STATEMENT OF

STEVEN A. ENGEL

BEFORE THE

**SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

ENTITLED

**"PROPOSALS FOR REFORM OF
THE MILITARY COMMISSION SYSTEM"**

PRESENTED

JULY 30, 2009

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**HEARING ON PROPOSALS FOR REFORM OF
THE MILITARY COMMISSION SYSTEM**

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Thank you, Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss current proposals for the reform of the military commission system.

During the prior Administration, I served as a Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. While at the Office, I worked with others in the Executive Branch and with Congress in developing the military commission system established under the Military Commissions Act of 2006 ("MCA"). Those commissions, in turn, reflected a substantial renovation of the commissions system that President Bush had established, based on historical models, to try enemy combatants shortly after the U.S. invasion of Afghanistan.

As President Obama recognized during his recent speech at the National Archives, the United States has long employed military commissions for prosecuting captured enemies for

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violations of the laws of war. Among other historical examples, George Washington employed military commissions during the Revolutionary War. President Lincoln used them during the Civil War. President Franklin Delano Roosevelt used commissions to try German saboteurs captured on American soil during World War II. In other words, far from an invention of the last Administration, many of our greatest Presidents have recognized in our past conflicts both the lawfulness and the utility of military commissions. Indeed, it is fair to say that commissions represent the traditional means by which this country has tried captured enemies for war crimes.

Because of this history, and because of their particular use in the present conflict, it should not be surprising that President Obama and his Administration have chosen to retain the military commission system for use in the trials of those detained at Guantanamo Bay. It is equally unsurprising, particularly in view of the legal developments since 2006, that the Obama Administration would seek to work with Congress to improve the workings of the commissions and, concomitantly, to improve the public perception of their ability to fairly dispense justice in this armed conflict.

Although I do not regard every proposed modification as an improvement, I do believe that there is much to recommend in the existing proposals. The Senate's version of the National Defense Authorization Act for Fiscal Year 2010, S. 1390, as well as the amendments suggested by the Obama Administration, reflect our experience in witnessing military commission prosecutions over the past three years and incorporate a number of critical legal developments since then. Most notably, in *Boumediene v. Bush*, 553 U.S. __ (2008), the Supreme Court held that the aliens detained by our military at Guantanamo Bay have the constitutional right to habeas corpus, and the Court suggested that they may well have other rights as well. In addition,

although much less publicized, the military judges who preside over the commission system have themselves made a number of important rulings in interpreting and implementing the MCA, and those rulings too are appropriately addressed in the proposals under consideration.

More significantly, and apart from any particular details, the endorsement of the military commission system by the Obama Administration and by this Congress will establish the commissions on a sound bipartisan basis. It is no secret that the despite our historical traditions, the use of military commissions in this untraditional conflict against international terrorist organizations has been a matter of some controversy and considerable litigation. Those challenges have impeded the commissions' ability to mete out justice to the terrorists who have committed war crimes against Americans, including those who perpetrated the attacks of September 11, 2001. In addition, since January of this year, President Obama has halted all commission trials, including the September 11th trial, while his Administration evaluates the commission system. I am hopeful that the Obama Administration's proposed reforms will remove some of the objections to the commissions, place them on a sounder legal footing, and allow these trials once again to move forward.

This afternoon, I would like briefly to address three issues relevant to the present discussion. *First*, why has the United States turned to military commissions? *Second*, when should military commissions be used? And *third*, I would like to comment on two of the Obama Administration's proposed amendments to the MCA's procedures.

Why Use Military Commissions?

The United States has traditionally employed military commissions for the prosecution of enemy combatants for two reasons: (1) military commissions are the appropriate forum for trying

our captured enemies, whose war crimes are not matters for ordinary law enforcement; and (2) military commission procedures are better suited than Article III courts for trying cases arising out of wartime circumstances.

As President Obama has recognized, the United States is engaged in an armed conflict with Al Qaeda, the Taliban, and affiliated forces. As with past conflicts, we have recognized the military justice system to be the appropriate forum for prosecuting captured enemies who commit war crimes against American service members and civilians. The defendants in military commission prosecutions are not ordinary civilian criminals. Their actions arise out of an armed conflict, and they breach the laws of war, not our domestic criminal code.

