House Armed Services Committee

Hearing on the Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba

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PREPARED STATEMENT OF MORRIS D. DAVIS

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I. Introduction

Chairman Skelton, Representative Hunter, Members of the Committee, I am Morris Davis. I have served for nearly twenty-five years as an active duty judge advocate in the United States Air Force. I am on terminal leave pending my retirement on October 1, 2008. I am licensed to practice law in North Carolina and before the United States Supreme Court, the Court of Appeals for the Armed Forces and the Air Force Court of Criminal Appeals. I served as the Chief Prosecutor for the Office of Military Commissions, from September 2005 until October 5, 2007, when the request I submitted a day earlier to resign from my post was accepted.

Mister Chairman, thank you for the opportunity to address the Committee on this important topic and provide some of my personal insights.[1] I devoted more than two years of my life to the military commissions and spent every day working inside that system. I know the process, the people, and the place quite well. I hope what I have to offer is helpful in the development of a credible way forward in this important endeavor.

Until my final day as chief prosecutor, I was one of the military commission's most forceful advocates. I vigorously defended the detention facility at Guantanamo Bay and the military commissions in talks around the country, in an op-ed published in the New York Times in June 2007 and in an article published in the Yale Law Journal Pocket Part on August 13, 2007, just fifty-two days before I resigned.[2] I pledged to serve as the Chief Prosecutor for as long as I believed we were committed to conducting full, fair and open trials. On October 4, 2007, I concluded full, fair and open trials were unlikely, and I asked to resign my post. I quickly went from being one of the most avid supporters of military commissions to one of its leading critics. In testimony I provided in two cases at Guantanamo Bay in recent weeks, to media interviews aired over the past several months, to op-ed pieces I wrote for the Los Angeles Times last December and the New York

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[1] Opinions expressed herein are my personal opinions and do not represent the views of the Department of Defense or the Department of the Air Force.

[2] Davis, Morris D., *The Guantanamo I Know*, op-ed, N.Y. TIMES, Jun. 26, 2007, http://www.nytimes.com/2007/06/26/opinion/26davis.html
Davis, Morris D., *In Defense of Guantanamo Bay*, 117 YALE L.J. POCKET PART 21 (2007), http://yalelawjournal.org/images/pdfs/579.pdf

Times last February, I explained how I saw the military commissions compromised.[3] I am proud of our military justice system, but in my view the military commissions as currently constituted are neither military nor justice.

Lloyd Cutler died in 2005 after a long and distinguished legal career. Among many remarkable accomplishments, he served as White House Counsel to Presidents Carter and Clinton, and he co-founded one of the worlds' largest and most prestigious law firms. Early in his career, back in 1942, he served as the youngest lawyer on the team that prosecuted the eight Nazi saboteurs that led to the Supreme Court decision in *Ex Parte Quirin*.[4] In December 2001, nearly sixty years after the trial of the Nazis and a little more than a month after President Bush authorized the detention and prosecution of unlawful enemy combatants, Mr. Cutler published an article in the Wall Street Journal based on his experiences in similar circumstances during World War II.[5] In it he encouraged allowing the accused access to the federal courts, discouraged secret proceedings to the maximum extent possible, and recommended each accused receive competent and conflict-free representation by his counsel of choice. He said the world needed to see that justice was in fact being done and, in a real sense, the trials would be as much about the American legal system as they would be about al Qaida. If Mr. Cutler was here today I doubt he would be proud of what the past eighty months say about our legal system.

II. Preliminary Comments

My experience is in the military commissions, so the bulk of this statement addresses that aspect of Guantanamo Bay rather than the broader issue of detainee treatment in general. Before turning in detail to the military commissions, there are several preliminary points to consider in the overall discussion.

First, the aims of national security/intelligence are not the same as law enforcement/criminal prosecution. The former has a prospective focus to prevent harm in the future while the latter is retrospective and punishes those who inflicted harm in the past. There is clearly a strong national interest in conducting both of these missions effectively, but they are separate and distinct missions. Guantanamo Bay presents a unique challenge in that its primary focus from the start was intelligence – to collect information that might prevent the next 9/11 – and criminal prosecution was at best a third or fourth tier consideration. In many respects trying to adapt information collected as intelligence into evidence suitable for use in an American system of justice is like trying to fit a square peg into a round hole. That distinction is important, particularly when some urge that Guantanamo Bay cases, or future cases like them, are ordinary

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[3] Morris D. Davis, op-ed, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story; Morris D. Davis, op-ed, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, at WK12, http://www.nytimes.com/2008/02/17/opinion/17davis.html.

[4] 317 U.S. 1 (1942).

