

STATEMENT OF DANIEL MARCUS

Senate Committee on Armed Services

July 7, 2009

Chairman Levin, Senator McCain, and other Members of the Committee: Thank you for inviting me to testify on one of the most important of the difficult set of issues facing Congress and the Administration with respect to the detainees held at Guantanamo Bay: In what forum should detainees who are believed to have committed war crimes be tried – Article III courts, courts-martial, or military commissions?

Unlike my colleagues on this panel, I am not an expert on military justice. But as a Government official and a law professor, I have been following these issues closely for the last six years – first, as General Counsel of the 9/11 Commission, and since 2005, teaching National Security Law and Constitutional Law at the Washington College of Law, American University. Before that, I was for many years a partner in the law firm of Wilmer, Cutler & Pickering, and I served in the White House Counsel's Office and in several positions at the Department of Justice, including Associate Attorney General, from 1998-2001.

The questions surrounding detention and trial of the Guantanamo detainees have become more complicated than they looked in late 2001 and early 2002, when the first detainees were captured in Afghanistan and sent to Guantanamo. In the wake of the 9/11 attacks, Congress had quickly enacted the Authorization to Use Military Force, essentially authorizing the President to conduct an armed conflict against Al Qaeda and the Taliban. Pursuant to the AUMF, the President had sent thousands of U.S. troops to Afghanistan to depose the Taliban as the de facto government of Afghanistan and to

capture or kill the Al Qaeda fighters and leadership. While the opponents in this armed conflict were not nation-states, the conflict seemed very much like a traditional armed conflict or “war.”

In the years since then, however, we have come to the realization that this is a different kind of war that is not so easy to define or limit, territorially or temporally. While the traditional battlefield is in Afghanistan (and to some extent, arguably, the adjacent western border areas of Pakistan to which Al Qaeda and the Taliban have fled), Al Qaeda continues to operate in other parts of the world, either directly or through other, loosely affiliated organizations. And it has become clear that this conflict is one of indefinite duration, which will not end with a truce or surrender. Finally, we have learned that even on the Afghanistan battlefield itself, it is not nearly as easy as in traditional wars against uniformed members of regular armed forces to determine who is and is not an enemy combatant.

These problems have been compounded, in my view, by some serious mistakes and over-reaching by the last Administration in the years immediately following the 9/11 attacks – the reliance on strained legal arguments to minimize or avoid entirely the application of the Geneva Conventions and the Convention Against Torture; the effort to deny the Guantanamo detainees any opportunity to challenge the determination that they were enemy combatants; and the creation of a system of military commissions that almost no-one outside the Administration believed provided anything close to a fair process for trying detainees for war crimes. This last mistake has delayed for years bringing the Guantanamo detainees to justice for their crimes.

Thanks largely to the Supreme Court and the Congress (in the Detainee Treatment Act and the Military Commissions Act), there has been significant progress in correcting these mistakes and providing a legal process for the detainees that can be defended as consistent with the basic principles of our military and civilian justice systems. But more remains to be done, and there are important decisions that this Congress and this Administration still have to make. I congratulate this Committee for taking the initiative in addressing these issues.

So, where should we go from here with respect to trials of the detainees? Some argue for abandoning the military justice model (if not the entire law of war paradigm) and prosecuting the detainees only in Article III district courts (or perhaps some new special national security court staffed by Article III judges). I believe there is a role for Article III courts in some types of cases and that our U.S. district courts – in cases such as Moussaoui and Padilla – have shown themselves capable of trying major terrorism cases. I also believe that it is inappropriate to use military tribunals to try U.S. citizens (such as Padilla) or others lawfully in the United States (such as al-Marri) who are arrested by law enforcement authorities in the United States, far from any traditional battlefield. The same is true for some of the Guantanamo detainees who were captured, not in Afghanistan, but in countries such as Bosnia or Algeria, and whose alleged crimes are unrelated to the events of 9/11 or the war in Afghanistan. A good example is Ahmed Khalfan Ghailani, who was recently transferred from Guantanamo to a federal prison in New York for trial in U.S. District Court on charges arising out of his alleged participation in the bombing of the U.S. embassies in East Africa in 1998. He is charged

with a very serious terrorist act, but not one properly regarded as a war crime triable by a military commission or court-martial.

