Opening Statement of Chairman Ike Skelton (D-MO)
Hearing on Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006

July 16, 2009

Washington, DC – House Armed Services Committee Chairman Ike Skelton (D-MO) delivered the following opening statement during today's hearing on Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006.

"The Committee will come to order. Since the 109th Congress deliberated and passed the Military Commissions Act of 2006, I have argued that the most important task before us has been to design a system that could withstand legal scrutiny and would be found to be constitutional. I doubted at the time and still believe that the current system could survive the Supreme Court's review.

"By my estimation, there are at least seven potential defects in the Military Commissions Act of 2006.

· First, the Supreme Court has already held in Boumediene that the Military Commissions Act unconstitutionally stripped federal courts of jurisdiction over habeas cases.

· Relatedly, the Act may violate the exceptions clause under article III of the Constitution by impermissibly restricting the Supreme Court's review.

· Third, it is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention.

· Fourth, the provisions regarding coerced testimony may be challenged under our Constitution.

· Fifth, the Act contains very lenient hearsay rules which rub up against the right of the accused to confront witnesses and evidence.

· Sixth, the Act may be challenged on equal protection and other constitutional grounds for how it discriminates against the detainees for being aliens.

· Lastly, article I of the Constitution prohibits ex post facto laws. That is what this Act may have created.

"At the President's instruction, the Administration is conducting an inter-agency review of detainee policy. This inter-agency task force should be recommending reforms to the Military Commissions law. Already the Administration has commented on the suggested amendments to the Military Commission Act that our colleagues on the Senate Armed Services Committee included in their National Defense Authorization bill.

"I invite each of our witnesses to provide their assessment of whether the Senate bill has gone far enough to correct the potential constitutional infirmities that I have indentified or whether something more or different should be done.

"The bottom line is that we must prosecute those who are terrorists with the full force of the law, but we must also make sure that the convictions stick. Certainty of convictions must go hand in hand with tough prosecutions. Permitting hardened terrorists to escape jail time because we didn't do our jobs in Congress

to fix the Military Commissions Act would be a travesty of justice to the victims of 9/11, our nation, and the rule of law.

"I now turn to my good friend and colleague, our distinguished new Ranking Member from California, Mr. McKeon, for any opening remarks that he would like to make."

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STATEMENT OF

VICE ADMIRAL BRUCE MacDONALD, JAGC, USN

JUDGE ADVOCATE GENERAL OF THE NAVY

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

16 JULY 2009

Chairman Skelton, Ranking Member McKeon and Members of the Committee, thank you very much for providing me with the opportunity to testify regarding my personal legal opinion on the subject of military commissions. My testimony today is neither the opinion of the Department of Defense or the Administration.

In 2006, Congress enacted a comprehensive framework for military commissions. The Military Commissions Act (MCA) established the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence, and prescribed substantive offenses. It used the Uniform Code of Military Justice as a model for the commissions' process. The Act also provided the Secretary of Defense with the authority to promulgate rules to be used in military commissions. The MCA and the rules currently in effect provide an accused with critical legal protections, which include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, including exculpatory 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, the right to be represented by military counsel of the accused's own selection if they are currently assigned to the Office of Military Commissions and reasonably available, and the right to civilian counsel at the accused's expense.

- The right to appellate review.
- Presumption of innocence, protection against double jeopardy, and the right to require the government to prove its case beyond a reasonable doubt.
- Protection from admission of statements obtained by torture or through the use of cruel, inhuman or degrading treatment, no matter when the statement was obtained.
- The right to equal treatment of all parties when hearsay evidence is offered, and a requirement that the proponent of the evidence establish its reliability.
- Recognition and reliance upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

Despite these protections, some shortcomings remain. These include:

- Classified materials are handled under guidelines that have no civilian or court-martial counterpart. The lack of precedent has created confusion over the authority to hold *ex parte* hearings, and has led to inefficient litigation regarding discovery and protective orders.
- The admissibility of hearsay evidence is too broad.
- There is no requirement for the prosecution to disclose evidence that might mitigate a sentence or impeach the credibility of a government witness.
- Appellate review is not sufficiently robust.

