

**Testimony of Jeh Charles Johnson**  
**General Counsel, Department of Defense**  
**Hearing Before the Senate Armed Services Committee**  
**“Military Commissions”**  
**Presented On**  
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Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

I also thank this Committee for taking the initiative, on a bipartisan basis, to seek reform of military commissions. As you know, in his speech on May 21 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. So, speaking on behalf of the Administration, we welcome the opportunity to be here today, and to work with you on this important initiative.

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.

In May, the Administration 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). My Defense Department colleagues and I have had an opportunity to review the language this Committee has included in the Defense Authorization Act, and it is our basic view that the Committee has identified virtually all of the same 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, 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 federal court, and for the just resolution of cases alleging violations of the law of war.

There are several changes to the Military Commissions Act reflected in the proposed legislation which I would like to highlight here, and which the Administration supports:

First, consistent with the rules changes approved by the Secretary of Defense and submitted to Congress in May, the legislation codifies a ban on the use in court of statements that were obtained by interrogation methods that amount to cruel, inhuman or degrading treatment. In my view, this change is a big one. The most prominent criticism we hear of the current Military Commissions Act is that it permits the use of such statements, if obtained before December 30, 2005. The statutory change which eliminates this possibility -- by itself -- will go a long way towards enhancing the legitimacy and credibility of commissions.

Second, I note that the legislation amends current law to clarify the government's obligations to disclose exculpatory evidence to the accused, including evidence that would tend to impeach the credibility of a government witness, or serve as mitigation evidence at time of sentencing. As you know, this clarification of the government's obligations would be consistent with the obligations prosecutors have now in civilian courts.

Third, the legislation would modify the rules on hearsay evidence, more closely resembling the rules used in civilian courts and in courts-martial.

Fourth, the legislation codifies our rules change to provide the accused with more latitude in the selection of military defense counsel, again making commissions' rules closer to those in courts-martial.

Fifth, the legislation discontinues the use of the phrase "unlawful enemy combatant." We in the Administration, effective March 13, have also discontinued using the phrase in our court filings identifying who we believe we have the authority to detain at Guantanamo.

The Administration supports these changes to existing law, though you will note that we prefer somewhat different language in several instances. As I said before, we believe that reformed military commissions can and should contribute to national security by affording a venue for bringing to justice those who violate the law of war, and for doing so in a manner that reflects American values of justice and fairness. We believe these reforms serve that purpose.

When considering this legislation, the Administration asks that the Congress also consider the following:

First, in Section 948r, concerning statements of the accused that can be admitted at trial, we ask that you consider the express incorporation of a “voluntariness” standard that, consistent with current law, takes account of the unique challenges and circumstances of the battlefield setting. We do not believe that soldiers on a battlefield should be required or even encouraged to provide *Miranda*-like warnings to those they capture—and we note that the current legislation expressly states that Article 31 of the Uniform Code of Military Justice is not applicable to military commissions. As you know, Article 31 requires *Miranda*-like warnings prior to official questioning of service members regarding alleged crimes.

The essential mission of our nation’s military is to capture or kill the enemy, not to engage in evidence collection for eventual prosecution. However, in both American civilian courts and courts martial, statements of an accused are normally admitted only in the event they are found to be “voluntary.” There is a concern that, as military commissions prosecutions progress, military commission judges and courts may apply this standard without taking adequate account of the critical circumstances. Thus, rather than jeopardize future prosecutions and convictions because a statement was admitted at trial that was not considered “voluntary,” the Administration believes we should specifically codify a standard to assess voluntariness that, consistent with current law, accounts for the realities of military operations. This will decrease the likelihood that combat objectives may be confused with a law enforcement mission, while ensuring that valid convictions before military commissions will be sustained on appeal.

Second, we note that the legislation incorporates certain of the classified evidence procedures currently applicable in courts-martial, where there is relatively little precedent and practice regarding classified

information. We in the Administration believe that further work could be done to codify the protections of classified evidence, in a manner consistent with the protections that now exist in federal civilian courts. We believe that those protections would work better to protect classified information, while continuing to ensure fairness and providing a stable body of precedent and practice for doing so.

Third, concerning hearsay, while welcoming the Committee's further regulation of the use of such evidence, we in the Administration recommend somewhat different language for achieving this result that we look forward to discussing in more detail.

Fourth, we look forward to working with the Congress to ensure that the offenses that may be prosecuted in a military commission are consistent with the law of war. We note that Section 950p of the Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The Committee replaced the language currently in Section 950p with similar, but not identical, language. The Administration supports this type of statement, though we prefer the existing language in Section 950p. I note also that the Committee bill retains the offense of providing material support for terrorism. After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement.

We also believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we welcome the retention of that offense in the Committee bill. As a former prosecutor, it is my belief that by definition, many material support cases are also conspiracy cases.

With the removal of material support, we are supportive of recognizing the law of war origins of all codified offenses.

Fifth, we agree with the Committee that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that an appellate court paralleling that of the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the U.S. Court of Appeals for the D.C. Circuit, would best achieve the legitimacy and credibility we all seek,

In conclusion, I thank you again for taking the initiative in this important area of national security, and I look forward to your questions.