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Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
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The Military Commissions and the Abandonment of the Rule of Law

By David J. R. Frakt, Lt Col (sel.), USAFR[1] [2]

I. Introduction

Chairman Conyers, Subcommittee Chairman Nadler, Ranking Member Sensenbrenner, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject, a subject with which I have been deeply engaged for the past couple of years.

The purpose of this hearing, as I understand it, is to consider whether military commissions are an appropriate, legitimate forum for prosecuting suspected terrorists and war criminals currently detained at Guantanamo Bay, Cuba, and other individuals who may be captured in the ongoing conflict with Al Qaeda and the Taliban. Assuming the answer to be yes, or that, regardless of the answer, military commissions are likely to continue to be utilized, a further purpose of this hearing is to determine what changes should be made to the Military Commissions Act of 2006 (MCA) to ensure that military commissions are regularly constituted courts which comport with our international treaty obligations, the law of war and the due process requirements of the U.S. Constitution. More specifically, are the amendments to MCA included in the Senate version of the 2010 National Defense Authorization Act sufficient to address the shortcomings of the MCA as enacted, or are more or different changes required to ensure that military commissions will provide fair, just trials which will withstand court challenges on appeal and be accepted as legitimate by the American public and the international community?

Before I answer these two critically important questions, let me first briefly explain my relevant experience which qualifies me to try to answer these questions. After graduating from Harvard Law School in 1994, and clerking for a year for the Honorable Monroe G. McKay of the U.S. Tenth Circuit Court of Appeals, I received a direct commission into the U.S. Air Force Judge Advocate General's Corps. I served on active duty from September 1995 to April 2005. During this time, my primary practice areas were military justice and international and operational law. In the spring of 2005, I transitioned into the Air Force Reserves, and started a second career as a law professor. At Western State University College of Law, I have taught criminal law, criminal procedure, evidence, professional responsibility (legal ethics), and a seminar on international war

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[2] The views expressed herein are my own, and do not reflect the views of the Air Force, the Office of Military Commissions, or the Department of Defense.

crimes, all courses which proved highly relevant when I was mobilized to active duty in April 2008 to serve as a military defense counsel with the Office of Military Commissions, Office of the Chief Defense Counsel. In the fall of 2008, I taught a seminar as an adjunct professor at Georgetown Law Center entitled "Terrorism as a War Crime: Military Commissions and Alternative Approaches" as part of their National Security Law program. In 2007, I began an intensive study of the Military Commissions Act of 2006 and the implementing regulations published by the Secretary of Defense in the Manual for Military Commissions (which includes the Rules for Military Commissions or RCMs, the Military Commission Rules of Evidence or MCREs, and the list of crimes and elements), which culminated in the publication of a law review article comparing the rules and procedures of military commissions and courts-martial. [3] In January 2008, I answered a DoD-wide solicitation for volunteers to serve as defense counsel in military commissions and I was selected for the position in February 2008. I was mobilized to active duty in late April 2008 and promptly was detailed as lead defense counsel in two referred cases, *U.S. v. Mohammed Jawad* and *U.S. v. Ali Hamza al Bahlul*. I was engaged in extensive pre-trial litigation in the military commissions from May 2008 through September 2008 in both cases, including several multi-day motion hearings.[4] In October 2008, Mr. al Bahlul became the third and final detainee to be tried by military commission at Guantanamo. He was convicted and sentenced to life in prison in early November 2008. I was his sole defense counsel at trial. His case has now been turned over to appellate counsel to file an appeal.

As you are undoubtedly aware, there have been a number of recent developments in Mr. Jawad's case. The military commission was originally scheduled to go to trial in January 2009, but due to an interlocutory appeal filed by the prosecution, his case was delayed. Because the military commissions, including appeals pending before the Court of Military Commission Review were suspended by Executive Order of President Obama in late January, the CMCR has stayed its decision until September 17, 2009. Although I completed my active duty tour in early June 2009, I continue to represent Mr. Jawad in my capacity as a Reserve JAG officer. Along with the ACLU, I also represent Mr. Jawad in his *habeas corpus* petition in U.S. District Court for the District of Columbia where we have been actively seeking Mr. Jawad's release from his illegal detention. Two weeks ago, in response to a motion to suppress, the government conceded that every statement made by Mr. Jawad since his arrest on December 17, 2002, was the product of torture. Accordingly, the District Court Judge, the Honorable Ellen Huvelle, suppressed the statements. Last Friday, July 24th, the Department of Justice filed a notice with the court that the United States no longer considers Mr. Jawad detainable under the laws of war. They informed the Court that Mr. Jawad would be transferred out of the maximum security prison where he has

[3] David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim L. 315 (2007).

