Testimony of
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INTRODUCTION

Disclaimer: Thank you, Chairman Skelton and Members of the House Armed Services Committee, for inviting me to speak to you today. My testimony is given in my capacity as a private citizen who is currently serving as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of the Department of Defense, the Army, my subordinates or any other entity.

The Military Commission process has been harshly criticized for allowing statements coerced from an accused – including statements obtained by cruel, inhuman or degrading treatment – to be used in evidence against him in some circumstances; for allowing convictions based on hearsay evidence; for granting the prosecutor virtually unlimited discretion to invoke the national security privilege and thereby prevent the defense from learning material facts; and for otherwise denying the accused fundamental rights that are honored in both the military and civilian criminal justice systems. This Subcommittee is familiar with these criticisms and I will not belabor them here. The role of the Office of the Chief Defense Counsel has been to serve as the conscience of the United States government in these proceedings, by insisting, in the face of the prosecution's claim that the Constitution is irrelevant in Guantanamo Bay, that the Commissions abide by the fundamental law of the land applicable in every other American judicial proceeding where life and liberty are at stake. In that connection, the attorneys in my office have challenged the legality of the rights-denying provisions of the MCA both before and after *Boumediene* was decided. Our daunting task, in the presence of national fear and a sensed fear of the Rule of Law, is instead, to defend the Rule of Law and to insist that it has application to those being held at GTMO who are being charged. I will not go into the technical details of their arguments and motions, many of which have yet to be filed. Instead, I will provide an overview of *Boumediene's* potential impact on the Commission proceedings more generally, focusing on sections of the Supreme Court's majority opinion that are particularly relevant. I will not address how our office resources will be most likely affected by the decision or how our office continues to struggle to maintain its independence and zealously represent those accused as is our duty. I will, obviously, entertain any questions that you have to the extent I can.

I have been asked to testify today about what the implications of the Supreme Court's decision in *Boumediene v. Bush* are likely to be for the detainees at Guantanamo Bay, Cuba. I have served as the Chief Defense Counsel of the Office of Military Commissions since August of 2007 and, in that time, have seen the number of cases expand from two to twenty-one. I have served in the United States Army for over 26 years in a myriad of assignments, both on Active Duty and as a member of the Reserve Component Services. While I am currently serving as Chief Defense

Counsel, I am on leave from my civilian profession as an elected Circuit Court Trial Judge in my home State of Indiana. I have served over thirteen years as a Trial Judge in Indiana. I consider myself a public servant. I have also served as a Military Judge, both in the Army Reserves and on Active Duty in the Army. I am proud to be an elected office holder and I am proud to wear the uniform of the United States Military. In my office in Boone County Indiana, I proudly and with great reverence, display the "Flag on Honor" with the names of the 9-11 victims. I do not see my role as an elected Judge or my obligations as an officer in the United States Military as any way inconsistent with my obligations as the Chief Defense Counsel. Because of the unique vantage point I have, I will generally confine what I have to say to what *Boumediene* means for the military commissions.

That said, and to put it briefly, the most important thing that *Boumediene* held is something that I always thought was obvious. Like Thomas Paine said in *Common Sense*, "In America the law is King. For as in absolute governments the king is the law, so in free countries the law ought to be king, and there ought to be no other." *Boumediene* held that in America, there are no law free zones.

The Status of GTMO

Why this was even an issue is because of the choice in 2002 to move enemy combatants from Afghanistan and terrorism suspects captured around the world to the U.S. military base at Guantanamo Bay, Cuba. As Defense Secretary Rumsfeld said at the time, this was the "least worst place" to put them. What made GTMO the "least worst place" was the fact that its legal status was ambiguous. On the one hand, it is technically Cuban territory. On the other, and for all practical purposes, it has been ours ever since we took it over from the Spanish in 1898, along with Puerto Rico, Guam, the Mariana Islands and all of the other, so called, "unincorporated territories."

The result was that even though the government could, and did, treat it as if it was U.S. soil, it took the position that it was foreign soil when it came to the rights of the people we held there. In support of that view, the government relied upon two Supreme Court cases – *Johnson v. Eisentrager* and *United States v. Verdugo-Urquidez*. *Eisentrager* dealt with German prisoners who had been tried by military commission and held in a military prison in occupied Germany after WWII. *Verdugo* dealt with a warrantless search conducted by U.S. law enforcement in Mexico. In both of these cases, the Supreme Court held that what U.S. officials did in a foreign country implicated the relations between the United States and that foreign government. Accordingly, the U.S. Constitution did not supplant that countries' local law unless the individuals involved had some other significant connection to the United States, such as citizenship or property they owned in the U.S. that would warrant it.

