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ARMED SERVICES COMMITTEE

STATEMENT OF
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JUDGE ADVOCATE GENERAL OF THE NAVY
BEFORE THE
SENATE ARMED SERVICES COMMITTEE
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Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you very much for giving me the opportunity to testify today on the subject of military commissions.

In 2006, when this Committee was working to establish a permanent framework for military commissions through the Military Commissions Act, I had the opportunity to share my views with the Senate Judiciary Committee and House Armed Services Committee. At that time, I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the Uniform Code of Military Justice should be used as a model for the commissions process. Although our experiences of the last few years have shaped my perspectives on some of the rules that should apply to military commissions, I am pleased to say that this committee's legislative proposal addresses the concerns I had in 2006. Overall, I believe that this legislative proposal establishes a balanced framework to provide important rights and protections to an accused while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

This legislation provides each accused with critical legal protections. These include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, along with an expanded

right to exculpatory, as well as mitigating and impeachment evidence.

- The right to be present during all sessions of trial when evidence is to be offered and the right to confront witnesses.
- The right to self representation and the right to be represented by detailed military counsel, an expanded right to counsel of the accused's own choice if reasonably available, and the right to civilian counsel at the accused's expense.
- The right to appellate review, to include a review of factual sufficiency identical to the type of review currently conducted for courts-martial under the UCMJ.

Prosecution of alien unprivileged enemy belligerents has proven a challenge over the last few years. Your legislation establishes a more balanced framework to prosecute accused by modeling the procedures used in general courts-martial under the Uniform Code of Military Justice while recognizing the exigencies that exist on the battlefield in time of war.

Specific highlights of the legislation that I support include:

- A requirement that the government prove its case beyond a reasonable doubt.
- Protection against double jeopardy.

- A requirement that the proponent of hearsay evidence establish its reliability to an extent required by rules long recognized in trials by general courts-martial.
- Exclusion of statements obtained through the use of torture or cruel, inhuman or degrading treatment. For other statements, permits the military judge to determine admissibility in the interests of justice based upon the reliability of the statement under a totality of the circumstances analysis.
- Establishes clearly defined criminal offenses.
- Continues to recognize and rely upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

In short, this legislation strikes the right balance between affording an accused the judicial guarantees recognized as indispensable by civilized people and our national security concerns.

In reviewing your legislation, I believe that there are two areas in which our practitioners would benefit from some additional clarity.

- Section 949d provides for the use of rules of evidence in trials by general courts-martial in the handling of classified evidence. This is consistent with our overall desire to use those procedures found within

the UCMJ and the Manual for Courts-Martial whenever possible. However, experience has shown that practitioners struggle with a very complex and unclear rule within the Military Rules of Evidence. The military rules do not have a robust source of informative or persuasive case law. Frankly, prosecutions using Military Rule of Evidence 505 are rare. In developing the rules for the handling of classified material during a military commission, it would be more prudent to rely upon the Classified Information Procedures Act (CIPA) used in Article III courts as a starting point. The use of CIPA as a touchstone for drafting provisions for use in the litigation of classified evidence in military commissions, complete with the definitional guidance that has developed over more than 20 years of jurisprudence in federal district courts, would provide practitioners with additional clarity in the area of classified evidence.

- Section 948r provides a test for determining the admissibility of allegedly coerced statements. I recommend you include a list of considerations a military judge should use in evaluating the reliability of those statements. Those considerations should include the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether and to what degree the will of the person making the statement was overborne.

Once again, thank you very much for this opportunity to share my personal views on your legislation. I look forward to answering your questions and working with the Committee on this important endeavor.