[4] For further information about my experience as a Guantanamo defense lawyer and these two cases, see, David J. R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammad Jawad* 22 Harvard Human Rights Journal 1 (2009); David J. R. Frakt, *The Difficulties of Defending Detainees*, 48 Washburn Law Journal 381 (2009); see also, *The Guantanamo Lawyers: Inside a Prison Outside the Law*, edited by Mark Denbeaux and Jonathan Hafetz (NYU Press, forthcoming October 2009).

been held for six and half years into a less restrictive detention camp for detainees eligible for release. An order granting the writ of habeas corpus and ordering Mr. Jawad's immediate release is expected shortly. We are hopeful that Mr. Jawad will soon be repatriated to Afghanistan and reunited with his family. In short, as both a scholar and practitioner, I have substantial experience to bring to bear on the issues being considered by this committee.

As we ponder the questions before us, I think it is important to review where we are now and how we got to this point. As the Administration considers reviving the military commissions and Congress considers various revisions to the Military Commissions Act, everyone should have a clear understanding of why the military commissions of the Bush Administration were created and where they went wrong.

II. The Abandonment of the Rule of Law

One point on which all sides should be able to agree is that the military commissions of the Bush Administration were a catastrophic failure. The military commissions clearly failed to achieve their intended purpose. After more than seven years and hundreds of millions of dollars wasted, the military commissions yielded only three convictions, all of relatively minor figures. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted. Two of the convicted, David Hicks and Salim Hamdan, received sentences of less than one year and were subsequently released. The third trial, of my client Mr. al Bahlul, although yielding a life sentence, was far from a triumph for the military commissions. There were several problematic aspects of this trial, not the least of which was the fact that several members of Mr. Hicks' jury were actually recycled for this military commission. More disturbing was the denial of Mr. al Bahlul's statutory right of self-representation. Mr. al Bahlul, a low-level Al Qaeda media specialist, wanted to represent himself before the military commissions and this request was granted by the military judge at the arraignment, Army Colonel Peter Brownback. Soon thereafter, Col. Brownback was involuntarily retired from the Army and replaced. The new judge revoked Mr. al Bahlul's *pro se* status, although he knew that Mr. al Bahlul had refused to authorize me, his appointed military defense counsel, to represent him. As a result, there was no defense presented; Mr. al Bahlul was convicted of all charges and received the maximum life sentence.

Why, with the entire resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal failure? The answer is simple: the military commissions were built on a foundation of legal distortions and outright illegality. The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by, the wholesale abandonment of the rule of law by the Bush Administration in the months after 9/11. In the United States of America, any such legal scheme is ultimately doomed to fail.

If we review the origins of the military commissions, a clear picture emerges of an intentional disregard for existing legal norms. Perhaps the first indication that the rule of law was to be

abandoned was in President Bush's Military Order of November 13, 2001.[5] In this document, President Bush found: "it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." In other words, what we consider essential for a fair trial for *us* would not be required for *them.* How did the Administration know, two months after 9/11, before a single major terrorist suspect had been caught, and before a single prosecutor had reviewed a single piece of evidence, that it would be impracticable to prosecute terrorism cases using existing rules and procedures? They didn't, of course. But having made this unsupported finding, President Bush and his senior advisors set out to make it a reality.

Another major step in the abandonment of the rule of law came on February 7, 2002, when President Bush issued another order,[6] this time announcing that the Geneva Conventions would not apply to those detained in the War on Terror, who were labeled with the new and misleading term "unlawful enemy combatants." The President held not only that such persons were not entitled to be treated as prisoners of war, but also, shockingly, that they were not even legally entitled to be treated humanely. With a stroke of the pen, the President wiped out the principle source of the law of war and the entire existing legal framework for the treatment of persons captured in an armed conflict and replaced it with a policy preference for humane treatment, which could be readily discarded whenever it interfered with military or intelligence operations. The decision that humane treatment was not required created unnecessary confusion about what was permissible and cleared the way for the approval of a vast array of patently illegal and highly coercive "enhanced interrogation techniques" to be employed upon the detainees.

The abandonment of the rule of law was compounded by the decision to house the "unlawful enemy combatants" at Guantanamo Bay, Cuba, and to turn the detention facilities there into a legal black hole, a place where detainees were not even entitled to be informed of the basis for their detention, much less challenge it. Indeed, the Bush Administration, regrettably aided and abetted by Congress, made a determined (and for several years, successful) effort to prevent detainees from gaining access to courts or legal representation. In an environment with no judicial oversight or meaningful avenues for redress, the detainees were simply at the mercy of their captors -- and the captors were not in a merciful mood. The extraordinary pressure to produce "actionable intelligence" coupled with the vengeful mood of the times led inexorably to shameful abuses of detainees.[7]

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[5] Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

[6] President's Memorandum to the Vice President et al. regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), (Homeland Security Digital Library), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[7] See generally, Inquiry into the Treatment of Detainees in U.S. Custody**,** Report of the Senate Armed Services Committee, available at**:** http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf; see also, Philippe Sands, *Torture Team* (2008); Jordan J. Paust, *Beyond The Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (2007); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008).