[5] Lloyd Cutler, *Lessons on Tribunal—From 1942* , WALL ST. J., Dec. 31, 2001, at A9. Mr. Cutler died in May 2005 at the age of 87. Adam Bernstein, *Lloyd Cutler, 1917-2005: Consummate Lawyer Played an Array of Roles*, WASH. POST, May 9, 2005, at A1.

criminal cases suitable for trial in our domestic criminal courts under ordinary criminal laws and procedures. The cases often cited – Moussaoui, Padilla, Lindh, Reid, and Ressam, for example – were principally law enforcement cases from the start.[6] Cases that began in an intelligence collection mode are not comparable to those developed under a law enforcement model, and the value of intelligence in the battle against terrorism may warrant special considerations.[7] It is also important to consider where to draw the line on how far we go to induce someone to talk. There may be a single line that applies to intelligence and law enforcement, but I believe there are at least two lines, and the bar is set the highest at the criminal trial level.

Second, contrary to popular notion, not all detainees are the same. There are, in my view, three categories of detainees currently at Guantanamo Bay: (1) those we believe violated the laws of war and should be held accountable, (2) those we believe present a continuing threat to us and our allies, and warrant continued detention but not prosecution, and (3) those we would like to release or transfer to responsible nations. It is the second group, what I would call general detainees, to which *Boumediene* is most relevant as they face the prospect of indefinite detention without an opportunity for a day in court. Our obligations vary among the groupings, but we must have fair and credible processes in place for each. I argued unsuccessfully that we should segregate, preferably at separate sites, those we intend to prosecute for war crimes from those we only intend to detain during hostilities. Doing so, I thought, would mitigate the problem caused by the public's perception that all detainees are exactly the same and must be afforded the same rights and privileges.

It is important to remember that a person can be a detainee and not be a war criminal, and vice versa. What I take from the *Boumediene* decision is that we must have some meaningful process in place that ensures those we detain, regardless of whether we believe they are war criminals and subject to prosecution, are held for legitimate reasons, and if the Executive Branch is not up to the task the Courts will intervene.[8] I, as it appears a majority of the Supreme Court did at an earlier point, believed the Combatant Status Review Tribunals (CSRT) provided meaningful review. Information surfaced in the spring of 2007 that cast doubt on just how fair and robust that process really was. I, along with some others, suggested revamping the CSRT rules to address the concern apparent in the Supreme Court's decision to reconsider and grant review in *Boumediene* as well as the disconnect in the CSRT and Military Commissions Act jurisdictional

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[6] Judge John Coughenour presided over the trial of Ahmed Ressam, commonly known as the Millennium Bomber. Judge Coughenour advocates the use of existing federal courts rather than the creation of specialized courts for terrorism cases. *See* John C. Coughenour, op-ed, *The Right Place to Try Terrorism Cases*, WASH. POST, Jul. 27, 2008, at B7.

[7] *See* Editorial, *Workable Terrorism Trials*, WASH. POST, Jul. 27, 2008, at B6.

[8] The military judge in the case of *United States v. Salim Hamdan*, Navy Captain Keith Allred, in a ruling that suppressed some of the statements obtained from Hamdan under excessive coercion, said: "Although the Supreme Court ultimately held that the *Boumediene* petitioners could claim the Writ of Habeas Corpus, the Court may not have found the Privilege available had … there been suitable alternative processes in place for determining the petitioners' status." Allred ruling, page 9, available at: http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf.

language.[9] Others intent on vindicating the CSRT process already in place prevailed, and now we confront the aftermath more than a year later, which I believe was avoidable.

Finally, with respect to the Supreme Court's decision in *Boumediene v. Bush*,[10] my personal opinion is it was wrongly decided, but I recognize that it is the Supreme Court's opinion, not my own, that controls. I do not believe foreign terrorists and their associates, whose only connection to the Constitution is a desire to destroy it, and who are held outside the United States by the armed forces during an armed conflict have constitutional rights, although they do have rights under Common Article 3 of the Geneva Conventions. When the nation's founders said "We the People of the United States" enter into the unique covenant that is the Constitution to secures its benefits to "ourselves and our Posterity," I do not believe they intended for its benefits to extend to the other side of the world to foreigners who participated in or supported a terrorist attack calculated to cripple the nation they founded. Nonetheless, if the result of the *Boumediene* decision is the question of how we deal with detainees finally gets the thoughtful consideration it has long deserved, then my optimism in the result outweighs my misgivings with the rationale.