On July 7th, I was called to testify on the military commissions provisions of Senate Bill 1390. The military commissions provisions under consideration by the Senate correct many of these shortcomings. There are, however, two areas in which our practitioners would benefit from some additional clarity.

- Section 949d under the Senate proposal 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 under the Senate proposal provides a test for determining the admissibility of allegedly coerced statements. I recommend that the provision include greater particularity. I recommend a list of considerations that the 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 in the statement itself, and whether and to what degree the will of the person making the statement was overborne. The rule should also distinguish between intelligence and law enforcement interrogations. When conducted for the purpose of intelligence in the proximity of the battlefield, the rule should clearly provide for admissibility where the actions of the person taking the statement were in accordance with the law of war. But when interrogations are conducted for the purpose of possible prosecution or not in the proximity to the battlefield, voluntariness is an appropriate standard for admissibility.

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.

DEPARTMENT OF THE AIR FORCE

PRESENTATION TO THE
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

SUBJECT: MILITARY COMMISSIONS

STATEMENT OF: LIEUTENANT GENERAL JACK L. RIVES
THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

JULY 16, 2009

Chairman Skelton, Ranking Member McKeon, members of the Armed Services Committee, good afternoon and thank you for this opportunity to testify today on the subject of military commissions. Before I begin, I would like to emphasize that the views expressed in my testimony are my own and do not represent the views of the Department of Defense or the Administration.

Military commissions have a long history in this country as a mechanism to address possible violations of the law of war. Military commissions were used extensively during and after World War II, and they were again called upon in the aftermath of the September 11, 2001 attacks. After action by the Executive and review by the Supreme Court, the Congress acted in 2006 to pass the Military Commissions Act (MCA), providing the President statutory authority to establish military commissions to try traditional offenses as codified in the MCA. The effort to make military commissions more fair and credible enhances national security by providing effective alternatives to try international terrorists who violate the law of war.

Periodic review of the military commissions legislation and procedures is vital to an effective and fair commission process. As you are aware, the Department of Defense has been participating in a review of military commissions as directed by the President. We have been involved in that undertaking. The review led to the development of procedural changes that did not require revisions to the statute.

As required by the MCA, the Secretary of Defense notified the Congress in May of proposed changes to the Manual for Military Commissions affecting the

procedures used by military commissions. Those amendments will improve the military commissions process. As a result of the changes:

- Statements obtained using interrogation methods that constitute cruel, inhuman and degrading treatment cannot be admitted as evidence at a trial.
- The burden of proof on admissibility of hearsay will shift to the party that offers it. The burden will no longer be on the party that objects to hearsay to disprove its reliability.
- The accused will have greater latitude in selecting defense counsel.
- In situations where the accused does not testify but offers his own prior hearsay statements, the military judge will no longer be required to instruct the members to consider the accused's decision not to be cross-examined on the hearsay statements and that the statements are not sworn. Any such instruction would now be left to the discretion of the military judge.
- Military judges may establish the jurisdiction of their own courts. Under prior practice, jurisdiction for a military commission to hear a case was established by a prior Combatant Status Review Tribunal.

Further review is ongoing within the Administration. Changes to the Military Commissions Act of 2006 have also been advanced by the Senate Armed Services Committee. Some of the recommendations include making the changes listed above statutory. Additional changes are also appropriate; I highlight two for your consideration.

Reforms in the rules for handling classified information would have significant impact. Procedures that follow the Classified Information Procedures

Act (CIPA) would, with appropriate modification, balance the Government's need to protect classified information with the defendant's interests. The substantial body of CIPA case law that has developed over the years would provide valuable guidance to lawyers and the commissions.