In 2002 and 2003, as senior Bush Administration officials drafted the rules for the President's military tribunals, they were aware of several important pieces of information about the detainees at Guantanamo. First, despite claims by high-level officials, including Secretary Rumsfeld, that the detainees represented "the worst of the worst," in reality, the vast majority of the detainees had no tangible connection with Al Qaeda, and even fewer had any provable role in any terrorist attack. Many of the detainees were completely innocent of any wrongdoing, and had simply been turned in for bounty, or were caught in the wrong place at the wrong time. The worst that could be said about many of them was that they had fought against the U.S. and Coalition forces that had invaded Afghanistan, conduct that, under the laws of war, would not be considered a war crime. A small group of those captured were likely guilty of terrorism crimes, but not crimes of war. The Administration was also keenly aware that, to the extent that there was some evidence of criminal acts by a small fraction of the detainees, much, if not most, of this evidence had been developed through highly coercive interrogations, which would not be admissible in a regular court of law.

The drafters of the original military commission rules[8] resolved each of these problems by rewriting the law. First, the rules of evidence were rewritten to allow the introduction of coerced statements and to eliminate the rules barring the fruits of torture and abuse. Second, the drafters classified as "war crimes" conduct, such as conspiracy and terrorism crimes that are violations of regular criminal law but had never previously been recognized as covered by the laws of war, largely because the laws of war rightly apply to the narrow context of armed conflict. They also created a number of "new" war crimes based on the alleged status of a person, rather than on conduct that actually violates the laws of war.[9] The most egregious examples of these were the invented crimes "Murder by an Unprivileged Belligerent," and "Destruction of Property by an Unprivileged Belligerent" which appeared in the original commission's list of offenses. These provisions made killing U.S. soldiers, destroying military property, or attempting to do so, a war crime. In other words, the U.S. declared that it was a war crime to fight, regardless of whether the fighters comply with the laws of war.

After protracted litigation, the original military commissions were invalidated by the Supreme Court in *Hamdan v. Rumsfeld* in the summer of 2006 before anyone was ever convicted. With nearly five years wasted, there was a great rush to put a new legal system in place. Within months, "new and improved" military commissions were authorized by Congress through the Military Commissions Act of 2006 (MCA). While these legislatively created commissions were undoubtedly an improvement over those created by Presidential decree, the hastily drafted and poorly considered MCA still incorporated some of the key distortions and departures from the rule of law featured in the invalidated version. Most disturbingly, Congress retained the rules of evidence (with minor variations) that permitted coerced evidence to be introduced. Congress also retained the full list of war crimes (again with minor variations), including the invented ones, and even added new ones, such as the flexible catch-all "material support to terrorism."

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[8] See, Dep't pf Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002) (Homeland Security Digital Library).

[9] Military Comm'n Instruction No. 2, Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6 (2005).

The Obama Administration has now acknowledged that material support is not a traditional war crime, calling into question all three of the convictions thus far attained. (Mr. Hicks, Mr. Hamdan and Mr. al Bahlul were all convicted of material support. For Mr. Hicks and Mr. Hamdan, it was the only crime of which they were convicted.) Although the military commissions were purportedly modeled on the Uniform Code of Military Justice, the best features of that system, such as the robust pretrial investigation required by Article 32 of the Uniform Code of Military Justice (UCMJ) and equal access by the prosecution and the defense to evidence and witnesses, were removed or weakened. The implementing regulations produced by the Secretary of Defense,[10] which could have corrected or mitigated some of the glaring problems with the legislation, served only to exacerbate them. [11]

Despite the widespread criticism of the MCA by the international community, legal scholars and non-governmental organizations, identifying the myriad shortcomings of the military commissions, the Bush Administration was determined to press ahead with the military commissions and convict as many detainees as possible. It was the hope and deliberate strategy of the administration that if the military commissions were well underway by the time the next Administration assumed office, with several trials completed and convictions duly rendered (the Administration did not foresee or accept the possibility of acquittals[12]), the commissions would be difficult to derail.

This "spray and pray"[13] strategy might have succeeded but for one factor the Bush Administration never anticipated: many of the military lawyers assigned the roles of prosecutors, defense counsel and judges in the military commissions refused to put aside their ethical obligations and their training in the rule of law. Many of these judge advocates, officers with decades of expertise in the law of war, considered the military commissions an affront to the military justice system to which they had devoted their careers. Ethical and courageous military prosecutors, such as former Chief Prosecutor Colonel Morris Davis and Lieutenant Colonel

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[10] U.S. Dep't of Defense, Manual for Military Commissions (Jan. 18, 2007); U.S. Dep't of Defense, Regulation for Trial by Military Commissions (April 27, 2007).

[11] See generally, David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim L. 315 (2007).

[12] See, Ross Tuttle, Rigged Trials at Gitmo, The Nation, (February 20, 2008) in which the following quotation was attributed by the Chief Prosecutor Colonel Morris Davis to DoD General Counsel William J. Haynes IV, "Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions."

[13] This expression was used by a senior Guantanamo official, Brig Gen Gregory Zanetti, in testimony before the military commission in U.S. v. Jawad to describe the push to bring as many cases to trial as possible. See, Jane Sutton, "Guantanamo Trials Put Generals At Odds" Reuters, August 13, 2008 ("The strategy seemed to be spray and pray, let's go, speed, speed, speed," Army. Brig. Gen. Gregory Zanetti said. "Charge 'em, charge 'em, charge 'em and let's pray that we can pull this off.")