III. Restoring the Commitment to Full, Fair, and Open Trials

I have doubts over whether it is possible nearly seven years after the start to restore credibility to anything called a military commission. Much like "Guantanamo Bay," the words alone generate negative images that may now be too deeply ingrained to ever attain legitimacy in the eyes of the world. Some – including Professor Amos Guiora from the University of Utah, Ben Wittes from the Brookings Institution, Professor Jack Goldsmith from Harvard, and my esteemed co-panelist Professor Neal Katyal from Georgetown – have proposed a national security court in varying forms. I was opposed at first, but I am warming up to the concept, particularly if it combines the talents of both federal and military practitioners and is based on the best features of the Military Commissions Act, the Classified Information Procedures Act, and military and federal criminal laws and procedures. That is, I believe, a far better approach than the naive view that these are really ordinary cases that can be easily transferred into the federal or courts-martial systems.

For purposes of this discussion, I assume it may be possible to restore credibility to the military commissions rather than pursuing other alternatives. In that regard, I generally stand by my comments in the Yale article and the June 2007 New York Times op-ed. Where I now have concerns is with respect to some aspects of how military commissions are currently administered, as discussed in more detail below. There are two indisputable points, from my perspective, to keep in mind from the start in the debate

[9] The CSRT regulation requires a determination of whether the detainee is an enemy combatant. The Military Commissions Act extends jurisdiction over those who are unlawful enemy combatants. The absence of the word "unlawful" from the CSRT findings led the military judges in the Hamdan and Khadr military commissions to dismiss charges for lack of jurisdiction. William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, Jun. 5, 2007, at A1. Charges were later reinstated.

[10] 553 U.S. ___ (2008).

over military commissions. First, there are some genuinely bad men at Guantanamo Bay who deserve to be held accountable for their past conduct. Second, the men and women I worked with on a daily basis – the Prosecution Task Force consisting of attorneys, paralegals, investigators, intelligence analysts, and support personnel from all of the military services, the Department of Justice, the Federal Bureau of Investigation, the Central Intelligence Agency, and other federal agencies – were without exception dedicated public servants who exhibited professionalism and integrity under very demanding circumstances. I have the utmost respect for them. They were not then, nor are they now, the problem.

I believe the Military Commissions Act of 2006 (MCA) provides a framework for full, fair, and open trials. When it was enacted almost two years ago, I believed it was a commendable piece of legislation and that is still my belief. The issues that led to my resignation stem from what happened after enactment of the MCA and how some, in my opinion, manipulated its implementation in an effort to influence outcomes. If someone empowered to do something – whether that is the President, the Secretary of Defense, or Congress – correct four main deficiencies, assuming it is not too late to restore credibility to military commissions, then I believe we could conduct proceedings that fulfill the commitment to full, fair, and open trials. The four points are: One, put the military back into military commissions and take the politics out; Two, ensure the independence of each component in the military commission process; Three, make openness and transparency of the proceedings an imperative, and; Four, expressly reject the use of evidence obtained by undue coercion.

(a) Put the Military In Military Commissions and Take the Politics Out

The President issued an order on November 13, 2001, authorizing military commissions.[11] Eighty months later, only one trial is done, and it was the result of a generous plea bargain that ensured the accused would return to his native Australia and be a free man before New Year's Eve. Some political appointees have tried to maintain a death-grip on the process and they have run it into the ground: If these truly are military commissions and an extension of the current war effort, and not a subterfuge for watered-down federal district courts as some critics contend, then this is a military mission for the uniformed military services.

In September 2006, as the House and the Senate worked on language for what eventually became the Military Commissions Act of 2006, I met with Senator Lindsey Graham, Senator John McCain, and some of their staff members. I told them that in the days since the President announced the transfer of Khalid Sheikh Mohammed and the other high value detainees from the custody of the Central Intelligence Agency to the custody of the Department of Defense, a lot of people had taken a sudden interest in military commissions and my duties as the Chief Prosecutor in particular. This included individuals from the Department of Defense as well as other federal agencies. Some were attorneys and some were not, but all had opinions on how the cases should be

[11] President's Military Order of Nov. 13, 2001 (available at: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html).

prosecuted, including opinions on trial preparation and strategy. I told Senator Graham and Senator McCain that I was concerned the military was going to be marginalized in the military commissions – kept around to present a military veneer over the Department of Justice so this appeared to be encompassed within the war effort, but stripped of any meaningful authority – unless Congress mandated that the person in charge of the prosecution and the person in charge of the defense were uniformed judge advocates. Language was added in Section 948k of the MCA that appeared to ensure military control of the prosecution and the defense.

Whether it is the treatment of detainees, appropriate techniques for intelligence gathering interrogations, or fair procedures for determining the guilt or innocence of detainees accused of war crimes, the record shows the group that consistently stood up for principles – advocating without much success that as Americans we should do the right thing – is The Judge Advocates General of the Army, Navy and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps.[12] During Congressional hearings on the Military Commissions Act it was clear that the Pentagon's civilian leadership, most notable its most senior civilian attorney Jim Haynes, at best trivialized and at worst completed ignored the advice of the military attorneys who wear the uniforms of the Soldiers, Sailors, Airmen and Marines who are, as we say in the Air Force, out where the rubber meets the ramp. Perhaps it is not surprising, then, that we end up with policies condoning simulated drowning, forced nudity, and exposure to heat and cold; processes that seek to minimize due process in the extreme; and study groups chartered to find ways to circumvent our international obligations.