I have become convinced, moreover, that while the federal courts can try many terrorism cases, there are some cases in which it would be very difficult to try Guantanamo detainees in federal court. Of course, I am not privy to the evidence that the Government has gathered with respect to any detainee. But I gather that there are two main reasons why it is difficult to try some detainees in federal court: First, in some cases the key evidence of guilt is statements of the defendant that could not be introduced in federal court because they were made without prior Miranda warnings or were the “fruit of the poisonous tree” of coerced statements. Of course, some of these statements would not be admissible under the MCA or this Committee’s bill, but a significant number would.

Second, and perhaps more important, the more public nature of trials in federal court – where it is extremely rare to close any proceedings to the public – and the hearsay rules that apply in federal courts make it very difficult to conduct a trial involving certain kinds of highly sensitive national security information. The prime example of this is where important evidence against the detainee is from an intelligence source whose identity cannot be made public. These difficulties are also present, to a large extent, with court-martial trials. Under the MCA as it would be amended by this Committee’s bill, however, and under changes in military commission procedures already adopted by the new Administration, some hearsay evidence found reliable by the presiding Judge could be admitted. And the greater flexibility that the Military Judge has to close portions of a

military commission trial (with the defendant and his counsel still present) will enable the fair presentation of more sensitive national security information.

I was initially of the view that it would be preferable to try all detainees by court-martial (or in Article III courts) – not because I thought military commissions could not be conducted in a fair manner that adequately protected the rights of defendants, but because I thought that the original military commission regime that was held unlawful by the Supreme Court in its 2006 Hamdan decision had given military commissions such a bad image around the world that we ought to choose some other forum to try the detainees. But I have become convinced that an *improved* system of military commissions, while not the ideal choice, is the best – or perhaps one should say the least worst – of the alternatives before us for trying many of the detainees.

In opting for an improved military commission system, I am also influenced by the interrelationship of this issue with the very difficult issue of indefinite or preventive detention of those detainees who cannot be tried or safely released. President Obama came into office, it appears, hoping that we could not only close Guantanamo, but also try (and convict) or release all the Guantanamo detainees. It seems likely, however, that the Administration will conclude that this cannot be done – that because of evidentiary problems and national security sensitivities, there will be some “guilty” and dangerous detainees who cannot be tried in any forum and who therefore should continue to be detained under the law of armed conflict (with periodic court review and additional safeguards). Such a longer-term detention system may be necessary, but it is certainly undesirable from a civil liberties standpoint. And one reason I conclude that improved military commissions are our best option for trying many detainees is that I believe it will

result in more detainees being tried, thus reducing the number of detainees who continue to be detained without trial.

Finally, let me list some of the important ways that the commission system established by the MCA can and should be improved, bringing it closer to the standards of courts-martial. (Some of these are already addressed in the Committee's bill.):

- The overbroad definition of "enemy combatant" should be narrowed to be more consistent with the law of armed conflict and the traditional battlefield concept.
- The list of offenses triable by military commissions should be revisited, to assure that it can be defended as consistent with the law of armed conflict. In particular, a fresh look should be taken at whether "material support of terrorism" and conspiracy can be deemed war crimes.
- Hearsay evidence should be admissible under more limited circumstances, with the burden on the prosecution to establish the reliability of the evidence.
- Statements obtained as a result of all cruel, inhuman, or degrading treatment, regardless of when that treatment took place, should be excluded. Only statements that meet basic standards of voluntariness should be admitted.
- There should be more robust requirements for disclosure by the prosecution of potentially exculpatory and mitigating evidence to the defense.
- The reviewing court (whether it is the Court of Appeals for the Armed Forces or the Court of Appeals for the District of Columbia Circuit) should have full appellate authority to review the military commission's judgment and findings, comparable to that of a federal court of appeals reviewing a district court judgment of conviction.

- Habeas actions should be available to defendants in military commission cases to the same extent that they are available to court-martial defendants.

Thank you for the opportunity to testify. I would be happy to answer your questions.