Darrel Vandeveld, who took their oaths to defend the Constitution seriously, resigned rather than be party to trials using coerced evidence or to allow political considerations to interfere with their prosecutorial judgment. Professional military judges refused to be bullied into endorsing the Administration's strained interpretations of the law of war. Tenacious military defense counsel challenged the government at every turn, exposing the many flaws in this concocted legal system and the disgraceful brutality with which their clients had been treated. Through patient, professional advocacy both inside and outside the commissions, these lawyers managed to put the brakes on the military commission freight train and slow the proceedings to the point where it was a simple matter for President Obama to suspend them almost immediately after assuming office. This suspension period allows us an opportunity for reasoned debate about the shortcomings of the military commissions and their efficacy and utility.

Although I have become known as a fierce critic of the military commissions, I want to make it clear that am not opposed to military commissions as a general matter, but rather am opposed to military commissions in their current form. I am a strong proponent of military justice and have no concerns about the military's ability to provide a fair trial, even for our worst enemies, given a fair set of rules and procedures. In my law review article, I did not propose to abolish the military commissions, but rather suggested a number of legislative and regulatory changes to convert them into a viable, acceptable legal system. After practicing in the military commissions, I developed some additional concerns with the military commissions which also would require legislative action to address. (These concerns are addressed in some detail below.) Although I still believe it is theoretically possible to amend the MCA to create valid commissions, the best solution would simply be to repeal the MCA and start over to create military commissions that are not just loosely based on the UCMJ and Manual for Courts-Martial, but are virtually identical. Any proposed deviation from court-martial procedure would have to be carefully scrutinized to ensure that it was truly necessary and appropriate and not merely an effort to favor the prosecution. Any deviations, individually and cumulatively, from the rules and procedures for general courts-martial should be minimal, and must not significantly detract from the overall fairness of the proceedings. In my view, had we adopted a military commissions scheme that truly mirrored the rules and procedures for general courts-martial, as was already authorized under federal law in 2001, we would not be in the position we find ourselves in today. The military commissions would have succeeded in providing fair trials and would not have been plagued by endless delays, challenges and setbacks.

Recognizing that it is highly unlikely that the Military Commissions Act will be repealed, and that the preferred approach of the Administration and Congress appears to be to revise it, there are a number of amendments that I would recommend.

III. Recommended Revisions to the MCA:

A. ***Admissibility of Coerced Statements*:** First and foremost, it is of the utmost importance that the military commissions categorically bar the admission of coerced evidence. The proposal in the Senate NDAA to amend § 948r to preclude the admissibility of statements made as a result of cruel, degrading and inhumane interrogation methods does not go far enough because it still allows for the admission of coerced statements so long as the government disputes "the degree of coercion," and a judge determines its reliability and that "the interests of justice would best be

served" by admission of the statement. This entire provision is built on false premises. There are no circumstances where "the interests of justice would best be served" by the introduction of involuntary statements. One significant reason that involuntary statements are inadmissible is because, as a category, such statements are not reliable. I concur with the Administration's view that due process standards apply to military commissions and endorse the proposal of the administration to require a voluntariness standard for the admissibility of all statements. The use of a voluntariness standard, a standard which pre-dates *Miranda v. Arizona*, would not mean that soldiers should be required to administer *Miranda* or Article 31, UCMJ warnings on the battlefield, or that evidence would necessarily be excluded for lack of a rights advisement. Rather, a totality of the circumstances test would be employed to determine if a statement was voluntary.

B. ***Derivative Evidence*** - Congress must also restore the ban on evidence derived from coerced, involuntary statements. When the Secretary of Defense promulgated the Military Commission Rules of Evidence, the derivative evidence rule was omitted from MCRE 304. Thus, although MCRE prohibits the introduction of statements which are the product of torture and limits the introduction of coerced statements, it does not prohibit the introduction of evidence derived from an interrogation in which torture, coercion, or cruel, degrading and inhumane interrogation methods were used. This evidentiary loophole creates a powerful incentive to use unauthorized abusive interrogation methods. MCRE 304 should be amended to mirror Military Rule of Evidence 304 which states simply "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."

C. ***Hearsay Evidence*** - Congress should significantly restrict the use of hearsay evidence to conform military commission procedures to those utilized in federal criminal court and general courts-martial. The hearsay rules currently in effect under the MCA create a presumption in favor of hearsay and inappropriately place the burden on the opposing party to prove the unreliability of the hearsay, The proposed revision to § 949a.(b)(3)(D) in the Senate NDAA goes a long way toward improving this rule and bringing the rule in line with federal practice, but still permits a greater degree of hearsay evidence than is justifiable, creating a potential for unfairness and unnecessarily infringing on the right of confrontation. This provision should be further amended to require that hearsay admitted under any special military or intelligence necessity exception must be "more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts."