I raise these cases not to make an oral argument, but to give context to what *Boumediene* decided. Because unlike Germany and Mexico, there is no local law in GTMO. I don't have to tell you that U.S. relations with Cuba have not been the friendliest over the past fifty years and the ring of landmines around GTMO is one of many steps that are taken to ensure that Cuban law

does not apply there. There is no conflict between the Constitution and foreign law at GTMO. There is the choice between the Constitution and no law at all.

In *Boumediene*, the Court said "Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."

Federal Court Habeas Corpus Review of Military Commission Procedures and Verdicts

Boumediene holds that a detainee found to be an "unlawful enemy combatant" in a CSRT hearing may challenge that finding on federal habeas review. This holding by itself may have consequences for Military Commission proceedings, because a finding that the accused is an "unlawful enemy combatant" is a prerequisite of the Commission's personal jurisdiction. In other words, under the MCA, unless the accused is an "unlawful enemy combatant," he may not be tried before a Military Commission. Thus, a detainee's habeas challenge to his CSRT determination is in effect also a challenge to the government's right to try him before a Commission. In *Hamdan v. Gates*, the first federal habeas case to be litigated after *Boumediene*, Judge James Robertson found it unnecessary to address Mr. Hamdan's challenge to his "unlawful enemy combatant" determination, because he thought that on the particular facts of Mr. Hamdan's claim habeas review should wait until after the Commission proceedings were completed. It remains to be seen, however, whether habeas petitions by other Commission defendants presenting different sets of facts will be held to warrant pre-trial intervention on the question of personal jurisdiction.

Beyond CSRT determinations, the majority opinion in *Boumediene* has clear implications for the availability of habeas corpus review of Military Commission procedures and verdicts as well. *Boumediene* declared section 7 of the MCA, which purported to strip federal courts of habeas jurisdiction over the CSRT determinations, to be unconstitutional. Another section of the MCA, now codified at 10 U.S.C. § 950j(b), also purports to strip federal courts of habeas corpus jurisdiction over the Military Commission verdicts and procedures. *Boumediene's* reasoning strongly suggests that § 950j(b) is also unconstitutional and that there will be federal habeas corpus review of Military Commission verdicts and procedures.

First, the Supreme Court noted that habeas review is constitutionally required even where the prisoner has been "detained pursuant to the most rigorous proceedings imaginable," that is, "a criminal trial conducted in full accordance with the protections of the Bill of Rights." It necessarily follows, then, that habeas must also be available after the Commission process runs its course, since these are criminal trials conducted on the explicit assumption that the Bill of Rights has no application whatsoever (at least, that is the position that the government has taken in these cases, and to date the Commission judges have agreed).

The only remaining question under *Boumediene*, once a general right to constitutional habeas corpus is established, is whether the procedures afforded the defendant under the challenged statutory scheme provide an "adequate substitute" for habeas review. Again, the *Boumediene*

opinion, which addressed this question in the context of CSRT procedures, provides good reason to believe that the MCA procedures will fail constitutional muster on this ground as well. In finding that the D.C. Circuit Court of Appeals review provided by the Detainee Treatment Act of 2005 (DTA) was not an "adequate substitute," the *Boumediene* Court focused on a number of flaws in the DTA process, but ultimately held that there was at least one flaw that was dispositive of the DTA's "inadequacy" as a habeas substitute: the reviewing court's lack of authority to consider exculpatory evidence discovered after the CSRT proceedings concluded.

Do Fundamental Due Process Rights Apply in Guantanamo?

The *Boumediene* majority decided that the Suspension Clause applies extraterritorially, at least insofar as it reaches to Guantanamo Bay. What the Court did not decide, however, to the consternation of some, is what other constitutional rights apply in Guantanamo. That issue is critical, because the question that federal habeas courts will ultimately have to decide is whether the Military Commission procedures comport with the Constitution. The content of the rights that apply at Guantanamo will provide the measure for that determination.

Although the Court did not provide an express answer to the question of what other rights apply, in the course of discussing the Suspension Clause it clarified the analytical framework required to answer it. In doing so, it left little doubt that the basic constitutional guarantees of fairness, including the bar on receiving coerced statements in evidence, the right to confront witnesses, and other fundamental due process rights, are enforceable in Guantanamo.