A meeting was held late in the afternoon on September 28, 2006, in the office of Deputy Secretary of Defense Gordon England to talk about Guantanamo Bay detainee issues, particularly plans for the high value detainees recently transferred to Guantanamo Bay from CIA custody. In addition to me, the attendees included Mr. England, Undersecretary of Defense for Intelligence Steve Cambone, General Counsel Jim Haynes, Secretary of the Army Pete Geren, and twelve to fifteen others. Several remarks during this meeting, which lasted perhaps an hour, illustrated to me the disregard the civilian political appointees have for uniformed service members and how politics are at the center of decision-making. The midterm elections on November 7, 2006, were less than six weeks away. Mr. England said to the group to think about which of the detainees could be charged, what they could be charged with, and when they could be charged, because there could be "strategic political value" in charging some of them soon. Dr. Cambone offered that the Department of Justice needed to get significantly involved in the military commissions because they are "the pros" and have the expertise that is absent in the Department of Defense. During a discussion on finding a new convening authority to replace Major General John Altenburg who was due to leave soon

[12] See, e.g., Mark Mazzetti and Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sep. 16, 2006, at A1 (describing how the senior military lawyers "repeatedly sparred behind the scenes with Mr. Haynes, the top civilian lawyer in the Defense Department" over issues on detention, interrogation and prosecution of detainees) and Josh White, *Military Studying Raising Military Lawyers' Rank*, Dec. 21, 2005, at A29 (panel mandated by Congress recommended elevating The Judge Advocates General to three-stars to give them more authority, noting clashes between the uniformed lawyers and the political appointees serving as the Pentagon's general counsels). The rank increase was recently approved.

to return to private practice, Dr. Cambone said it should be a civilian of noteworthy standing, a person he suggested should be "a dollar a year guy."[13] As a uniformed attorney and the person who, at least on paper, was supposed to be responsible for prosecutorial decision-making, the tone of this meeting showed there was little confidence in me or other attorneys in uniform, and with the benefit of hindsight it was a harbinger of the next twelve months leading up to my resignation.

On January 9, 2007, the day Jim Haynes' nomination for a seat on the Fourth Circuit Court of Appeals was withdrawn, I received a telephone call from Mr. Haynes. He asked how soon I could charge the Australian detainee David Hicks. The telephone call was unusual for three reasons. First, it came the day after senior Department of Defense and Department of Justice officials met with representatives of the Australian government to discuss David Hicks. Second, until that moment Mr. Haynes had taken a hands-off approach with respect to my office. The few times we had talked in the previous sixteen months we discussed matters in general and not the particulars of any single case. Third, on January 9, 2007, we had no Manual for Military Commissions, no Regulation for Trial by Military Commission, no Convening Authority, and no trial judges. His inquiry was akin to asking a federal prosecutor how soon he can charge someone in the absence of a federal criminal code, federal rules of evidence, and federal judges. I explained that we could not charge anyone until the Manual for Military Commissions was published. The Manual is a substantial document that, among other things, defines the elements of each offense (i.e., the facts the prosecution must prove beyond a reasonable doubt to establish guilt). It was impossible to draft a charge when we did not know what we were required to prove to establish guilt. He asked how soon after the manual was published we would charge Hicks and if we could charge some of the other detainees in addition to Hicks. I said we would need about two weeks and that there were several other cases ready to be charged once the Manual was published. Mr. Haynes said two weeks was too long and it needed to happen sooner. I told him we would do our best, but since this was the start-up of a completely new process we would need some time to review and digest the new rules, reassess the evidence to determine how it meshes with the elements of the potential offenses, prepare charges in whatever format would be required by the Manual, and coordinate proposed charges with some other non-DoD agencies. Mr. Haynes ended the call by saying we had to get the Hicks case moving and that he would do what he could to move the Manual to completion as soon as possible.

About thirty minutes after the call from Mr. Haynes, I received a call from his Principal Deputy, Dan Dell'Orto. Mr. Dell'Orto is now the Acting General Counsel due to Mr. Haynes' resignation a few months ago. Mr. Dell'Orto said Mr. Haynes spoke with him about our conversation and he explained to Mr. Haynes that outside influence on the prosecution is prohibited. I specifically recall Mr. Dell'Orto saying "I took a wire brush to Jim and told him he can't have those kinds of conversations with you." Mr. Dell'Orto told me to disregard everything Mr. Haynes said and to do my best to get cases moving as soon as I could, but to take the time necessary to ensure it is done right. He asked if I

[13] I was not familiar with the expression "a dollar a year guy," and it took a few seconds for me to realize he meant someone who had amassed enough riches to where he would not be taking the job for the money. I also realized military officers were not "dollar a year" guys.

really thought two weeks would be enough time once we had the Manual and I told him I thought two weeks was a reasonable estimate.