D. ***Choice of counsel*** – The MCA currently requires that the accused be represented by military counsel. The Obama Administration has recently proposed a rule change which purports to give greater choice of counsel to the accused. However, the accused is still required to have an appointed military defense lawyer. This provision for the right to request individual military defense counsel does bring military commission practice more in line with court-martial practice, but does nothing to address the real problem of choice of counsel: most of the accused are unwilling to be represented by American military lawyers. I experienced this myself. I was appointed to represent Mr. Ali Hamza al Bahlul, but he refused to accept me as his attorney, as he had rejected several other previously assigned military counsel. It was not personal. It was simply that he was Al Qaeda and I was the enemy. The refusal to accept the representation of

the detailed defense counsel has been a major source of delay in the military commissions and has placed several military counsel in untenable ethical quandaries. The requirement to be represented by military counsel has caused several defendants to seek to represent themselves, which has also caused significant delay and logistical problems. Of course, the rules permit accused who have the resources to also hire a civilian counsel at their own expense, but such counsel must be U.S. citizens. The requirement of U.S. citizenship is unjustifiable and should be eliminated. Non-U.S. citizens may represent U.S. service members in courts-martial. In fact, non-citizens may serve in the U.S. Armed Forces. It is particularly unfair when attorneys from our coalition partners, such as Canada, the U.K. and Australia, are ineligible to represent detainees from their home countries. The citizenship requirement should be replaced with a rule permitting foreign counsel but requiring them to have proficiency in English and to be admitted to practice in at least one U.S. jurisdiction. Of course, the foreign counsel must also be eligible for a visa and meet other security requirements.

E. ***Pretrial Investigation*** – The MCA eliminated one of the best features of the military justice system, the Article 32 pretrial investigation. Article 32 of the UCMJ, sets forth the requirements of a "thorough and impartial investigation" prior to referral of charges to a General Court-Martial. Under Article 32, a neutral, experienced investigating officer, typically a senior JAG officer, investigates the charges, determines if there are reasonable grounds to believe the offenses were committed by the accused, explores potential legal and evidentiary issues, and makes recommendations as to the appropriate disposition of the charges. The Article 32 investigation also provides an opportunity for the defense to receive a significant amount of discovery early in the process. Article 32 investigations frequently help to winnow out weak or duplicative charges and narrow the issues for trial; they can also facilitate pre-trial agreements. The lack of any pretrial investigation is a serious limitation on the due process available in military commissions, and gives far too much power to the prosecution. It is contrary to both domestic and international practice for serious offenses (including capital offenses) to be referred to trial without any independent review. In federal court, a grand jury indictment is required for any felony. State courts require either a grand jury or a preliminary hearing in front of a judge. International war crimes tribunals such as the ICC and ICTY require approval from the pre-trial chamber. A pretrial investigation requirement modeled on Article 32 and Rule for Court-Martial 405 should be incorporated into the MCA.

F. ***Statutes of Limitation*** – There are no statutes of limitation in the MCA, even where the comparable offense under the UCMJ or federal law carries a statute of limitation. This enables disparate treatment of non-citizens tried in military commissions. This should be remedied to ensure that there are reasonable statutes of limitation in place for non-capital offenses. Provision for tolling the statute of limitations until an offense is discovered or until a suspect is captured may be appropriate.

G. ***Speedy Trial*** – There is no real requirement for a speedy trial under the MCA. The MCA specifically makes inapplicable the speedy trial requirements of the UCMJ[14] which require that a service member placed in pretrial confinement be charged and brought to trial promptly (within

[14] Article 10, UCMJ states "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

120 days) or released. Since the detainees are ostensibly detained under the law of war, which permits combatants to be removed from the battlefield for the duration of the conflict, requiring a detainee to be charged or released within 120 days would be unreasonable. However, the government should not be able to hold detainees indefinitely before charging them, especially when the government is aware of chargeable offenses. Once a detainee in custody is suspected of involvement in a chargeable offense, there should be some reasonable window of time in which the government must bring charges, or forfeit the opportunity to do so. This time limit could be extended by the commission for good cause shown, such as the discovery of new evidence, the necessity to wait for another trial to conclude, or while awaiting evidence to be declassified.

There is a speedy trial requirement under R.M.C. 707 requiring a military commission to be assembled within 120 days of service of charges, but this requirement has proven to be illusory because the government can withdraw charges without prejudice and re-prefer them at any time, thereby granting itself a fresh 120 days. The government has repeatedly taken advantage of this provision. The MCA should be amended to close this loophole and prevent gamesmanship by the prosecution.

