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**Before the Constitution, Civil Rights,
And Civil Liberties Subcommittee of the
House Committee on the Judiciary**

Hearing on Legal Issues Surrounding the Military Commissions System

July 8, 2009

Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee, I want to thank you for inviting me to testify on the legal issues surrounding the military commissions system, including the mistaken proposals to revise and revive the irretrievably flawed military commissions at Guantanamo Bay.

I am a Lieutenant Colonel in the US Army Reserve Judge Advocate General's Corps. Since the September 2001 attacks, I have served in Bosnia, Africa, Iraq and Afghanistan. I have been awarded the Bronze Star Medal, the Iraqi Campaign Medal, the Joint Service Commendation Medal, and two Joint Meritorious Unit Awards. In civilian life, I am a senior prosecutor for the Commonwealth of Pennsylvania, and since graduating from law school, I have tried well over one hundred criminal jury trials.[1]

Most importantly for the purposes of this hearing, I served on active duty as a prosecutor at the Office of Military Commissions in Guantanamo Bay, Cuba, from May 2007 to September 2008. I proudly went to Guantanamo to serve our country as a prosecutor charged with bringing to justice detainees who President George Bush had said were "the worst of the worst." But I eventually left Guantanamo after concluding that I could not ethically or legally prosecute the

[1] Obviously, the views I express are wholly my own, and should not be taken as representative of the Department of Defense, the Department of the Army, or, certainly, my civilian employer.

assigned case. I became the seventh military prosecutor at Guantanamo to resign because I could not ethically or legally prosecute the defendant within the military commission system at Guantanamo.

I am here today to offer a single, straightforward message: the military commission system is broken beyond repair. Even good faith efforts at revision, such as the legislation recently passed by the Senate Armed Services Committee, leave in place provisions that are illegal and unconstitutional, undermine defendants' basic fair trial rights, create unacceptable risks of wrongful prosecution, place our men and women in uniform at risk of unfair prosecution by other nations abroad, harm the reputation of the United States, invite time consuming litigation before federal courts, and, most importantly, undermine the fundamental values of justice and liberty upon which this great country was founded. It is my firm belief that if the United States continues to prosecute terrorism suspects through military commissions, past will become prologue. Inevitably, we will find ourselves once again with a discredited system, with a series of unfavorable rulings by federal courts, and with few, if any, successful prosecutions.

My concerns appear to have been vindicated by the Justice Department's Office of Legal Counsel. As the members of this committee are no doubt aware, the *Wall Street Journal* reported last week that the OLC has issued an opinion finding that detainees tried by military commissions can claim certain constitutional rights, including the Constitution's prohibition on the use of statements obtained through coercive interrogations. Not only does this opinion bind the Executive branch to uphold a higher standard of admissibility of evidence than that afforded by either the current military commission rules or the Senate Armed Services Committee's legislation, but it also raises the specter of eventual invalidation by the Supreme Court of any prosecution of a detainee now held at Guantanamo.

At the very least, the OLC opinion should caution legislators that the Senate Armed Services Committee proposal, which permits the use of coerced evidence, is likely to spur protracted litigation and result in even more delay. And at this point, we cannot afford to delay justice any longer. Seven years of detention without charge is long enough. It is time for government to charge the individuals it is going to charge before regularly constituted Article III courts or military courts-martial, and resettle or repatriate the others. Indefinite detention of those imprisoned at Guantanamo without charge is anathema both to U.S. constitutional values and to the rule of law.

I was not always so skeptical about the capacity of military commissions to deliver justice. I entered my job at the Office of Military Commissions as a "true believer." I had heard stories about abuse at Guantanamo, but I brushed them off as hyperbole. When one of the detainees I was prosecuting, a young Afghan named Mohammed Jawad, told the court that he was only 16 at the time of his arrest, and that he had been subject to horrible abuse, I accused him of exaggerating and ridiculed his story as "idiotic." I did not believe that he was a juvenile, and I railed against Jawad's military defense attorney, whom I suspected of being a terrorist sympathizer.