While it is sometimes the case—and particularly so, when it comes to our war against Al Qaeda terrorists—that the crimes committed by our enemies may also violate our domestic laws, the United States has traditionally not treated its wartime enemies as ordinary domestic criminals. For instance, when the FBI arrested eight German saboteurs in the United States during World War II, President Roosevelt did not present them for trial to the civilian justice system, although he surely could have done so. Rather, he determined that such captures—even though they were effected by law enforcement and took place on American soil—were incident to an armed conflict, and so he directed that they be prosecuted by military commission. The same circumstances are presented here. During the present armed conflict, we have relied on our military not simply to fight Al Qaeda, but to detain them under the law of armed conflict. So too it is appropriate to regard their offenses, not as ordinary violations of our domestic laws, but as war crimes, and to turn to the military justice system to hold them accountable.

The second justification for military commissions is a more practical one. In contrast with our civilian courts, military commissions are simply better tailored to handling the challenges of wartime prosecutions. Military commissions have special rules better able to handle the significant amounts of classified information that are implicated by the trials of those apprehended during wartime and by our military and intelligence services. Military commissions can better, and more easily, provide for the safety and security of the participants than can the federal courts located in our communities.

Most significantly, military commissions employ more flexible rules of evidence that allow for the consideration of battlefield evidence that likely would not be admissible under the strict procedural rules of the federal courts. As the Obama Administration's Detention Policy Task Force explained in its July 20, 2009 preliminary report:

> Some of our customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct. Our soldiers should not be required to give *Miranda* warnings to enemy forces captured on the battlefield; applying these rules in such a context would be impractical and dangerous. Similarly, strict hearsay rules may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from the battlefield, which may be reliable, probative and lawfully obtained.

By contrast with our federal courts, the military commissions do not require *Miranda* warnings, and they permit the consideration of hearsay, when reliable and appropriate, under circumstances considerably broader than in Article III courts. Military commission rules thus are adapted to wartime circumstances, and they can permit full and fair trials under circumstances where trials in Article III courts would not be feasible.

When Should Military Commissions Be Used?

The Obama Administration has acknowledged these two justifications underlying the military commissions system, but it is not yet clear whether it accords them equal weight. The Administration at times has recognized that the commissions are the appropriate forum for hearing war crime cases, but other times, it has suggested that commissions should function solely as a court of last resort—suitable only where Article III prosecutions would not be feasible.

The Bush Administration agreed that Article III terrorism prosecutions played an important part in our Nation's counter-terrorism efforts, and we counted many successes in winning convictions against terrorists and terrorist supporters apprehended in the United States through the traditional methods of law enforcement. When it came to the prosecution of aliens captured and detained abroad by our military and intelligence forces, however, President Bush determined, consistent with historical precedents, that military commissions were the appropriate forum for trying the "unlawful enemy combatants" or "unprivileged belligerents" who had committed war crimes against our civilians or our military forces.

This month, in passing S. 1390, the Senate expressed its agreement with this approach. Section 1032 of the Senate bill expresses the "Sense of Congress" that "the preferred forum for the trial of alien unprivileged enemy belligerents" subject to military commissions "is trial by military commissions." In other words, according to the Senate, the Guantanamo detainees are military detainees and where they have committed crimes, they should be treated as war criminals and prosecuted before military commissions, not Article III courts.

In contrast with the Senate, the Obama Administration's view has been less clear. In his speech at the National Archives, President Obama stated that "whenever feasible," his

Administration would try individuals who violated U.S. criminal law in Article III courts. In its Preliminary Report, the Detention Policy Task Force echoes the President's statement by identifying "a presumption that, where feasible, referred cases will be prosecuted in an Article III court." At the same time, the Task Force suggests that the feasibility of Article III prosecutions would not be the only interest at stake, for "where other compelling factors make it more appropriate to prosecute a case in a reformed military commissions, it may be prosecuted there." Those other factors require prosecutors to look at "the nature of the offenses to be charged," the "identity of the victims of the offense," "the location in which the offenses occurred," "the context in which the individual was apprehended," and the "investigating entities" that gathered the relevant evidence.

