Chairman Ike Skelton Opening Statement

House Armed Services Committee Hearing on Reforming the Military Commissions Act of 2006 and Detainee Policy

July 24, 2009

"The Committee will come to order.

"This morning's hearing will continue the constructive conversation that we began last week with the top military attorneys of the services on reforming the Military Commissions Act of 2006. I look forward to hearing the perspectives of today's distinguished witnesses on what amendments are needed to ensure that we finally end up with a system that can withstand judicial scrutiny and ensure that convictions stick. We certainly welcome our witnesses' thoughts on what legislative changes are most necessary and how the existing law can be improved.

"In addition to military commissions reform, today's hearing addresses other key detainee policy issues, such as the closure of the detention facilities at Guantanamo Bay, Cuba, and law-of-war detention.

"We initially had hoped that a major report addressing these critical issues would have been released earlier this week, as required by the President's Executive Orders from the beginning of the year. Instead, the Inter-agency Task Force that was established to produce such a report received a six-month extension and issued a Preliminary Report.

"The Preliminary Report reiterates the Administration's proposed changes to the Military Commissions system and begins to describe the process and criteria that the Attorney General will use to determine whether to prosecute a detainee in federal criminal court or in a military tribunal. It does not, however, make recommendations on the details of Guantanamo's closure or on the process for continuing to detain enemy combatants or belligerents who, for different reasons, cannot be prosecuted in any of our courts.

"As the Detainee Task Force and the separate Inter-Agency Review Team that is evaluating all the files of Guantanamo detainees finalize their work in the coming months, I am confident that they will recommend policies which will keep America safe and conform to American values.

"Nevertheless, I want to offer a few words of advice from a former country prosecutor.

"Although I continue to believe that the closure of the detention facilities in Guantanamo will help restore our country's reputation and moral standing around the globe, I am concerned that time is running out for meeting the President's deadline.

"With little more than five months to go, the lack of details on how Guantanamo should be closed, where detainees will be transferred, what precautions will be taken to protect

communities, the costs associated with the closure decision, and the range of related considerations is disturbing.

"A detailed plan should be proposed as soon as possible.

"To maintain congressional support for the closure decision, this forthcoming plan should safeguard America and be able to be implemented in the little time that is left.

"With regard to detainees who cannot be prosecuted but also cannot be allowed to return to the battlefield, the Administration should –

· One, clarify the President's authority to detain these individuals regardless of where they are held, and state whether legislation is needed to augment his authority to detain,

· Two, propose a process to replace the Administrative Review Boards in Guantanamo and similar bodies in Afghanistan with something that is more independent and viewed as legitimate,

· Lastly, indicate what factors will be considered to determine when an end of hostilities has been achieved and, thus, continued detention is no longer justified under the Supreme Court's Hamdi decision and the laws of war.

"I now turn to my good friend and colleague, our distinguished Ranking Member from California, Mr. McKeon, for any opening remarks that he would like to make."

Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing Before the House Armed Services Committee
"Reforming the Military Commissions Act of 2006 and Detainee Policy"
Presented On
July 24, 2009

Mr. Chairman and Representative McKeon, thank you for the opportunity to testify here today.

On January 22, 2009, President Obama signed Executive Orders 13492 and 13493, which establish two interagency task forces -- one to review the appropriate disposition of the detainees currently held at Guantanamo Bay, and another to review detention policy generally. These task forces consist of officials from the Departments of Justice, Defense, State, and Homeland Security, and from our U.S. military and intelligence community. Over the past six months, these task forces have worked diligently to assemble the necessary information for a comprehensive review of our detention policy and the status of detainees held at Guantanamo Bay.

I am pleased to appear today along with David Kris of the Department of Justice to report on the progress the Government has made in a few key areas, including especially military commission reform.

Let me begin with some general observations about our progress at Guantanamo Bay. All told, about 780 individuals have been detained at Guantanamo. Approximately 550 of those have been returned to their home countries or resettled in others. At the time this new Administration took office on January 20, 2009, we held approximately 240 detainees at Guantanamo Bay. The detainee review task force has reviewed and submitted recommendations on more than half of those. So far, the detainee review task force has approved the transfer of substantially more than 50 detainees to other countries consistent with security and treatment considerations, and a number of others have been referred to a DOJ/DoD prosecution team for potential prosecution either in an Article III federal court or by military commission. Additional reviews are ongoing and the process is on track. We remain committed to closing the Guantanamo Bay detention facility within the one-year time frame ordered by the President.

A bi-partisan cross section of present and former senior officials of our government, and senior military leaders, have called for the closure of the detention facility at Guantanamo Bay to enhance our national security, and this Administration is determined to do it.

The Administration, including the separate Detention Policy Task Force, is busy on a number of other fronts:

First, in his May 21 speech at the National Archives, President Obama called for the reform of military commissions, and pledged to work with the Congress to amend the Military Commissions Act. Military commissions can and should contribute to our national security by becoming a viable forum for trying those who violate the law of war. By working to improve military commissions to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the law of war. To that end, in May, the Secretary of Defense announced five changes to the rules for military commissions that we believe go a long way towards improving the process. (I note that those changes were developed initially within the Defense Department, in consultation with both military and civilian lawyers, and have the support of the Military Department Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.) Significantly, these rule changes prohibit the admission of statements obtained through cruel, inhuman and degrading treatment, provide detainees greater latitude in choice of counsel, afford basic protection for those defendants who refuse to testify, reform the use of hearsay by putting the burden on the party trying to use the statement, and make clear that military judges may determine their own jurisdiction.