The case against Jawad seemed uncomplicated. He stood accused of carrying out a hand-grenade attack on two U.S. Special Forces soldiers and their Afghan interpreter in December 2002, under instructions from a domestic insurgent group. Jawad had confessed to his role in the attack on a videotape recorded by U.S. personnel. To me, the case appeared to be as simple as the street crimes I had prosecuted by the dozens in civilian life, and seemed likely to produce a quick, clean conviction, and an unmarred early victory for the prosecution, vindicating the concept of the Guantanamo Military Commissions.

As I delved deeper into Jawad's case file, however, I soon discovered a number of disturbing anomalies. And when I attempted to bring these anomalies to the attention of my supervisors, they were harshly dismissive of my concerns and actually, on some unspoken level, began to question my loyalty, even though my combat experience exceeded both theirs combined. I began to realize that the problems with Jawad's case were symptomatic of the military commissions regime as a whole. Indeed, if *any* case was likely to be free of such anomalies, it should have been that of Mr. Jawad, whose alleged crime was as straightforward as any on the prosecutor's docket. Instead, gathering the evidence against Mr. Jawad was like looking into Pandora's box: I uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense, judicial incompetence, and ugly attempts to cover up the failures of an irretrievably broken system.

Evidence from U.S. Army criminal investigators showed that Jawad had been hooded, slapped repeatedly across the face and then thrown down at least one flight of stairs while in U.S. custody in Afghanistan. Detainee records show that once at Guantanamo, he was subjected to a sleep deprivation regime, known as the "frequent flier program," during which he was moved to different cells 112 times over a 14-day period—an average of once every 2 1/2 hours, and that he had tried to commit suicide by banging his head repeatedly against a wall. Evidence from a bone scan showed that he was, in fact, a juvenile when he was initially taken into U.S. custody. Field reports, and examinations by US medical personnel in the hours after Jawad had been apprehended, indicated that he had been recruited by terrorists who drugged him and lied to him, and that he probably hadn't committed the crime for which he was being charged. In fact, the military had obtained confessions from at least two other individuals for the same crime.

In this way, I came to realize that Mr. Jawad had probably been telling the truth to the court from the very beginning. I implored my supervisors to allow Mr. Jawad to reach a plea agreement, in hopes that he would soon be released and returned to Afghanistan, but they not only rebuffed my requests, they refused even to listen to my explanation of my rationale for the agreement. I then made the enormously painful decision to ask to be reassigned from the Commissions, and personally petitioned the Army's top lawyer, to return to Iraq or Afghanistan to serve the remainder of my obligation. I simply could not in good conscience continue to work for an ad hoc, hastily-created apparatus – as opposed to the military itself -- whose evident resort to expediency and ethical compromise were so contrary to my own and to those the Army has enshrined and preached since I enlisted so many years ago.

The military commissions cannot be fixed, because their very creation—and the only reason to prefer military commissions over federal criminal courts for the Guantanamo detainees—can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation. The problems manifest themselves in at least three ways, each of which I witnessed during my time at Guantanamo and which would remain problematic under the present proposal. They are, first, the rules of admissibility of evidence, including the relaxation of restrictions on the admissibility of evidence obtained through coercion and of hearsay; second, the gathering and handling of evidence, including legal and institutional restrictions on the disclosure of sensitive or classified evidence to the defense; and third, institutional deficiencies, including the insufficient experience and qualifications of both judges and counsel, and the inadequate provision of resources to the defense. Each of these shortcomings, I believe, will

prove persistent even in the face of the most ardent, well-meaning legislative repackaging. I will address each in turn.

Admissibility of Evidence

The rules of admissibility of evidence established by the Military Commissions Act were deeply flawed, and the Senate Armed Services Committee legislation would continue most of these flaws. In particular, I am deeply troubled to learn that the new legislation would continue to allow into evidence statements obtained through coercion. The impetus for this rule is obvious. The sad reality is that virtually every detainee—Mohammed Jawad is a salient example—has been subjected to torture and abuse repeatedly. Many of them are mentally ill as a result, some profoundly so.