Read one way, the Administration would establish a presumption that military commissions would be used only as a last resort, when Article III prosecutions could not go forward. If that were the case, the Administration would risk undermining the legitimacy of the commission system, creating a perception of a two-tiered justice system, wherein the question whether a detainee was tried in the Article III system or in the military commission would turn solely upon the quality of the prosecution's evidence. Where feasible, detainees would receive full due process, while in other cases, detainees would receive "due process lite." Such a system of discrimination, however, gives short shrift to the military judges and military lawyers who operate the military commission system and would hardly be a recipe for building domestic and international confidence in the system.

Read another way, however, the presumption is merely that, a thumb on the scale, and the Task Force asks prosecutors to examine the nature of the underlying case, so as to separate

terrorism cases sounding in civilian law enforcement from those that are primarily military in nature, such as where the asserted war crimes took place in Afghanistan or where they were directed at American military forces. In other words, even if an Article III prosecution may be theoretically possible on a terrorism charge, the Task Force would leave the door open to trying Guantanamo detainees before military commissions where there offenses are primarily war crimes. If that were the case, most of the Guantanamo detainees would likely remain within the military commission system, which as the Senate has recognized, is the appropriate forum for the prosecution of such wartime detainees.

No doubt the most important decision the Obama Administration will have to make in this regard is assessing the appropriate venue for the prosecution of those who conspired to commit the attacks of September 11, 2001. Right now, the United States has brought military commission charges against five individuals for their involvement in the attack, including Khalid Sheikh Mohammed, who has admitted to being the mastermind of the plan. Will the United States continue to regard the September 11th attack as an act of war, or will we treat the attacks as mere violation of criminal law, like the Oklahoma City bombing, suitable for prosecution in our ordinary criminal courts? The Obama Administration has not yet spoken with one voice on this issue, but it will make its views on this and related matters clearer in the context of the prosecution decisions it makes in the months ahead.

Reforms in the Military Commission System

In recent weeks, Congress and the Obama Administration have discussed a number of amendments to the MCA. The Senate's reform proposals are reflected in Section 1031 of S. 1390. The Administration has expressed support for most, but not all, of those proposed

modifications, and in addition, has recommended some additional changes. Although I would be happy to discuss any of those proposals this afternoon, I would like to say a brief word about two off them, the Obama Administration's proposal to adopt a "voluntariness" standard for the admissibility of statements and the suggestion that Congress should remove "material support for terrorism" as a war crime under the MCA.

Voluntariness Standard

The Administration's proposed "voluntariness" standard would take aim at the rule that has proven to be the most controversial provision of the MCA, the rule that purportedly would allow the admissibility of so-called "coerced statements." I think it is prudent for the Administration to seek to amend this rule given the taint that it has given to the military commission proceedings. That said, the controversy over the rule has in many ways been unfortunate, because military commissions no more permit the admission of "coerced statements" than do the International War Crimes Tribunals for the Former Yugoslavia or for Rwanda. Reflecting the realities of wartime circumstances, both the U.N. war crimes tribunals and the American military commissions direct the judges to evaluate the reliability of proffered statements and the impact that their admission could have on the nature of the proceedings, what the U.N. tribunals call the "integrity of the proceedings" and what the MCA describes as the "interest of justice." In practice, our military judges have proven themselves quite adept at determining which statements are reliable and appropriate for use as evidence in court, and I am aware of no instances of "coerced statements" being admitted at commission trials.

Under the MCA, any statements obtained by torture are flatly deemed inadmissible, as are any statements obtained in violation of the Detainee Treatment Act of 2005's prohibition on

"cruel, inhuman, and degrading treatment." Beyond those rules, however, it can be difficult to assess the "voluntariness" of statements obtained under inherently coercive wartime circumstances. We do not want captured enemies to believe they have the "right to remain silent" when it comes to our intelligence-gathering efforts. And when the accused has been questioned while surrounded by armed U.S. soldiers, it may be difficult to assess what constitutes a truly "voluntary" statement. For these reasons, rather than focusing on voluntariness as such, the MCA provides that statements should only be admitted where they are "reliable" and it would serve the "interest of justice" to admit them.