The Secretary of Defense published the Manual for Military Commissions on January 18, 2007. Fourteen days later, on January 31, I received another telephone call from Jim Haynes. He said it had been two weeks since the Manual was published, so where were the charges on David Hicks? I told him that we had a draft we were vetting with our counterparts outside DoD, but we were not quite ready to sign them and serve them on Hicks. He said I promised him during our January 9 conversation that I would charge Hicks within two weeks of the Manual's publication, and that based on my assurances he made the same promises to others, and now we had no charges. I told him I was sorry, we were doing the best we could, and that in any event there was no Convening Authority to forward charges to once they were signed and served on the accused.[14] He said a new Convening Authority would be named soon, so do not let that stop us from moving forward with the charges. He asked who we planned to charge in addition to Hicks and I named four others we were considering at that point in time. Mr. Haynes was clearly annoyed and ended the call by telling me that we had to get charges done as soon as possible.

We signed charges and served them on David Hicks, Omar Khadr, and Salim Hamdan on February 2, 2007. At that time there was still no Convening Authority and no Regulation for Trial by Military Commission. The Convening Authority, Ms Susan Crawford, was appointed on February 7, five days after we charged Hicks, Khadr, and Hamdan. Ms Crawford, the most senior person in the military commission hierarchy, has a distinguished record in a number of politically appointed positions, but she had not served one day in uniform. From 2001 to 2007, the Army, Navy, Air Force and Marine Corps convened more than 50,000 courts-martial.[15] To the best of my knowledge, each of those courts was convened by a military officer, not a civilian political appointee. The Regulation for Trial by Military Commission was not published until April 27, weeks after the Hicks case ended. Some critics said the government was trying to get the train out of the station before the government finished laying the tracks. That is a fair analogy.

No one ever gave me specific reasons why it was imperative for us to charge David Hicks and others before the government finished writing the rules for military commissions, but it was widely reported in the news media the problem David Hicks was causing Australian Prime Minister John Howard in the upcoming election. We traveled to Guantanamo Bay on Saturday, March 24, 2007, intending to arraign David Hicks on Monday, March 26, a process that normally takes about an hour in the courtroom. At a press conference on Sunday, March 25, a reporter asked me if there was any talk of a plea bargain and if so what kind of sentence would I accept? I said there had been discussions between the prosecution and the defense, but there was no plea bargain and, if there was one, I considered the John Walker Lindh case a benchmark for purposes of

[14] Major General Altenburg stepped down as the Convening Authority in November 2006. The Secretary of Defense appointed Ms Susan Crawford as the Convening Authority on February 7, 2007.

[15] Each service reports its court-martial data to the Court of Appeals for the Armed Forces for the Court's annual report. The reports are available at: http://www.armfor.uscourts.gov/Annual.htm.

negotiations.[16] In our discussions with the defense we talked about a potential sentence in the ten to twenty year range. The defense was most interested in David Hicks returning to Australia and serving part of his sentence there. We had no objection if suitable arrangements could be made with the Australian government. On Monday morning, March 26, I received a telephone call from the Convening Authority's office informing me that the Friday night before we left for Guantanamo Bay the defense struck a deal with the Convening Authority. David Hicks would plead guilty and in return Ms Crawford agreed any sentence in excess of nine months would be suspended and Hicks would be transferred to Australia within sixty days of the date the sentence was announced. Instead of an arraignment, David Hicks entered a plea of guilty at a hearing on March 26. He was sentenced on March 30 and agreed to waive all appeals. On May 20, 2007, a Gulfstream jet landed in Adelaide, Australia, after a flight from Cuba and David Hicks walked off. He was released from the Yatala Labour Prison on December 29, 2007. A man included among a group described as the "worst of the worst" was free after serving the equivalent of a misdemeanor sentence. As Los Angeles Times reporter Carol Williams wrote: "Bringing [David Hicks'] case to the war-crimes tribunal first, and before all the procedural guidance was ready, left the impression with many legal analysts that Crawford stepped in to do [Prime Minister] Howard a favor – at the expense of the commissions' credibility."[17] Despite the effort, on November 24, 2007, John Howard lost his bid for reelection.