Prior to *Boumediene*, the Court had long recognized that certain fundamental rights protect noncitizens even outside the sovereign territory of the United States. In analyzing whether the Suspension Clause was among these rights, Justice Kennedy concluded for the majority that the extraterritorial effect of a particular constitutional provision turns on "objective factors and practical concerns, [and] not formalism." Consistent with this practical view, the majority rejected the notions that extraterritorial application was strictly a function of the United States's territorial sovereignty or of a habeas petitioner's citizenship, and instead adopted Justice Harlan's focus on the practical obstacles to honoring the right: "the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'"

The Supreme Court thus adopted a pragmatic analysis that looks primarily to whether particular constitutional rights can be honored on the foreign territory without undue burden on the United States government or displacement of the local forms of justice. Along the way, the Court endorsed certain principles that are highly relevant to the question of whether other constitutional protections apply in Guantanamo.

First, it is clear that neither *de jure* sovereignty over the location of the proceeding nor the citizenship of the defendant is dispositive of the extraterritorial application question. After *Boumediene*, that the accused is an alien and that the trial is held off-shore does not answer the question of whether the United States must abide by the Constitution before taking life or liberty.

Second, the Supreme Court concluded that Guantanamo Bay was *de facto* within the territory of the United States for purposes of the extraterritoriality analysis, stating that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." That conclusion was based on the pragmatic realities of the United State's control over Guantanamo and not on any special characteristic of the habeas corpus right. Thus, absent some special factor, the applicability of other fundamental rights in the Commission proceedings will be determined no differently than if they were occurring on the United States's sovereign territory.

Finally, the *Boumediene* majority noted with regard to the Suspension Clause that applying it at Guantanamo placed a burden on the government, insofar as it would require new and further proceedings that would cost money and "divert the attention of military personnel from other pressing tasks." Despite these concerns, the Court held that they were not dispositive: "The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."

By contrast, recognition of other fundamental rights of due process will not place any such burdens on the government at all. Unlike the Suspension Clause right, honoring other constitutional rights will not initiate new judicial proceedings in courtrooms far away from Guantanamo Bay, but will simply guarantee the fundamental fairness of the commission procedure that is *already* part of the military mission at Guantanamo. There are no "credible arguments" that an accused's rights under the *Ex Post Facto* Clause, or his Due Process Clause right not to have coerced testimony used against him in court, or his Sixth Amendments rights to confront the witnesses against him, to the effective assistance of counsel, and to a speedy and public trial, for example, will place any burden on the government other than the burden of providing guarantees of fair treatment in the procedures already initiated against him. Nor do the government's legitimate concerns for secrecy and national security permit the wholesale rejection of an accused's fair trial rights. These concerns are dealt with every day in domestic civilian courts and military courts-martial in a manner that preserves both the government's interests and the defendant's constitutional rights.

There is little doubt that judicial rulings applying these due process rights to the Guantanamo trials would profoundly alter their nature, since so many of the MCA procedures were designed with the conscious intention of denying or ignoring these rights. These are defendants who have been held incommunicado for years without being allowed to consult with an attorney. They have been subjected to interrogations which at their most lawful were conducted outside the presence of counsel and without warnings that the defendants' statements would be used to convict them in court, and which at their worst amounted to torture or cruel, inhumane, and degrading treatment that is criminalized under federal law and banned by international treaties to which the United States is a signatory. These are facts that would threaten the very possibility of prosecution in ordinary criminal courts where the Constitution is held to apply.

Moreover, many of these are capital cases (including the so-called "high value detainee" conspiracy case against the individuals charged with the 9/11 crimes), to which the Supreme Court has applied a heightened standard of constitutional scrutiny. To mention just one issue of special relevance to capital cases that has received less attention than some others, the Supreme Court has become much more vigilant about the constitutionally required effectiveness of

counsel in death penalty cases. Yet conditions at Guantanamo, in terms of access to clients, inadequate resources and facilities, and obstacles created by the classification of so much of the evidence, have created a situation in which constitutionally effective assistance of counsel is a daily struggle. That is no criticism of the defense attorneys working on these cases, who have done an astonishing job of carrying out their missions under the most difficult of circumstances. It is simply to say that even to begin to apply the Constitution to these trials, as *Boumediene* ion.