H. ***Credit for Pretrial Detention and Illegal Pretrial Punishment*** - The Rules for Military Commission do not include a provision found in Rules for Court-Martial 305(k) which provide for administrative credit for time served in pretrial detention. In *U.S. v. Hamdan*, the U.S. argued that no credit should be given for pretrial detention. The military judge, Captain Keith Allred, disagreed, and awarded credit for a significant period of the time served by Mr. Hamdan. The MCA should be amended to make it clear that the judge has the power to award this credit. Rule for Court-Martial 305(k) and military case law also authorize military judges to provide extra credit "for each day of pretrial confinement that involves. . . unusually harsh circumstances." This rule was omitted from the Rules for Military Commission. In two rulings by Colonel Stephen Henley in response to pretrial motions in *U.S. v. Jawad*, Judge Henley indicated that he believed this remedy to be available in military commissions. [15] Congress should affirm this power through an appropriate amendment to the MCA.

I. ***Discovery and Production of Evidence and Witnesses*** – The military commissions have been plagued by slow, incomplete and inadequate discovery on the part of the government, which has resulted in needless delay while motions to compel discovery are litigated. Routine discovery requests have gone unanswered for months. The prosecution has even gone so far as to claim

[15] Ruling on Defense Motion to Dismiss – Torture of the Detainee (D-008), 1 Military Commission Reporter 334, 336-37 (2008), "the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including, but not limited to, sentence credit towards any approved period of confinement.") Ruling available at http://www.defenselink.mil/news/Ruling%20D-008.pdf; Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction: Child Soldier (D-012), 1 Military Commission Reporter 338, 341 at n. 13(2008)("Nothing precludes the defense from requesting relief from the Military Commission for housing the accused while a juvenile with adult detainees, providing inadequate physical and psychological resources to a confined juvenile and any other actions that may constitute unlawful pretrial punishment of the Accused. Such relief may include, but is not limited to, specific sentence credit towards any approved period of confinement.") Ruling available at http://www.defenselink.mil/news/RULING%20D-012%20(child%20soldier).pdf

that they have no obligation under the MCA to respond in writing to defense discovery requests. In my view, part of the problem is that the MMC weakens the discovery requirements which exist in courts-martial. Instead of guaranteeing "an equal opportunity to interview witnesses and inspect evidence" as R.M.C. 701(b)(5)(3) does, the equivalent Rule for Military Commissions promises only that "no party may unreasonably impede the access of another party to a witness or evidence." Similarly, § 949j. of the MCA requires that "defense counsel shall have a *reasonable* opportunity to obtain witnesses and other evidence" where in courts-martial, R.C.M. 703(a) states that both sides "shall have *equal* opportunity to obtain witnesses and evidence." There is no justification for the weakening of this rule, which clearly provides an advantage to the prosecution.

In practice, the defense has been hampered by the requirement to submit all witness requests through the prosecution and all requests for expert witnesses to the Convening Authority, Susan Crawford, who routinely denied defense requests regardless of their merits. Merely replacing the current Convening Authority will not resolve the systemic unfairness of the current scheme. The defense needs to have an independent budget to hire experts and independent subpoena power.

The Senate NDAA proposal amends the MCA to strengthen the requirement to turn over exculpatory evidence. This is a welcome proposal as exculpatory evidence has repeatedly been withheld by the prosecution.

J. ***Age Limitations and the Treatment and Prosecution of Juvenile Detainees*** – The MCA does not contain any age limitation. Theoretically, anyone captured who meets the definition of an "unlawful enemy combatant" ("unprivileged enemy belligerent" in the Senate NDAA version) can be tried by military commission. Two juvenile detainees, Omar Khadr, aged 15 at the time of capture, and my client Mohammed Jawad, possibly as young as 12 at the time of capture according to his family and the government of Afghanistan, have had charges referred to trial by military commission. Mr. Khadr was rapidly approaching trial at the time the military commissions were suspended by President Obama. It appears, based on the government's recent concession that Mr. Jawad is no longer detainable under the laws of war, that the military commission charges against him will be withdrawn. I believe the omission of an age limitation in the MCA was an unintentional oversight by Congress and that Congress did not intend for juveniles to be subjected to trial by military commission. There is not a single mention of "minors" "child soldiers" or "juveniles" in the legislative history of the MCA. One possible reason for the oversight is that the UCMJ, upon which the MCA is based, does not include an age limit. However, since jurisdiction under the UCMJ is limited to military members and one may not join the Armed Forces until the age of 18,[16] court-martial jurisdiction is necessarily limited to adults.

If Congress did not intend for juveniles to be subject to military commissions, then this oversight must be corrected. Child soldiers, even those who perpetrate atrocities, are recognized under

[16] Seventeen year olds may enlist with the permission of a parent. However, service members are ineligible to serve in a theater of war until they turn 18, precluding the possibility of committing a war crime as a juvenile.

international law primarily as victims of war. There is no international precedent for treating child soldiers as war criminals. The United States should not be the first country in the world to prosecute child soldiers. Authorizing juveniles to be subject to the MCA arguably violates our treaty obligations under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This treaty, entered into force on February 12, 2002, requires that state parties accord to child soldiers "all appropriate assistance for their physical and psychological recovery and their social reintegration." Omar Khadr and Mohammed Jawad have been housed in adult facilities and denied any opportunities for rehabilitation and reintegration. The MCA has no provisions to take into account the age of juveniles and the only sentencing option is confinement. Subjecting child soldiers to possible life imprisonment is incompatible with the requirement to provide child soldiers with rehabilitation and reintegration.