These are a few illustrations of how politics injected itself into the military commissions. If these truly are military commissions intended to dispense military justice, then assign the mission to the military and take politics out of the equation.[18]

(b) **The Components of the Military Commissions Must Be Separate and Independent for the Process to Have Legitimacy**

"The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source." The necessity for prosecutors to exercise professional legal judgment free of outside influence or coercion is recognized as a fundamental principle of a legitimate system of justice – at least it is in the war crimes court sitting in the African nation of Sierra Leone. The language in quotations comes from Article 3 of the agreement between the United Nations and the government of Sierra Leone creating a special court to punish those who committed war crimes and other atrocities during Sierra Leone's civil war.[19] Virtually identical language appears in Article 6 of the agreement between the United Nations and the government of Cambodia establishing the Extraordinary Chambers in the Courts of Cambodia to punish those who committed atrocities during the

[16] John Walker Lindh was sentenced to twenty years confinement.
[17] Carol J. Williams, *Hicks' Plea Deal Strikes Some Experts as a Sham*, L.A. TIMES, Apr. 1, 2007, at A19.
[18] Professor Stephen Saltzburg noted that the current administration is trying to move forward with the prosecutions rapidly prior to the November elections to make it more difficult for the next administration to change course. He said, "I think the desire to move forward now is to avoid this (the military commissions) being dismantled later." Jerry Markon, *Goal of the Hamdan Trial: Credibility*, Jul. 27, 2008, at A2.
[19] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002 (available at: http://www.sc-sl.org/scsl-agreement.html).

Khmer Rouge regime, as well as in the Statute for the International Criminal Tribunal for the Former Yugoslavia and the Statute for the International Criminal Tribunal for Rwanda.[20]

This fundamental principle applied in the United Nations' sanctioned war crimes courts for Sierra Leone, Cambodia, Yugoslavia, and Rwanda stands in contrast to the practice in our own military commissions. In a memorandum to me dated October 3, 2007, Deputy Secretary of Defense Gordon England mandated that the Legal Advisor to the Convening Authority (Brigadier General Thomas Hartmann) "shall directly supervise you in the performance of your duties as Chief Prosecutor." In a memorandum to Brigadier General Hartmann dated the same day, Deputy Secretary of Defense England mandated that the Deputy General Counsel (Legal Counsel – Mr. Paul Ney) "shall directly supervise you in the performance of your duties as Legal Advisor." The Deputy General Counsel (Legal Counsel) reports to the General Counsel of the Department of Defense who at the time was William J. Haynes.

During the meeting with Senators Graham and McCain in September 2006, I explained that I believed information obtained through the use of waterboarding was unreliable and not suited for use as evidence in a criminal proceeding conducted by the United States, and that I had instructed the prosecution team that we would not offer such evidence at a military commission. I expressed concern to the Senators that some outside the Office of the Chief Prosecutor had strong opinions to the contrary on waterboarding and other issues, and may attempt to influence the prosecution. The Office of the Chief Prosecutor was still recovering from an earlier incident where several junior officers thought they were being compelled to compromise their integrity, resulting in an investigation and unplanned turnover within the office. To ensure that the integrity of the prosecution team was protected, and to shield against the potential effect of outside pressure, I proposed language that Senator Graham added to Section 949b of the MCA (Unlawfully influencing action of military commission), which reads:

> ''No person may attempt to coerce or, by any unauthorized means, influence—the exercise of professional judgment by trial counsel or defense counsel."

I believed this addition to the section on unlawful influence prevented those outside the Office of the Chief Prosecutor from attempted to impose their views on issues like what types of evidence the prosecution will or will not introduce at trial and what charges will be brought against particular accused. I believed this addition ensured me and my prosecutor the same prosecutorial independence recognized in the United Nations'

[20] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Jun. 6, 2004 (available at: http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf). "The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source." Article 16, Statute of the International Criminal Tribunal for the Former Yugoslavia, Feb. 28, 2006 (http://www.un.org/icty/legaldoc-e/index-t.htm) and Article 15, Statute of the International Criminal Tribunal for Rwanda, Oct. 13, 2006 (http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf).

sanctioned war crimes courts in Sierra Leone and Cambodia. As noted earlier, however, on October 3, 2007, when Deputy Secretary of Defense England placed the Chief Prosecutor under the direct authority of Brigadier General Hartmann, Mr. Ney, and ultimately Mr. Haynes, all individuals of superior rank and authority, and all serving outside the Office of the Chief Prosecutor, the language Senator Graham included in the MCA was rendered questionable if not worthless.[21] I submitted my resignation a few hours after I received Mr. England's memorandum.