To date no federal judge has yet passed on the question of which constitutional rights apply at Guantanamo after *Boumediene*. Judge Robertson in the *Hamdan* decision abstained on prudential grounds from deciding that question, but he noted in passing the MCA's "startling" departure from the norms of United States civilian court and court-martial procedure insofar as it allows coerced statements into evidence. "Startling," here, is presumably a euphemism for "shocks the conscience" – the constitutional standard under which interrogation methods far less gruesome than those applied to many of the Guantanamo detainees have traditionally been condemned and their fruits excluded from evidence in federal and state criminal trials. Despite the absence of definitive court rulings, for the reasons stated today there is good reason to think that other federal judges will find the MCA's departure from American constitutional norms traditions "startling" as well, and after these trials are concluded, will not be constrained in substantive rulings that use the stronger language of constitutional condemnation.

Despite *Boumediene's* message that the Constitution applies at Guantanamo and that federal courts will eventually review these proceedings on habeas corpus, that fact has not yet made an impression in the Commission proceedings themselves. It does not bode well for that future habeas review, for example, that shortly after *Boumediene* was decided, and virtually contemporaneously with Judge Robertson's "startling" comment, the military judge in the first Commission case to go to trial ruled that the Due Process Clause does not apply in the Commissions and that some coerced statements would be admitted at trial.

THE FUTURE OF THE MILITARY COMMISSIONS

As I said, I would have thought this was obvious to everyone until coming to serve in my current role. We are a nation first and foremost of laws. This is why the men and women of our military must take an oath to "support and defend the Constitution against all enemies, foreign and domestic."

A number of the witnesses most likely have or will discuss the many deviations the military commission allows from the procedures that would govern commissions convened under the UCMJ or in federal courts. The admission of forced confessions into evidence, limitations on the right to counsel and access to evidence, and the prosecution of at least two juvenile offenders without any account being taken of their age, names but a few.

The situation created by *Boumediene* is that the military judges confronted with these problems are put between the rock of applying the Constitution and the hard place of the government's reading of the Military Commissions Act. In litigating these issues, the government still maintains that the Constitution does not apply at all. They have taken the position that

Boumediene only applied the Constitution's Suspension Clause to GTMO and no other; not the Bill of Rights nor even the Ex Post Facto Clause. No fair reading of *Boumediene* supports such a narrow view, but that is the position they have forced themselves into, since many of the provisions of the Military Commissions Act and the Rules for Military Commissions are not "battle tested," and in many instances, are squarely at odds with controlling precedent on what due process requires.

Exacerbating the difficulty of resolving these very novel and complex legal questions is the highly politicized atmosphere surrounding everything the commissions do. Some of it is inevitable given the intense international interest in everything that goes on in GTMO, but some of it is self-inflicted. The military judge in the Hamdan case, for example, found that the legal advisor to the Convening Authority had systematically overstepped his role to such an extent that it amounted to unlawful influence of the Office of the Chief Prosecutor. Much of this appeared motivated by a desire to accelerate as many of these cases to completion before the presidential election as possible. This has come, in my judgment, at the cost of fairness, and perceived fairness, and in the face of logistical difficulties that have plagued every case at every step along the way. While there is always an imperative to ensure speedy trials, the pace of these trials, which are some of the most complex criminal trials ever brought, should be dictated by the facts of the case, not a political timetable. If this process cannot survive a presidential election, it doesn't deserve to survive.

Which brings me to the question of whether, after *Boumediene,* these commissions will and should survive at all. To the extent these commissions were intended to be convened beyond the reach of the Constitution, *Boumediene* makes clear that GTMO is well within the Constitution's grasp. At the edges, there will be some debate about the extent to which provisions of the Constitution apply extraterritorially, but there is a hundred years of precedent from the Supreme Court on this subject, and in the end, there is little doubt that the significance of GTMO's territorial status will not be very different than Puerto Rico's. Then there is the question of the application of the Constitution to military proceedings, and there is a hundred years of precedent on that as well. I can assure you that the military trials I have presided over as a military judge do not look that different from the trials I have presided over in Indiana.

So the question of whether the military commissions will survive at all appears to be in doubt and, if they do, those provisions of the Military Commissions Act that survive constitutional scrutiny will ultimately make the commissions look a lot like they would have looked had they been convened under the UCMJ. As I have been saying since I took this position, and many many others before me…is that we can do better than the Military Commissions Act. Our nation's legal integrity is on trial at the same time the Hamdan case is proceeding and we are not faring very well.

