



Department of Justice

STATEMENT OF

**DAVID KRIS
ASSISTANT ATTORNEY GENERAL**

BEFORE THE

**COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE**

ENTITLED

“MILITARY COMMISSIONS”

PRESENTED

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**Statement of
David Kris
Assistant Attorney General
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Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you for the opportunity to discuss legislation that would reform the Military Commissions Act of 2006. As you know, a Task Force established by the President is actively reviewing the detainees held at Guantanamo Bay to determine whether they can be prosecuted or safely transferred to foreign countries. As the President stated in his May 21st speech at the National Archives, where feasible we plan to prosecute in Federal court those detainees who have violated our criminal law. Prosecution is one way — but only one way — to protect the American people, and the Federal courts have proven on many occasions to be an effective mechanism for dealing with dangerous terrorists.

The President has also made clear that he supports the use of military commissions to prosecute those who have violated the laws of war, provided that necessary reforms are made. Military commissions have a long history in our country dating back to the Revolutionary War. Properly constructed, they take into account the reality of battlefield situations and military exigencies, while affording the accused due process. The President has pledged to work with Congress to ensure that the commissions are fair, legitimate, and effective, and we are all here today to help fulfill that pledge. I thank this Committee for leading the effort to develop legislation on this important national security issue.

As you know, on May 15th, the Administration announced five rule changes as a first step toward meaningful reform. These rule changes prohibited the admission of statements obtained through cruel, inhuman, and degrading treatment; provided detainees greater latitude in the choice of counsel; afforded basic protections for those defendants who refuse to testify; reformed the use of hearsay by putting the burden on the party trying to use the statement; and made clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and legitimacy of the commission process without compromising our ability to bring terrorists to justice.

These five rule changes were an important first step. This Committee has now taken the next step by drafting legislation to enact more extensive changes to the Military Commissions Act (“MCA”) on a number of important issues. The Administration believes the Committee’s bill identifies many of the key elements that need to be changed in the existing law in order to

make the commissions an effective and fair system of justice. We think the bill is a good framework to reform the commissions, and we are committed to working with you on it. With respect to some issues, we think the approach taken by the Committee is exactly right. In other cases, we believe there is a great deal of common ground between the Administration's position and the provision adopted by the Committee, but we would like to work with you because we have identified a somewhat different approach. Finally, there are a few additional issues in the MCA that the Committee's bill has not modified that we think should be addressed. I will outline some of the most important issues briefly today.

First, the Committee's bill would bar admission of statements obtained by cruel, inhuman, or degrading treatment. We support this critical change so that neither statements obtained by torture nor those obtained by other unlawful abuse may be used at trial.

However, we believe that the bill should also adopt a voluntariness standard for the admission of statements of the accused — albeit a voluntariness standard that takes account of the challenges and realities of the battlefield and armed conflict. To be clear, we do not support requiring our soldiers to give *Miranda* warnings to enemy forces captured on the battlefield, and nothing in our proposal would require this result, nor would it preclude admission of voluntary but non-*Mirandized* statements in military commissions. Indeed, we note that the current legislation expressly makes Article 31 of the Uniform Code of Military Justice inapplicable to military commissions, and we strongly support that. There may be some situations in which it is appropriate to administer *Miranda* warnings to terrorist suspects apprehended abroad, to enhance our ability to prosecute them, but those situations would not require that warnings be given by U.S. troops when capturing individuals on the battlefield. Voluntariness is a legal standard that is applied in both Federal courts and courts martial. It is the Administration's view that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional. Although this legal question is a difficult one, we have concluded that adopting an appropriate rule on this issue will help us ensure that military judges consider battlefield realities in applying the voluntariness standard, while minimizing the risk that hard-won convictions will be reversed on appeal because involuntary statements were admitted.

Second, the Committee has included a provision to codify the Government's obligation to provide the defendant with exculpatory evidence. We support this provision as well; we think it strikes the right balance by ensuring that those responsible for the prosecution's case are obliged to turn over exculpatory evidence to the accused, without unduly burdening every Government agency with unwieldy discovery obligations.

Third, the Committee bill restricts the use of hearsay, while preserving an important residual exception for certain circumstances where production of direct testimony from the witness is not available given the unique circumstances of military and intelligence operations, or where production of the witness would have an adverse impact on such operations. We support this approach, including both the general restriction on hearsay and a residual exception, but we would propose a somewhat different standard as to when the exception should apply, based on

whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts.

Fourth, we agree with the Committee that the rules governing use of classified evidence need to be changed, but we would do so in a fashion that is more similar to the system provided in the Classified Information Procedures Act (“CIPA”), as it has been interpreted by Federal courts. While CIPA may need to be revised and updated in important respects to address terrorism cases more effectively, we believe it has generally worked well in both protecting classified information and ensuring fairness of proceedings. Importing a modified CIPA framework into the statute will provide certainty and comprehensive guidance on how to balance the need to protect classified information with the defendant’s interests. It will also allow military judges to draw on the substantial body of CIPA case law and practice that has been developed over the years.

We are concerned with a provision in the Committee bill that allows the use of traditional CIPA practices — the use of deletions, substitutions, or admissions — only after an agency head or original classifying authority has certified that the evidence has been declassified to the maximum extent possible. This provision has no analogue in CIPA or the Uniform Code of Military Justice (“UCMJ”), and it suggests a potentially burdensome process of declassification where the traditional alternatives would be more efficient and would adequately protect the rights of the accused. We also believe there are a number of elements of CIPA law and practice that would substantially improve the way classified information issues are dealt with by the commissions, including for example establishing clear guidance on the propriety of *ex parte* hearings on classified information issues and setting substantive standards for provision of classified evidence to the defense in discovery. We would be happy to work with you and your staff on these issues.

Fifth, we share the objective of the Committee to empower appellate courts to protect against errors at trial by expanding their scope of review, including review of factual as well as legal matters. We also agree that civilian judges should be included in the appeals process. However, we think an appellate structure that is based on the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the United States Court of Appeals for the District of Columbia Circuit under traditional standards of review, is the best way to achieve this result.

There are two additional issues I would like to highlight today that are not addressed by the Committee bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional

law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy. However, we believe conspiracy can, in many cases, be properly charged consistent with the law of war in military commissions, and that cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

Finally, we think the bill should include a sunset provision. In the past, military commissions have been associated with a particular conflict of relatively short duration. In the modern era, however, the conflict could continue for a much longer time. We think after several years of experience with the commissions, Congress may wish to reevaluate them to consider whether they are functioning properly or warrant additional modification.

In closing, I want to emphasize again how much the Administration appreciates the Committee's leadership, and the very thoughtful bill it has drafted. While there may be some areas of the bill on which we disagree with the approach taken or the specific language adopted, we think this bill represents a major step forward and we are optimistic that we can reach agreement on the important details. We would welcome the opportunity to conduct further discussions.

Thank you again for the opportunity to testify today, and I will be happy to answer any questions you have.