Expanding the scope of appellate review to include review of factual matters, as the Service Courts of Criminal Appeals enjoy under Article 66 of the UCMJ, is desirable. Retention of the current Court of Military Commissions Review, comprised in whole or part of military appellate judges experienced in reviewing cases for both factual and legal sufficiency, is logical and efficient.

I encourage you to closely consider these revisions and stand ready to assist as appropriate in your efforts.

Again, thank you for the opportunity to testify and I look forward to answering your questions.

STATEMENT BY

LIEUTENANT GENERAL SCOTT C. BLACK
THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES ARMY

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

PROSECUTING LAW OF WAR VIOLATIONS: REFORMING THE MILITARY COMMISSIONS ACT OF 2006

FIRST SESSION, 111TH CONGRESS

JULY 16, 2009

NOT FOR PUBLICATION
UNTIL RELEASED
BY THE COMMITTEE
ON ARMED SERVICES

Introduction

Thank you, Mr. Chairman, Ranking Member McKeon and members of the committee. I'd like to thank you for the opportunity to appear here today and for the committee's consideration of these important issues.

I join in endorsing and encouraging continued Congressional and Administration efforts to reform military commissions for the trial of unprivileged belligerents accused of violations of the law of war during our country's ongoing conflict against those who planned and conducted the attacks against us on September 11, 2001 as well as those detained during the conduct of associated military and intelligence operations.

Our responsibility and interest in the enforcement of the law of war requires the viability and availability of military commissions for the legitimate prosecution of alleged war crimes. I am confident that this reform effort will result in a system that meets the standards for military commissions described by the Supreme Court in Hamdan v. Rumsfeld. I am similarly confident that such reformed military commissions will satisfy any outstanding concerns relative to our demand for a system characterized by our proper devotion to standards of due process recognized under the law of war, our commitment to ensuring fair treatment of the accused, and reliable results in any commission proceeding.

I offer the following comments in relation to a few specific proposals found in the Senate version of the NDAA:

First, I understand that the Administration favors adoption of a voluntariness standard on the admissibility of statements into evidence. I acknowledge and respect the prerogative of the Administration to resolve policy on all such matters but maintain my

recommendation against adoption of a voluntariness standard and in favor of a reliability standard where voluntariness is a relevant factor in resolving whether statements warrant admission at commission trial.

A domestic criminal law voluntariness standard of admissibility imposes an unrealistic burden upon our Soldiers in the field conducting lawful operations and will likely result in the exclusion of relevant and reliable statements collected during the course of military operations. Battlefield conditions neither warrant nor permit the scrupulous pursuit of Constitutional standards applicable to law enforcement activities. Any requirement that the United States establish the voluntariness of statements during the course of operations that are necessarily and legitimately coercive and intimidating by nature will likely frustrate what would otherwise be legitimate and necessary prosecutions at military commissions. I will continue to work with the Administration and Congress to fashion a standard for admissibility of evidence that is reliable and takes voluntariness into account, along with the exigencies of military operations, as a part of a "totality of the circumstances" analysis.

Second, I support the Administration's proposal to adopt the most recent developments in Federal practice under the Classified Information Procedures Act for application to trial by military commission in this context. The Senate proposal generally accords with rules applied by CIPA and Military Rule of Evidence 505 but fails to address impediments to the fair, efficient, and effective adjudication of classified information issues that frequently arise in such trials. Incorporation of the more sophisticated methods employed by those most experienced with the issue, borne of hard

experience in a number of cases, will ensure the best protection of classified information while conforming to the demands of a fair trial at military commissions.

Third, I disagree with the Senate's proposal to establish the Court of Appeals for the Armed Forces as an intermediate court of appeals for those convicted by military commission. I favor, instead, the Administration proposal to modify the responsibility and authority of the Court of Military Commission Review by infusing that court with the same responsibility and authority of our service Courts of Criminal Appeals under Article 66 of the Uniform Code of Military Justice (UCMJ).

