

STATEMENT BY
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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

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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.