K. ***Substantive Crimes and Elements*** – Many commentators, myself included, believe that there is a serious *ex post facto* or retroactivity problem with the MCA because it authorizes trial for offenses not previously punishable under the law of war. The MCA, at § 950p, declares, inaccurately, that "the provisions of this subchapter codify offenses that have traditionally been triable by military commissions." Thus, according to the MCA:

> Because the provisions of this subchapter. . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

The proposed revision of the MCA recognizes that there is considerable debate over whether several of the listed offenses were traditionally triable under the law of war, and proposes this caveat: "To the extent that the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of. . . enactment." In essence, this proviso acknowledges the possibility that courts may find some listed offenses in the MCA were not traditionally law of war offenses. However, the Senate NDAA version still retains all of the offenses of the original MCA, even those widely acknowledged to be new crimes.

Allowing detainees to be tried for offenses in military commissions which are not traditional war offenses creates a strong possibility either that the charges will be dismissed by the trial judge or that the convictions will be reversed on appeal. The more prudent course of action would be to remove those offenses from the MCA which were not clearly recognized war crimes prior to the enactment of the MCA. There have been several recent comprehensive codifications of the laws of war which list law of war offenses, most notably the Rome Statue of the International Criminal Court. The U.S. had a significant role in developing the list of war crimes in the Rome Statue and in defining the elements of those offenses. There are several offenses in the MCA which do not appear in the Rome Statute or in other recent codifications of the law of war, including terrorism, conspiracy, and material support for terrorism. None of these offenses have

been traditionally been triable under the law of war.[17] All should be deleted from the Military Commissions Act.

In addition to removing offenses which are not traditional law of war offenses, Congress should clarify the meaning of certain offenses to remove ambiguity. In particular, Congress should clarify the vaguely defined offense of "murder in violation of the law of war." This offense replaced the invented offense of "murder by an unprivileged belligerent" in the list of offenses created by Executive Order of President Bush. Although the title and definition of this offense are clearly different from the predecessor offense, government prosecutors interpreted this offense to be identical to the offense of "murder by an unprivileged belligerent." Several defendants at the military commissions have been charged with the offense of "murder in violation of the law of war" and/or solicitation or conspiracy to commit this offense. The prosecution's theory, advanced in several military commissions, was that all murders committed by an "unlawful combatant" or "unprivileged belligerent" violated the law of war. Their claim was that the mere status of being an "unlawful combatant" was sufficient to establish a violation of the law of war and that no other law of war violation need be proven. This interpretation of the statute finds no support in the law of war and was emphatically rejected by three different judges (Captain Keith Allred, USN; Colonel Stephen Henley, USA; and Colonel Ronald Gregory, USAF) in three different military commissions (Hamdan, Jawad and al Bahlul). The clearest expression of this can be found in Judge Henley's ruling in *U.S. v. Jawad*.[18] According to Judge Henley:

> 10 U.S.C. § 950v(b)(15) states that "Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct." Thus, there is a dual requirement for the government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. . . .
>
> If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation, they could have said so. . . .
>
> Proof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war.

[17] The Administration has acknowledged that material support for terrorism is not a traditional law of war offense.

[18] Ruling on Defense Motion to Dismiss, Lack of Subject Matter Jurisdiction (D-007), 1 Military Commission Reporter 331, 332 (2008) available at: http://www.defenselink.mil/news/RULING%20D-007%20(subject%20matter%20jurisdiction)%20(2).pdf;

Unsatisfied with this explanation, which undercut their entire theory of criminality, the government filed a motion for reconsideration of this ruling.[19] Once again, Judge Henley found the government arguments "unpersuasive":

> Congress did not intend to make every murder committed by an alien unlawful enemy combatant or every murder of a lawful combatant by an unlawful combatant a law of war violation. As the Military Commission held in its September 24, 2008 ruling, there is a dual requirement for the Government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an alien unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. The propriety of the charges in this case must be based on the nature of the act and not merely on the status of the Accused at the time of the alleged offenses. In other words, proof that the Accused is an alien unlawful enemy combatant alone will be insufficient at trial to find the alleged acts of attempted murder in this case were in "in violation of the law of war." The Military Commission's position is consistent with case precedent, international law and Congressional intent.

The government attempted to resurrect the theory of the meaning of "murder in violation of the law of war" in the trial of Mr. al Bahlul, in their proposed jury instructions. Colonel Gregory, the military judge, rejected the government's proposed jury instructions and substituted instructions based on Judge Henley's ruling in *U.S. v. Jawad*. Despite the repeated rejection of their theory, the government has continued to charge detainees with this crime, or allow charges previously referred to go forward despite a complete lack of any evidence of a violation of the law of war. Congress could resolve this situation and eliminate any ambiguity about legislative intent by providing a definition for "in violation of the law of war" in the MCA. This phrase appears in the offense of "destruction of property in violation of the law of war" and "intentionally causing serious bodily injury" as well. I recommend adding a definition to § 948a as follows:

> IN VIOLATION OF THE LAW OF WAR – The term 'in violation of the law of war' means in a method or manner or under circumstances which violate the law of war. The mere status of being an unprivileged enemy belligerent, without more, is insufficient to establish that an act was 'in violation of the law of war'.

