

TESTIMONY OF
WILLIAM H. TAFT, IV
HOUSE COMMITTEE ON ARMED SERVICES
MARCH 29, 2007

Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss two subjects – the future of the detention facility at Guantanamo Bay and the Military Commissions Act. As you know, I have testified many times before this committee, but I don't think I have been here since 1988, when I left the Pentagon almost twenty years ago. It's a pleasure to be back. Although I miss some faces, I am glad to see at least a few familiar ones and, of course, many new ones.

Regarding the future of the detention facility at Guantanamo Bay, I understand that most people would like to close it and transfer the persons we have captured in our conflict with al Qaeda and the Taliban regime who are there to other facilities. I share this view. There is no doubt that the facility has acquired a notorious reputation around the world, and its continued use is a focal point for criticism of our foreign policy and a drag on our ability to get important things done. Its notoriety arises, I believe, from two causes. First, it is evident that some detainees have been abused at the facility and that interrogation methods that have been used there have not complied with our international obligations under the Geneva Conventions, particularly Common Article 3 of the conventions. Second, there is an impression that the facility was established in Guantanamo in order to deprive the persons we captured in the conflict with the terrorists of access to our courts and other rights that they would enjoy if they were being held at a facility in the United States.

As to the treatment of the detainees and the methods of interrogation that have been employed at Guantanamo, I believe it was a mistake not to follow the consistent U.S. practice in all our conflicts since World War II. That practice was to treat all detainees in strict accordance with the Geneva Conventions and the Army Field Manual, regardless of whether they were entitled to this. I understand that this is now the policy embodied in the Detainee Treatment Act

and the Military Commissions Act. Whether the detainees are at Guantanamo or elsewhere, then, will not affect how they are treated going forward. I certainly hope that by treating them properly we will both repair our reputation for compliance with the laws of war generally and, most importantly, increase the chances that our servicemen will be treated properly when they are captured in combat. The capture of a number of British servicemen by Iranian forces earlier this week reminds us that the United States is not the only state that can revise or reinterpret the rules under which its forces operate in war. We created a dangerous precedent when we set out on that road in February, 2002. Even if it will take some time to repair our reputation, we are right to have begun that work.

Regarding the impression that we established the facility in Guantanamo in order to deprive the persons held there of access to the courts and other rights they would enjoy if they were in custody in the United States, I would make two points.

First, it was not clear at the time the decision to use Guantanamo was made that the persons held there would be treated any differently from the way they would have been treated if they were in custody in the United States. At the time, it was U.S. policy to treat all captured persons in accordance with the Geneva Conventions and the Army Field Manual. Those were the rules of engagement for our forces operating in Afghanistan. Guantanamo had many features that made it a natural choice for us: security, size, ability to obtain intelligence from detainees gathered in one place, no issues with governors or members of congress, etc. What was not a factor at that time was the idea that detainees would be treated differently in Guantanamo than if they were held in the United States. True, many thought that, consistent with the precedent of the Eisenstrager case, the detainees would not have access to U.S. courts to review the issue, under habeas corpus, whether they were being lawfully detained at all. I believed the Eisenstrager decision would prevent this. The point, however, did not appear to be significant in light of our policy to comply with the Geneva Conventions and our undoubted ability to detain persons captured in combat who posed a threat to us. Those of us who had experience with military law enforcement procedures had confidence, at the time, that the absence of judicial review of our

forces' conduct in Guantanamo was not likely to result in the abuse of detainees there. It had not done so in Korea or Vietnam or other theaters of war over which the courts have no jurisdiction. It would not, we thought, affect the way the detainees were treated in Guantanamo.

Second, persons captured in the conflict with al Qaeda and the Taliban should not be treated differently because they are in custody in Guantanamo from the way they would be treated if they were in custody in the United States. That is to say, the decision about whether the facility is to be closed should not, in my judgment, be based on how this may affect the legal rights of the detainees. Political and logistical factors should determine our course. Logistically, I imagine, Guantanamo still has a number of advantages over other options. It seems doubtful, however, that these outweigh the political costs of continuing its operation. At some point a brand becomes so toxic that no amount of Madison Avenue talent can rehabilitate its image. What the Reverend Jim Jones did for KoolAid and the British penal system did for Van Diemen's Land, abuse of the detainees seems to have done for Guantanamo. My recommendation would be to cut our losses. Relocation in the United States should not affect the legal rights of the persons held in Guantanamo for the simple reason that they should not be being deprived of any rights because they are there rather than in the United States.

Regarding the Military Commissions Act, I will limit my remarks to just three points.

First, I think it was a mistake for Congress to preclude judicial review of the lawfulness of detaining the persons we have captured in the conflict with al Qaeda and the Taliban. As I understand it, convicted detainees may obtain such review after their criminal cases are concluded, but persons who are not charged with crimes do not have access to the courts to challenge their detention. The benefits of this approach escape me.

It should be recalled that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban as long as they pose a threat to the United States. This is black letter law of war. Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees. Nor, will they do so as long as it is shown that the detainee poses a threat.

Currently, this determination is made by the military. Having it endorsed by a court would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of these cases will impose only a very modest burden on the courts. As I say, the cases are comparatively straightforward. My understanding is that many detainees freely state that they would try to harm the United States if they are released. The records of military determinations should make judicial review uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases. And there are not that many detainees.

My two other points relating to the Military Commissioners Act concern the rules of evidence in the trials before the commissions. I do not think either hearsay evidence or coerced testimony should be used in these trials.

I understand that hearsay evidence is admitted in several international criminal tribunals and in other national courts. But our system and traditions are different. The Sixth Amendment establishes a defendant's right to confront witnesses in criminal trials. The use of hearsay evidence is inconsistent with this right. The hearsay "witness" is not under oath, on the record or available for cross-examination, so his testimony is presumed automatically to be unreliable. Coerced testimony is likewise inherently unreliable. Courts normally exclude such testimony not only because it is unreliable but also in order to discourage the use of coercion by the authorities. Both rationales are relevant to the proceedings of the military commissions.

In proposing these changes in the rules of evidence I recognize that they may make it harder to obtain convictions. If I thought for a moment that Khalid Sheik Muhammed or other detainees like him might be released as a result of such changes, I might hesitate to recommend them. What Khalid Sheik Muhammed says he has done to Daniel Pearl and in planning the 9/11 attacks naturally enrages all Americans. But because he is being held consistent with the law of war he will not be released and, most importantly, it is when we are enraged – when our blood boils - that we most need to adhere to the rule of law as we have established it, not change it to suit our convenience. In this sense, Senator McCain is right when he says that how we treat the

detainees is not about them but about us. It is in this spirit that I make these proposals for changes in the rules of evidence set out in the Military Commissions Act.

Mr. Chairman, thank you for this opportunity to appear before your committee. This concludes my testimony. I look forward to answering your questions.