The Administration would propose to amend this standard so as to replace the existing rule with a "voluntariness" standard. There is something to be said for amending the rule, so as to dispel once and for all the perception that commission verdicts are tainted by coerced evidence and to bring the commission standard closer in line with the constitutional standard applied by the federal courts that will sit in review on those judgments. Senior military lawyers, however, have expressed concern that the "voluntariness" standard, developed originally in the domestic law enforcement context, would not be sufficiently tailored for wartime circumstances. Those concerns perhaps may be addressed by ensuring that any amendment adopting a "voluntariness" standard provides military judges with appropriate guidance so as to ensure its proper application in the wartime context. In practice, military judges have come close to adopting a voluntariness standard by making their admissibility decisions on a case by case basis. An amendment that takes those decisions into account could both improve both the workings and the perceived legitimacy of the commission proceedings.

Material Support for Terrorism

The Administration also has questioned whether the offense of "providing material support for terrorism" has sufficient roots under the law of war to be properly charged by military commission. The "material support" offense recognizes that it is an offense under the law of war to enlist oneself in a terrorist organization, such as Al Qaeda, or to otherwise provide funds or materials to help that organization accomplish its goals. Under the MCA, Congress exercised its constitutional authority to "define and punish … Offences against the Law of Nations" and declared that "material support" was among those war crimes we would prosecute by military commission. Not surprisingly, in the three years since, the "material support" offense has been a common charge in the military commission cases, one found in most, if not all, of the two dozen cases that have been charged so far. Like some in the Administration, the Al Qaeda members in the commission cases have questioned whether "material support" constitutes an established offense under the law of war, but so far, the military judges have squarely rejected those claims.

In truth, there is a strong basis for Congress's recognition that "material support" constitutes a war crime. It is no doubt true that the term "material support" was first coined under Title 18 of the U.S. Code, but the offense under Title 18 is broader than that of the MCA, extending beyond conduct associated with an armed conflict and beyond the "unlawful enemy combatants" or "unprivileged belligerents" who are triable by military commission. For purposes of the law of war, the question whether "material support" states an established offense does not turn upon the origins of the label, "material support," but upon whether the underlying wartime conduct has been recognized as a violation.

As the military judge explained in *United States v. Hamdan*, in rejecting the defendant's motion to dismiss the charge, the United States recognized long ago that those who provided support to an unlawful armed forces could themselves be subject to punishment under the law of war. *See United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto) at 4-6 (July 14, 2008). During the Civil War, for instance, the United States prosecuted by military commissions "numerous rebels … that furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation" for the purpose of engaging in sabotage operations behind Union lines. *Id.* at 4 (quoting H.R. Doc. No. 65, 55th Cong. 3d Sess. 234 (1894)). Indeed, the United States found such individuals "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission." *Id.* (quoting Winthrop, *Military Law and Precedents* 784). In view of these historical precedents, the United States is well justified in prosecuting Al Qaeda members who do the same in support of the enemy in Afghanistan or elsewhere.

Moreover, it cannot be denied that acts of terrorism themselves constitute a violation of international law and, when associated with armed conflict, a war crime. U.N. Security Council Resolutions condemn terrorism and require that all States criminalize it, and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, the murder of innocent civilians, and other acts of terrorism. *See Hamdan*, *supra*, at 3. The MCA defines an act of "terrorism" itself to be a war crime, and the Administration has not questioned the legitimacy of that charge. Insofar as the underlying acts of terrorism would violate the law of war, Congress was well within its authority to conclude that those who provide material support

to a terrorist force, and therefore make such acts of terrorism possible, could themselves be charged with a separate offense triable by military commissions.

The "material support" charge gives the prosecutors an important weapon in building their cases, and prosecutors have used the offense successfully in obtaining verdicts or guilty pleas in the early commission cases. I believe it would be a mistake, absent any adverse court decision, for Congress to adopt the losing arguments of the Al Qaeda members in those cases and simply to remove "material support" charge from the prosecutors' arsenal. Rather, prosecutors should be permitted to charge "material support" when the evidence would support the claim and to defend the lawfulness of the charge in court, as they so far have been successful in doing.

* * *

The use of military commissions for the prosecution of members of Al Qaeda, the Taliban, and its affiliates has been the subject of great discussions since the attacks of September 11th. It is certainly a worthwhile subject for the attention of this Subcommittee. I appreciate the opportunity to participate in the discussion today, and I look forward to your questions.