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STATEMENT OF
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STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS
BEFORE THE
HOUSE ARMED SERVICES COMMITTEE
16 JULY 2009

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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 begun 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 indispensable 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.