IV. Conclusion

In short, the revisions of the MCA in the SASC proposal fall well short of what is required to transform the deeply flawed MCA into a law Americans can be proud of. The suggestions I have provided above are just a partial list of many aspects of the MCA that require revision. However, by adopting these recommendations and others proposed by the witnesses on this panel and others who have testified before this committee, the Military Commissions Act could be modified to create a fair, legitimate legal system to try law of war offenses.

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[19] Ruling on Government Motion for Reconsideration (D-007), 1 Military Commission Reporter 347, 348 (2008). Available at: http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf

The question this committee, and the rest of Congress, must consider is whether there is any point in continuing with military commissions. As President Obama has stated, military commissions are a legitimate forum in which to try offenses under the law of war, but this begs the question of whether there are any law of war offenses to try. If one were to review the charges brought against all of the approximately 25 defendants charged in the military commissions, as I have, one would conclude that 99% of them do not involve traditionally recognized war crimes. Rather, virtually all of the defendants are charged with non-war crimes, primarily criminal conspiracy, terrorism and material support to terrorism, all of which are properly crimes under federal criminal law, but not the laws of war. In fact, in my estimation, there has been only one legitimate war crime charged against any Guantanamo detainee, the charge of "perfidy" against Abdal-Rahim Al-Nashiri for his alleged role in the attack on the U.S.S. Cole in October 2000. But even though perfidy is a traditional offense under the law of war, convicting Mr. Al-Nashiri of this offense requires accepting the dubious legal fiction that the United States was at war with Al Qaeda nearly a year before 9/11, for the law of war only applies during a war. In fact, most of the offenses with which the so-called "high value detainees" are charged relate to events which occurred on or before 9/11, when the U.S. was not involved in an armed conflict with Al Qaeda. Perhaps more to the point, Mr. Al- Nashiri was also charged with several other non-law of war offenses arising out of the same conduct, including multiple charges carrying the death penalty, making the charge of perfidy redundant. The Senate bill acknowledges that it includes non law of war offenses in §948b "This chapter establishes procedures governing the use of military commissions. . .for violations of the law of war *and other offenses triable by military commission.*" (emphasis added)

If there are no real war crimes to prosecute, are there any good reasons to continue with military commissions? The Bush Administration's motive for creating military commissions was to establish a forum in which American standards of due process did not apply and convictions could be obtained for terrorism crimes (not law of war offenses) under summary procedures using evidence which would not be admissible in a regular court of law. The Obama Administration has now rightly concluded that Constitutional due process standards should apply to military commissions, and that normal rules of evidence should apply. Modifying the military commissions to comport with due process and the rule of law will mean eliminating the very reason for their existence. Partially amending them with some minor cosmetic changes will result only in many more years of protracted litigation.

Among the over two hundred detainees still at Guantanamo, there are perhaps a few dozen who have committed serious offenses. I have yet to hear any compelling reason why any of these men could not be prosecuted under existing law in Federal Court. As the recent report by Human Rights First conclusively demonstrates,[20] the federal courts are open, and have a long track record of successful prosecutions of terrorism crimes. Military commissions have not proven to be faster, more efficient or less costly than the alternative. The logistical difficulties in trying cases in Guantanamo have proven to be incredibly vexing. With Guantanamo slated to be closed in the next six months, the military commissions will have to be relocated and a whole new infrastructure created to support the commissions. This could further delay the commissions

[20] In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008) and 2009 Update and Recent Developments available at http://www.humanrightsfirst.org/us_law/prosecute/

for months or even years. Military lawyers, unlike federal prosecutors and federal public defenders, have no special expertise in prosecuting or defending complex international terrorist conspiracies. The entire military commissions experiment has been a massive drain on DoD resources and personnel at a time when the military can least afford it.

The only other reason I have heard advanced for the use of military commissions is the belief that a person who could not be successfully prosecuted in Federal Court because of evidentiary problems might be successfully prosecuted in a military commission. Those who make this argument are essentially conceding that military commissions do not and should not provide the same due process as a regularly constituted American court.

The desire to achieve convictions at all costs is simply not an acceptable basis for the creation of an alternative legal system. The reason that the military commissions failed, indeed, the primary mistake of the entire "War on Terror" was the pervasive abandonment of the rule of law by the prior administration. We must not repeat the mistakes of the past and continue to cut corners. We must remember that this war is ultimately a war about ideas and values. True American values guarantee justice and fairness for all, even for the vilified and unpopular. If there are terrorists and war criminals to be tried, let's do it the old-fashioned way, in a fair fight in a real court with untainted evidence. America is better than the last eight years. It is time to prove it to the world, and to ourselves. Thank you.