Over the last few weeks, the Administration has also worked with the Congress on legislative reform of the Military Commissions Act of 2006, by commenting on Section 1031 of the 2010 National Defense Authorization Act, which was reported out of the Senate Armed Services Committee on June 25, 2009. My Defense Department colleagues and I have had an opportunity to review the reforms to the military commissions included in the draft of the National Defense Authorization Act reported by the Senate Armed Services Committee, and it is our basic view that the Act identifies virtually all of the elements we believe are important to further improve the military commissions process. We are confident that through close

cooperation between the Administration and the Congress, including the esteemed Members of this Committee, reformed military commissions can emerge from this effort as a fully legitimate forum, one that allows for the safety and security of participants, for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in an Article III federal court, and for the just resolution of cases alleging violations of the law of war.

At the same time, Mr. Kris and I have agreed upon a protocol for determining when cases for prosecution should be pursued in an Article III federal court or by military commission. By the nature of their conduct, many suspected terrorists may be charged with violations of both the federal criminal laws and the laws of war. There is a presumption that, where feasible, such cases should be prosecuted in Article III federal courts. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. Our protocol calls for the Department of Justice and Department of Defense to weigh a variety of factors in making that forum selection assessment.

I will touch on one other issue. As the President stated in his National Archives address, there may ultimately be a category of Guantanamo detainees "who cannot be prosecuted for past crimes," but "who nonetheless pose a threat to the security of the United States" and "in effect, remain at war with the United States." The Supreme Court held in *Hamdi v. Rumsfeld* that detention of enemy forces captured on the battlefield during wartime is an accepted practice under the law of war, to ensure that they not return to the fight. For this category of people, the President stated "[w]e must have clear, defensible, and lawful standards" and "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified."

This President believes that, if any detention of this sort proves necessary, the authority to detain must be rooted firmly in authorization granted by Congress. This is why, on March 13, 2009, the Department of Justice refined the Government's definition of our authority to detain those at Guantanamo Bay, from the "unlawful enemy combatant" definition used by the prior Administration to one that is tied to the Authorization for the Use of Military Force passed by the Congress in 2001, as informed by the laws of war. Thus the Administration has been relying solely on authority provided by Congress as informed by the laws of war in justifying to federal

courts in habeas corpus litigation the continued detention of Guantanamo detainees.

Finally, I would like to take a moment to thank the men and women of the armed forces who currently guard our detainee population. From Guantanamo Bay to Baghdad to Bagram, these service members have conducted themselves in a dignified and honorable manner under the most stressful conditions. These Soldiers, Sailors, Airmen, and Marines represent the very best of our military and have our appreciation, admiration and unwavering support.

I thank you again for the opportunity to appear here today and I look forward to your questions.

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

“REFORMING THE MILITARY COMMISSIONS ACT OF 2006 AND DETAINEE POLICY”

PRESENTED

JULY 24 2009

Statement of
David Kris
Assistant Attorney General
Before the
Armed Services Committee
United States House of Representatives
For a Hearing Entitled
"Reforming the Military Commissions Act of 2006 and Detainee Policy"
Presented
July 24, 2009

Chairman Skelton, Ranking Member McKeon, and Members of the Armed Services Committee, thank you for the opportunity to discuss ongoing efforts to 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.

Prosecution is one way — but only one way — to protect the American people. 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. Federal courts have, on many occasions, proven to be an effective tool in our efforts to combat international terrorism, and the legitimacy of their verdicts is unquestioned. A broad range of terrorism offenses with extraterritorial reach are available in the criminal code, and procedures exist to protect classified information in federal court trials where necessary. Although the cases can be complex and challenging, federal prosecutors have successfully convicted many terrorists in our federal courts, both before and after the September 11, 2001, attacks. In the 1990s, I prosecuted a group of violent extremists. Those trials were long and difficult. But prosecution succeeded, not only because it incarcerated the defendants for a very long time, but also because it deprived them of any shred of legitimacy.

The President has also made clear that he supports the use of military commissions as another option 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.

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. The Senate Armed Services Committee took 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 that 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 both houses of Congress to reform the military commission system. With respect to some issues, we think the approach taken by the Senate Armed Services 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 Congress to make additional improvements 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 Senate 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 other 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 — which forbids members of the armed forces from requesting any statement from a person suspected of any offense without providing *Miranda*-like warnings — 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 likelihood 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 Senate bill 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 Senate 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 Senate bill that the rules governing use of classified evidence need to be changed, and we support the Levin-McCain-Graham amendment on that point.

Fifth, we share the objective of the Senate Armed Services 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 article III 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 Senate 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 likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse 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 cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

We also 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.

Finally, I'd like to note that earlier this week, the Departments of Justice and Defense released a protocol for determining when a case should be prosecuted in a reformed military commission rather than in federal court. This protocol reflects three basic principles. First, as the President put it in his speech at the National Archives, we need to use all instruments of national power to defeat our adversaries. This includes, but is not limited to, both civilian and military justice systems. Second, civilian justice, administered through Federal courts, and military justice, administered through a reformed system of military commissions, can both be legitimate and effective methods of protecting our citizens from international terrorism and other threats to national security. Third, where both fora are available, the choice between them must be made by professionals according to the facts of the particular case. Selecting between two fora for prosecution is a choice that prosecutors make all the time, when deciding where to bring a case when there is overlapping jurisdiction between federal and state courts, or between U.S. and foreign courts. Decisions about the appropriate forum for prosecution of Guantanamo detainees will be made on a case-by-case basis in the months ahead, based on the criteria set forth in the protocol. Among the factors that will be considered are the nature of the offenses, the identity of the victims, the location in which the offense occurred, and the context in which the defendant was apprehended.

In closing, I want to emphasize again how much the Administration appreciates the invitation to testify before you today on our efforts to reform military commissions. We are optimistic that we can reach a bipartisan agreement with both the House and the Senate on the important details of how best to reform the military commission system.

I will be happy to answer any questions you have.