One reason coerced confessions are prohibited is moral repugnance; the other is practical experience, as they are unreliable. For some of the prisoners, such as some of the High Value Detainees, coerced statements may be corroborated by evidence that would be admissible. For others, only an unreliable coerced statement provides a tenuous theory of prosecution. Such cases should rightfully give any prosecutor pause. Disallowing evidence obtained through coercion would result in the evisceration of many of the cases that might otherwise, on the most tenuous of theories, have been prosecuted. Instead of recognizing this sad reality and resettling or repatriating those prisoners against whom the government has insufficient and tainted evidence, the present legislation, in effect, opts to continue the charade. Thus, in place of the ban on the use of coerced statements mandated by the Due Process Clause of the Constitution, the present legislation disallows only statements obtained through torture or cruel, inhuman or degrading treatment.

These changes will only exacerbate the practical impossibility of achieving justice at Guantanamo. The ban on the use of involuntary statements or confessions as evidence against an accused is a fundamental principle of the American criminal justice system. The Uniformed Code of Military Justice bans as "involuntary" statements obtained "through the use of coercion, unlawful influence, or unlawful inducement." That is the law that applies in every court-martial—absolutely no coerced evidence may be admitted. In contrast, it is unclear what, precisely, constitutes cruel, inhuman or degrading treatment under U.S. law. Indeed, the definition of cruel, inhuman, or degrading treatment has never been litigated before U.S. courts, and has, in the recent past, been the subject of discredited interpretations by Executive Branch attorneys.[2]

I am convinced that all prosecutions based on coerced evidence will ultimately be overturned by the courts. Coerced evidence is banned from every courtroom in America. It is inconceivable that our courts will find that there somehow is an exception from the ancient protection against prosecutions based on forced confessions.

I was also disappointed to learn that the Senate Armed Services Committee legislation would continue the military commissions' practice of allowing hearsay into evidence. President Obama has argued that such an expansive admissibility standard "would be consistent with international standards, such as those employed in international criminal tribunals." Unfortunately, the President's statement is misleading at best. Although international tribunals in the former Yugoslavia, Rwanda, Sierra Leone, and elsewhere do admit hearsay evidence, they

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[2] In 2005, for example, President Bush's Office of Legal Counsel concluded that CIA "enhanced interrogation techniques," including waterboarding, walling, dousing with water down to 41°F, stress positions, wall standing, cramped confinement, nudity, restrictions of caloric intake down to 1,000 kcal/day, sleep deprivation for up to 180 hours, shackling, clothing in adult diapers, slapping and other techniques involving "physical interaction with the detainee" *did not* constitute cruel and inhuman or degrading treatment inconsistent with U.S. treaty obligations under Article 16 of the UN Convention Against Torture.

differ fundamentally from military commissions in two significant ways. First, international tribunals use judges with experience in criminal law and procedure who are qualified to consider hearsay and determine its value. By contrast, the military commissions employ lay jurors who, once exposed to hearsay, lack the legal expertise to determine its probative value and discount it where appropriate. Second, judges in international tribunals issue detailed opinions in which they analyze each piece of evidence and provide an explanation of any corroborating testimony. Unlike the lay jurors in the military commissions, then, the professional judges at international tribunals must justify, in explicit terms, any reliance on hearsay.