Some argue that the level of prosecutorial independence in the United Nations sanctioned war crimes courts is unnecessary in military commissions conducted by the United States because military commissions are based upon practices recognized in the Uniform Code of Military Justice (UCMJ). This argument is flawed for two reasons. First, the leading criticism of the UCMJ is the significant role commanders and their lawyers play in the disciplinary process. We defend command involvement on the grounds that commanders are responsible for the mission readiness of their troops, and that maintaining good order and discipline is essential to mission readiness. The accused on trial in a court-martial is one of the convening authority's own troops and the trial has a direct link to the readiness of the entire organization when called upon to perform its mission. This justification, however, is totally lacking in a military commission. Ms Crawford, as the Convening Authority, is not responsible for the mission readiness of al Qaida nor does she owe any duty to Usama bin Laden to help maintain good order and discipline among his forces. Military commissions are about retribution, not readiness. Second, the level of interest in courts-martial is generally limited and when there is interest it usually is confined to a domestic audience. Military commissions are conducted before a worldwide audience. It is difficult to explain command involvement in courts-martial to a domestic audience, even to members of Congress; it is impossible to explain similar involvement in military commissions to an already skeptical international audience.

Military Commission Instruction Number 6, dated April 30, 2003, said: "The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) for the Department of Defense and then to the General Counsel of the Department of Defense."[22] Less than a year later, during the period when his confirmation for the federal appellate bench was in jeopardy, Mr. Haynes issued a new Military Commission Instruction Number 6 and removed himself from the prosecution's chain of command. The new Instruction said: "The Chief Prosecutor shall report to the Legal Advisor to the Appointing Authority and then to the Appointing Authority."[23] On April 20, 2004, the Department of Defense issued a press release saying this changed helped ensure

[21] This issue was litigated in an April 2008 hearing in the Hamdan case. The military judge found that through the additional language Congress expressed its intent for the prosecutors to have more protections than in the courts-martial context. This ruling is encouraging, although expressly limited to the Hamdan case. The ruling is available on the military commission web site at: http://www.defenselink.mil/news/May2008/D026.pdf.

[22] Military Commission Instruction No. 6, Apr. 30, 2003, at para. 3.A.(3) (http://www.defenselink.mil/news/Feb2006/d20060217MCI6.pdf).

[23] Military Commission Instruction No. 6, Apr. 15, 2004, at para. 3.A.(3) (http://www.defenselink.mil/news/Apr2004/d20040420ins6.pdf).

independence.[24] On October 3, 2007, Deputy Secretary of Defense Gordon England signed memoranda that reverted back to the practice abandoned in 2004 and put the prosecution back under Jim Haynes' command authority. The change implemented in 2004 and heralded as an improvement was abandoned in 2007.[25]

Additionally, the influence of the Convening Authority's staff on the Office of the Chief Prosecutor, particularly by the Legal Advisor to the Convening Authority Brigadier General Tom Hartmann, compromises the ability of the Convening Authority to be neutral and detached, and it compromises the independence of the prosecution. I testified on unlawful influence during a hearing in the Hamdan case at Guantanamo Bay in April 2008, and I described the same events discussed above.[26] In a ruling released on May 9, 2008, the military judge found my assertions were true and that Brigadier General Hartmann broke the law by violating the statutory prohibition on exerting influence or coercion on the prosecution.[27] To ensure a fair trial and to restore public confidence in the proceedings, the judge ordered Brigadier General Hartmann disqualified from further involvement in the Hamdan case.[28] Many observers waited to see how the Department of Defense would respond to the finding that the Legal Advisor broke the law, and most expected he would be relieved of his duties. Instead, in the weeks since the judge's ruling, eight more detainees were charged, charges against Khalid Sheikh Mohammed and the other 9/11 accused were referred to trial, and Brigadier General Hartmann remains on the job. Confidence in the military commissions had been on a steady decline for some time and DoD choosing to ignore that Brigadier General Hartmann broke the law perpetuates the perception that the military commissions are rigged to achieve predetermined outcomes rather than to do justice. The independence of each component is essential for the military commissions to gain credibility.

(c) Openness and Transparency Are Critical to the Legitimacy of Military Commissions

The most perfect trial in the history of mankind will be viewed with skepticism if it is conducted in secret behind closed doors. Justice Louis Brandeis was right nearly seventy-five years ago when he said, "Sunlight is said to be the best of disinfectants."

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[24] Dept. of Defense Release No. 384-04, Apr. 20, 2004 (available at http://www.defenselink.mil/releases/release.aspx?releaseid=7277).

[25] The General Counsel of the Department of Defense wrote himself out of the Chief Prosecutor's chain of command in 2004 during the height of the criticism of his role in shaping detainee treatment policies. He was placed back into the Chief Prosecutor's chain of command in 2007 after his nomination for appointment to the federal appellate bench was withdrawn.

[26] I provided similar testimony on the same issue in the Jawad case in June. The military judge has not issued a ruling in that case.

