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ARMED SERVICES COMMITTEE

STATEMENT OF  
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JUDGE ADVOCATE GENERAL OF THE NAVY  
BEFORE THE  
HOUSE ARMED SERVICES COMMITTEE  
16 JULY 2009

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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 7<sup>th</sup>, 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.