These rules of evidence represent significant departures from typical federal criminal court trials, courts-martial proceedings, and proceedings before international tribunals. As such, they will ultimately found to be unconstitutional and also will very likely be found to fail to comply with Common Article 3 of the Geneva Conventions, which require trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Language from *Hamdan* indicates that the Supreme Court might find these provisions problematic. In a portion of his concurring opinion endorsed by the majority,[3] Justice Kennedy noted specific deficiencies in the commissions' rules of evidence, which, he argued, "could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability," including "unsworn written statements," and "coerced declarations."[4]

Gathering and Handling of Evidence

The military commissions suffer from enormous problems surrounding the gathering and handling of evidence. The "case files" compiled the commissions' investigators and prosecutors

[3] Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006).
[4] *Id.* at 652-53 (Kennedy, J., concurring).

are nothing like the investigation and case files assembled by military or civilian police agencies and prosecution offices, which typically follow a standardized format, include initial reports of investigation, subsequent reports compiled by investigators, and the like. But for the military commissions, there is no central repository for case files, no method for cataloguing and storing physical evidence, nor any other system for assembling a potential case into a readily intelligible format that is the sine qua non of a successful prosecution.

While no experienced prosecutor, much less one who had performed his or her duties in the fog of war, would expect that potential war crimes would be presented, at least initially, in "tidy little packages," at the time I inherited the Jawad case, Mr. Jawad had been in U.S. custody for approximately five years. It seemed reasonable to expect at the very least that after such a lengthy period of time, all available evidence would have been collected, catalogued, systemized, and evaluated thoroughly—particularly since the suspect had been imprisoned throughout the entire time the case should have been undergoing preparation.

The obvious reason behind the shoddy preparation of evidence against Mr. Jawad is that it was not gathered in anticipation of any semblance of a "real" trial. With the government setting an extremely low evidentiary bar for continued detention without charge, with the focus on extracting information through coercive interrogations rather than on prosecution, and with the understanding that any trials will forego fundamental due process protections, there is little incentive for investigators to engage in the type of careful, systematic gathering of evidence that one would find in a typical civilian trial. In the case of Mr. Jawad, these incentives proved manifestly perverse; they allowed for the prolonged detention and abusive treatment of a juvenile who is very likely innocent of any wrongdoing.

It took enormous amounts of time and effort for me to gather the evidence in Jawad's case, which was scattered in various locations throughout the military bureaucracy. Certain crucial documents had been tossed into a locker at Guantanamo and promptly forgotten. Crucially, none of it had been disclosed to the defense. Despite my best efforts, I was never able to locate some key pieces of evidence, such as the videotape of Jawad's initial confession to U.S. forces—which, incidentally, the commission has ruled was obtained through torture.

Another persistent problem with the military commissions is the excessive restrictions on the disclosure of classified or sensitive evidence to defense counsel. Over-classification and protective orders can make it almost impossible for defense attorneys to formulate a viable case. Defense counsel are no less professional than their counterparts in the prosecution, and there is no reason that the military commission rules should deny them access to this information, once granted the appropriate security clearances. They can and should be trusted not to share such information with their clients as the law requires. As it stands, names of potential defense witnesses are routinely redacted from discovery materials, and protective orders hinder the defense's ability to ascertain such witness's identities through its own investigation.

Over-broad protective orders impair information sharing among defense team members and create unnecessary delay, and over-classification makes it impossible to pursue any investigation based on information from the client, including such simple pieces of information as the names and addresses of family members. Beyond such legally-mandated restrictions, institutional shortcomings also inhibit the discovery process. The chaotic state of the evidence and the absence of any systematic, reliable method of preserving and cataloguing evidence make it nigh impossible for prosecutors to comply with the discovery obligations mandated by their rules of professional conduct, even in a case as seemingly uncomplicated as Mr. Jawad's.

Institutional Deficiencies

The military commissions suffer from numerous institutional deficiencies, which undermine the pursuit of justice and have created a kind of "circus" atmosphere at GTMO. First, the military judges who preside over the military commissions will not always possess the requisite experience in handling high-profile cases. They have spent much of their professional lives processing the various low-level and low-ranking servicemembers, in proceedings where defendants typically treat judges with an enormous degree of deference. These judges have scant experience in actually controlling courtrooms or the detainees. The detainees, on the other hand, are not in the slightest intimidated by the military judges. They view them as lackeys of an illegitimate system.

