

Testimony of
David Kris

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STATEMENT OF

DAVID KRIS ASSISTANT ATTORNEY GENERAL
BEFORE THE
COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON TERRORISM AND
HOMELAND SECURITY UNITED STATES SENATE
ENTITLED

"PROSECUTING TERRORISTS: CIVILIAN AND MILITARY TRIALS FOR GTMO AND
BEYOND"

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Chairman Cardin, Ranking Member Kyl, and Members of the Subcommittee, thank you for the opportunity to discuss ongoing efforts to prosecute terrorists through trials before civilian courts and military commissions. 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 on July 20, 2009, 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.