the protections of Common Article 3. Specifically, Section 948b (g) of the MCA states that "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." While this section is designed to prevent a detainee from using the Geneva Conventions as a sword, it also purports to strip a detainee of the ability to claim a violation of Common Article 3 as a basis for defending himself in a commission. The legality of this section will certainly be tested because a plurality of the Supreme Court took the position in Hamdan v. Rumsfeld that Common Article 3 "must be understood to incorporate at least the barest of those

trial protections that have been recognized by customary international law." 126 S.Ct. at 2797. Furthermore, several of the MCA's provisions depart from the requirements of Common Article 3. These provisions include a denial of equal protection by singling out aliens as the only individuals eligible to face a military commission and allowing coerced testimony to be presented.

Logistical Obstacles Hindering Full And Fair Proceedings: Many of the logistical obstacles I first encountered over five years ago still remain in place and present substantial barriers to ever having full and fair military commission hearings at Guantanamo. These challenges include transportation difficulties, inadequate access to clients, and the legal difficulty of not being able to subpoena civilian witnesses and require that they attend a military commission hearing at Guantanamo. As for transportation, it is difficult to get to Guantanamo**;** therefore**,** an attorney often has to set aside several days in order to conduct a single client meeting at Guantanamo, due to limited military flights in and out of the base. This problem is exacerbated by the fact that defense counsel have not been afforded the opportunity to communicate with clients via telephone. In addition to being limited to face-to-face contact with clients, defense attorneys face limitations on the unclassified information they can share with their clients. Joint Task Force Guantanamo (JTFGTMO) officials limit what defense attorneys can share with their clients. For example, current defense counsel report that JTFGTMO officials have prevented them from sharing evidence with clients that the prosecutors have provided. This makes it impossible to adequately prepare for trial.

ESTABLISHING PRECEDENTS

> **"***He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."* Thomas Paine

The Guantanamo detentions along with the fits and starts of the military commissions have seriously undermined our nation's standing as a beacon for the rule of law. The danger associated with the Administration's detainee policies in the wake of September 11th lies in the fact that our actions will serve as precedent in at least two ways. First, there are those in other nations who will look to our actions to justify their own. This diminishes our credibility as a serious promoter of human rights. Second, our soldiers who traverse future battlefields could find themselves subject to the same type of treatment in which we have engaged. We would find such a turn of events to be deplorable.

THE FUTURE

There now seems to be widespread consensus in this country among opinion leaders, including both major Presidential candidates, that Guantanamo should be closed. This consensus springs from recognition that our policies have cast a stain on how we are viewed in the world. While a much needed symbolic measure, closing the facility is not enough. The military commission rules and procedures that have been put forth over the last several years have had a synergistic effect that continues to deprive the proceedings and this nation of legitimacy. As pointed out in the report released last month by the Center for American Progress called "How to Close Guantanamo," closing the detention facility and moving the detainees will not solve our credibility problem. The MCA, while an improvement over the initial military commissions system, still has substantial shortcomings and falls short of Common Article 3 requirements. Rather than seeking to tinker with the MCA, I strongly recommend using the courts martial system and/or federal courts to dispose of the cases of detainees that should be tried in a court of law.

Both the military justice system and our federal court system have substantial advantages over the existing military commission system. Both systems are "battle" tested, have existing procedures for dealing with classified information, and both systems enjoy domestic and international legitimacy. The Global War on Terrorism is a battle for security that challenges us to adhere to our fundamental principles. Respect for law, including international human rights norms and the law of war, is critical to this battle.