Which leads me to believe that the question of whether they *should* survive is in even greater doubt. Even assuming some of the military commissions reach completion, as the case of Salim Hamdan appears it will by the end perhaps even by the end of this week, any conviction is almost guaranteed to be reversed by the appellate courts. This process could take a matter of years and by the time that happens, some of these detainees will have been held for more than eight years, making any retrial enormously complicated by the passage of time, if not impossible. You must ask yourself then, why are we pressing forward with something that many, a majority

agrees is doomed to fail? Why proceed at such great cost financially and to the international reputation of the United States as a stalwart guardian of human rights and the due process of law? Why are such things as Torture even being discussed, let alone its definition being debated in 2008 AD? Maybe 2008 BC but not today. Why are we in Cuba in 2008? Doesn't the fact that we are conducting "trials" in Cuba make your skin crawl? We are the United States of America! Why are we hiding in Cuba?

ALTERNATIVE WAYS FORWARD

This question becomes even more poignant in the face of the alternatives that are readily available to try these cases.

Some have proposed a national security court that will fix some of the more significant problems with the military commissions, but nevertheless provide an alternative forum for these kinds of terrorism cases. My first instinct is to say that such a court will be no less fraught with logistical and legal difficulties than are the current military commissions. You can expect the first five to ten years of the court's operations to be weighed down with challenges to its legitimacy. I would venture to guess that nearly every deviation in the procedures of such a court will reach the Supreme Court in one form or another. This is how it should be, since this is the standard of zealous advocacy that makes our criminal justice system so robust.

The overriding consideration that I would put to you, however, is that none of the defendant's I have seen so far charged are worthy of such a venture, nor of this one. Some of the defendants may no doubt be evil people and may be guilty of some of the worst acts of terrorism in our country's history. They are not, however, too great for the U.S. justice system and treating them as such turns them into international celebrities to an extent far in excess of their individual merit. To put it in perspective, Timothy McVeigh was tried, convicted and executed within six years of his bombing the Oklahoma City Building. It has now been almost seven years since the attacks of September 11, 2001.

The real alternative is to demonstrate to the world and our enemies that our Constitution is not a handicap in the war on terrorism, but the source of our greatest strength. Court-martials historically and federal courts recently have had no difficulty in prosecuting terrorists no matter where in the world they are captured. Indeed, some of the alleged co-conspirators of detainees currently being tried at GTMO have already been prosecuted and convicted in our federal courts. Perhaps one of the most dangerous men in the world, the international arms dealer Viktor Bout, was arrested this past winter in Singapore and is now standing trial in the Southern District of New York for providing military weaponry to terrorist organizations, including al Qaeda.

There are no doubt difficulties to trying such cases in regular civilian or even military courts. The major concern that is both substantial and legitimate is the need to protect national security information, much of it classified at the highest levels. This information will often be necessary to the proper prosecution and defense of a terrorism suspect and the risks of having that information leaked to the public may be as high as declining to prosecute may be unacceptable. One solution therefore may be bolstering the Classified Information Protection Act.

Another, and this is based of my experience with the fine men and women who have served in the Office of the Chief Defense Counsel, would be to establish some form of National Security Defense Counsel's Office. This office could be required to participate in any national security prosecution and could be staffed with military and civilian personnel with the highest levels of security clearance, whose professional careers and place within the government would ensure that the most sensitive government information stays in the hands of the government. As I am leaving active duty in the next few months to return to the bench in Indiana, I can assure you that I am not seeking a job. This is merely meant as a suggestion for balancing the legitimate need to protect national security information with the need to afford trials that will not make martyrs of the defendants, but show those convicted to be the criminals they are.

CONCLUSION

I will conclude by reiterating the point with which I opened my remarks. *Boumediene* reaffirmed what should be a surprise to no American –that where our government is sovereign, the Constitution is sovereign. This fact will lead to the ultimate striking down of the most constitutionally suspect of the military commission procedures now in place. The only question that remains is how long it will take, how many convictions must be reversed and whether it will be the product of the rulings of the military judges presiding over the commissions or the appellate courts on review. The same uncertainty cannot be said exist with the trials of Viktor Bout, Timothy McVeigh, Zacarius Moussaoui or Ramzi Yousef. Since it is now simply a question of when, the only remaining one is why? Since there are alternatives in place both within the military and civilian justice systems, that's a question I don't have an answer to.

The ultimate tragedy is that United States federal courts and military courts-martial have shown themselves to be more than capable of meting out justice to terrorists under the traditional principles of American justice that the Military Commissions system has abandoned. Even before *Boumediene*, the Military Commissions were a stain on the United States justice system's reputation. *Boumediene* now makes it clear that they will almost certainly be futile exercises.

As one of my favorite country music singers, Toby Keith explains in one of his songs, "There ain't no right way to do the wrong thing.

Thank you for the opportunity to express my opinions. If you have any questions, I will try to address them at this time.