Still, the judges at Guantanamo have displayed a remarkable independence that has clearly confounded the architects of the commissions system, who evidently believed that both the military judges and the commissions panel members would serve as little more than an "amen chorus," witlessly endorsing every pronouncement, however thin, false, or ill-conceived, by the prosecution.[5]

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[5] These judges – Col. (Ret.) Ralph Kohlmann, despite his earlier published misgivings about the tribunals (*see* Kohlmann, R., *Forum Shoppers Beware: the Mismatch between the Military Tribunal Option and United States Security Strategy*, concluding, "even a good military tribunal is a bad idea." [Paper written for the Naval War College, 1 March 2002, available at http://www.uniset.ca/misc/kohlmann.html.]), COL (Ret.) Peter Brownback, CAPT (Ret.) Keith Allred, and COL Stephen Henley, the Chief of the Trial Judiciary at Guantanamo and for the US Army – distinguished themselves by their very independence, rejecting prosecution arguments regarding jurisdiction (rulings overturned by the politically-constituted Court of Military Commission Review, in a decision, *United States v. Khadr*, that even the proponents of the commissions recognize would not survive scrutiny in a regularly-constituted court and have hence sought to amend the MCA of 2006 to address this inevitable outcome; in COL Henley's case, he ignored what must have been the condemnation of his colleagues to hold, as described above, that Jawad's confessions had been obtained through torture. Judge Allred also adopted the only plausible definition of what constitutes a "war crime," incorporated this traditional definition into his instructions to the panel in *United States v. Hamdan*, with the result that the panel acquitted Hamdan of the principal charge against him, conspiracy to commit violations of the law of war. The panel also delivered the prosecution the rebuke of a lifetime when, after the prosecutor asked for a thirty-year sentence, they adjudged an effective sentence of approximately five months.

The habeas rulings alone show the unspeakable travesty—the shame—of holding so many of these innocent prisoners for so long, without charge, without access to lawyers, or even without access to the very "evidence" sought to justify their prolonged imprisonment.

A second, critical institutional deficiency is the inadequate provision of resources to the defense. I was pleased to see that the Senate Armed Services Committee report references the recent Memorandum for the Attorney General and General Counsel of the Department of Defense from the Office of the Chief of Defense Counsel at the Commissions, which calls for the provision of more resources to defense counsel, ending the practice of giving the prosecution input on defense resources, and ensuring that at least one “learned” defense counsel is assigned to all capital cases. Such reforms represent the bare minimum required for these trials to meet ABA standards on this issue, and should be adopted. But these changes cannot be simply recommended, they must be mandatory.

Before concluding, I would request that the members of this subcommittee engage in the kind of role reversal that senior military officers routinely consider. Imagine that U.S. soldiers captured on the battlefield were, today, being subjected to the type of trial proceedings that we plan set up through these military commissions. Imagine that our service members had been tortured or abused, and that the commissions hearing their cases allowed into evidence statements obtained through coercion. Imagine that defense counsel were thoroughly under resourced and prohibited even from viewing information critical to their cases, and that exculpatory evidence was hidden. Imagine that the evidence against our soldiers was so weak, and had been gathered and compiled in such a shoddy and disorganized manner, that the commissions allowed hearsay into evidence—to be analyzed not by professional judges but by

lay jurors—just to "make sure" that any and all prosecutions were successful. How would our government react to such trials? I imagine the uproar would be close to deafening.

I am convinced that even the well-intentioned changes made to the military commissions by the Senate Armed Services Committee legislation will create a real risk that, in the future, American men and women in uniform will be subject to a farcical trial regime of this nature. By declining to uphold the fair trial rights of the terrorism suspects in our custody, we place our own soldiers at risk.

The answer to this conundrum is simple and time honored. We do not need military commissions. They are broken and beyond repair. We do not need indefinite detention, and we do not need a new system of "national security courts." Instead, we should try those whose guilt we can prove while observing "the judicial guarantees which are recognized as indispensable by civilized peoples"—in other words, using those long-standing rules of due process required by Article III courts and military courts-martial—and resettle or repatriate those whom we cannot. That is the only solution that is consistent with American values and American law.