The nature of this armed conflict does not require departure from the uniformity principle addressed by the Supreme Court in Hamdan, as applied to appellate review, but, rather, warrants adoption of an appellate system that more closely resembles that mandated by the UCMJ. The only departure from that system warranted by the history of military commissions and present circumstances is designation of a Federal Court of Appeals and the Supreme Court for ultimate civilian appellate review.

I caution against encumbering the Court of Appeals of the Armed Forces (CAAF) with a separate set of responsibilities in relation to review of military commissions in addition to those it has in relation to review of courts-martial, namely the need to review convictions for factual as well as legal sufficiency. CAAF's role and responsibility under the UCMJ is well-defined. It should not be confused with additional and significantly different duties when such are unnecessary for the proper review of commissions. It is better to rely on an intermediate court comprised of military judges already familiar with such review to serve as an additional check upon unreliable results at commission before resort to a traditional legal review in higher appellate courts.

And with that, I look forward to your questions, sir.

STATEMENT OF

BRIGADIER GENERAL JAMES C. WALKER, USMC

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

16 JULY 2009

The views expressed in this statement are those of the witness and do not represent the views of the Department of Defense or the Administration.

Chairman Skelton, Ranking Member McKeon and Distinguished Members of the Armed Services Committee, good morning. I appreciate this opportunity to come before you and testify today regarding the military commission process. The military commission process, while not new in American military history, has evolved significantly over time, as society has evolved. Just as American notions of what is fair and just have changed in our Criminal Justice practice, so have American notions changed of what is fair and just in the conduct of military commissions in the prosecution of alleged unlawful enemy combatants, or as the current legislation would describe them, unprivileged enemy belligerents. When I came before this committee in September of 2006, we discussed the way forward in light of the Supreme Court's Opinion in *Hamdan v. Rumsfeld*. At that time, I stated that I supported the military commission process. My views have not changed. Then, I stated, that we needed to "strike the balance between individual due process and our national security interests, while maintaining our nation's flexibility in dealing with terrorists and unlawful enemy combatants." The process to achieve this end has proven challenging. I believe a number of the provisions in Senate Bill 1390 under consideration make great steps towards this end. Admirably, Senate Bill 1390 continues to recognize those "fundamental guarantees" the Supreme Court determined as "indispensable by civilized peoples," such as, the presumption of innocence, the right against self-incrimination, and the right to presence during one's trial.

As we have began to work through the commissions process, problem areas have been identified in the current Military Commissions Act.

Senate Bill 1390 of the proposed National Defense Authorization Act addresses many of these problems. Overall, I concur with most of the changes proposed, and believe those changes establish the correct framework to ensure those responsible for violations of the laws of war are brought to justice and receive a fair and impartial trial.

Specific Senate Bill 1390 provisions, to name a few, which I support, are as follows:

- I support the provision in the proposed legislation that allows an accused to select a military defense counsel, among counsel determined reasonably available. This provision balances fairly the need for an accused to select a counsel that he personally feels comfortable representing him, with the needs of military efficiency to ensure that any counsel selected be reasonably available to represent such an accused.

- I support the requirement that prosecutors disclose any exculpatory evidence to the defense that negates guilt, reduces the degree of guilt, tends to impeach the credibility of a government witness, or may mitigate the sentence imposed. This is a matter of fundamental fairness and basic justice. Commissions should be a search for the truth, and the requirement that the prosecution disclose that information within its knowledge that exculpates the accused is a necessary step in satisfying this goal.

- I support the requirement that the proponent of hearsay evidence establish its reliability and necessity before such evidence is admitted. I believe we must also always recognize the realities of the battlefield in any measure of reliability of evidence.

As a result, I believe overall the quality and content of Senate Bill 1390 is admirable in its attempts to remedy problem areas in the conduct of military commissions. We can only achieve justice by

maintaining those fundamental guarantees indispensible for civilized people. These guarantees are also the principles that have served our nation for well over 200 years. Thank you for the opportunity to express my views on the commission process and I look forward to answering your questions.