[27] The ruling is available on the military commission web site at: http://www.defenselink.mil/news/May2008/D026.pdf.

[28] The judge also ordered the DoD General Counsel to ensure no one who testified suffered any adverse consequence for having done so. *Id.* Two weeks later, I was notified by the DoD General Counsel that I was denied the customary DoD medal awarded to officers assigned to the Office of Military Commissions because my service as chief prosecutor was not honorable. Josh White, *Colonel Says Speaking Out Cost a Medal*, WASH. POST, May 29, 2008, at A9. The Air Force recently approved a medal for my honorable service for this same period of time.

The Military Commissions Act provides for closed proceedings to protect classified information, but closed proceedings should be the exception after exhausting all reasonable alternatives. The prosecution team devoted considerable time and effort to get information declassified for use in open court. As an example, we spent more than two years on the Khadr case alone. Brigadier General Hartmann and Ms Crawford made it clear to me in conversations we had in September 2007 that moving cases to trial outweighed the value of open proceedings. They both said Congress gave us the ability to close the proceedings, so we could not afford to waste time trying to declassify evidence when it is not required by the rules.

There is inherent skepticism about the fairness of military commissions and it has been made worse by nearly seven years of bungling that produced no meaningful results. Proving these are fair proceedings at this stage will be extremely difficult even with maximum transparency. It will be absolutely impossible if the trials are held behind closed doors. Lloyd Cutler opined in December 2001 that the military commissions would be "held in the full glare of modern print and video journalism" and expressed optimism that the trials could be done in "a manner that meets all legitimate constitutional and public concerns."[29] If that is to happen we must devote whatever time and effort is required to work through the declassification process. Closed proceedings should only be considered after all reasonable efforts to keep them open are exhausted.

(d) The United States Must Reject Evidence Obtained by Undue Coercion

Placing an individual in a situation where his apparent choices are to say what his interrogators want to hear or possibly die may produce information of significant intelligence value, but it does not produce reliable information that has evidentiary value in an American system of justice. I believed waterboarding and comparable techniques were clearly over the line and I instructed the prosecutors that we would not offer such evidence at trial. Fortunately, in my view, we had sufficient evidence to establish guilt independent of anything a detainee said under excessive coercion, so it was unnecessary to even consider sinking to that level. Nonetheless, Brigadier General Hartmann challenged my authority to exclude evidence obtained by coercion, including waterboarding. In public statements he has consistently refused to rule out the use of evidence obtained by waterboarding and he said the decision is up to the military judges, not the prosecutors.[30] If we condone offering this type of evidence in our military commissions we forfeit the right to condemn others for doing likewise, and hopefully we would condemn any country that sought the death penalty against an American citizen using a confession obtained by waterboarding or similar coercive methods.

Additionally, requiring a prosecutor to offer evidence obtained by methods many consider torture and let the trial judge determine its admissibility places the prosecutor in

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[29] *Supra* note 5.

[30] Josh White, *Evidence From Waterboarding Could Be Used in Military Trials*, WASH. POST, Dec. 12, 2007, at A4; DoD News Briefing with Brig. Gen Hartmann from the Pentagon, Feb. 11, 2008, available at: http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4142; Josh White, *Charges Are Filed in Cole Bombing*, WASH. POST, Jul. 1, 2008, at A3.

a precarious position where he or she may have to choose between violating the rules of professional conduct and disobeying a superior officer. In his ruling that disqualified Brigadier General Hartmann from participation in the Hamdan case, Judge Allred said: "While it is true that the trial judge is ultimately the gatekeeper for each item of evidence, each Prosecutor also has an ethical duty not to present evidence he considers unreliable."[31]

It really should not be a matter for the prosecutors to decide. It should be our national policy that we do not attempt to convict anyone in any American criminal trial using evidence obtained through methods like waterboarding. Not too many years ago most would have taken that as a given, but today it requires express reinforcement. As former hostage Tom Ahern said twenty-seven years ago when he was offered a chance to torture his Iranian torturer just before his release from captivity, "we don't do stuff like that."[32]

IV. Conclusion

Perhaps it is too late to restore credibility to the military commissions, but some sensible solution is required. In the wake of the recent *Boumediene* decision and with the presidential election on the horizon, now is the time to give this matter the thoughtful consideration it deserves. We need a comprehensive system that ensures detainees are held for legitimate reasons and that allows for full, fair, and open trials for the subset alleged to have committed war crimes. This is an opportunity to begin the process of restoring our standing as the world leader in human rights and adherence to the rule of law. I look forward to the chance to help facilitate that process.

[31] *Supra* note 8, at page 11.
[32] Morris D. Davis, op-ed, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, at WK12, http://www.nytimes.com/2008/02/17/opinion/17davis.html.