Statement
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Mr. Chairman, thank you for holding this important hearing and inviting me to participate. I firmly believe you are addressing some of the most critical issues facing the United States today. The way we have dealt with detainees risks blemishing the reputation of this great country for generations to come. We must fix it now or history will judge us harshly.

There are at least two important issues that require the close attention of this committee if we are to extricate ourselves from the morass in which we have languished for over five years now. The first is to address the realities of securing detainees and ascertaining their legal status. This includes both the related issues of Combat Status Review Tribunals and Habeas Corpus. The second is the actual prosecutions of those suspected of having committed crimes against the United States. If we don't get these issues straightened out, we will have failed in a very important and visible aspect of the ongoing struggle against terror. This is part and parcel of the actual prosecution of the war itself.

Let me start by saying that the judicial system of the United States is the envy of the world now and has been for generations. We stand second to none in how we treat the worst of the worst in our society. We have an opportunity now, in this context, to demonstrate once again that we stand tall and unwavering for the rule of law and human rights, and that we consider these to be assets in combating terrorism. We will be judged by our allies, our enemies, by history, and most importantly, by ourselves and our progeny. Rather than hiding our dedication to human rights behind closed doors in Guantanamo or elsewhere, we should proudly exclaim it.

As Nuremberg prosecutor Robert Jackson said, "*We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."* That admonition is as true today as it was when Jackson first uttered it. He said it in reference to the horrible Nazi leadership. Surely, they were no less an evil nor formidable a foe than the detainees in Guantanamo.

This is not the worst war we have ever fought, nor will it be the last. Plato said that only the dead have seen their last war. We must preserve our values. If we forsake them now, in the face of this enemy, they aren't really values, and our attempts to promote them internationally will be viewed as cynical and self-serving. It is not a Rule of Law if we only apply it when it is convenient. We delude ourselves if we give up what we have cherished for generations in the face of adversity. That comes from fear and weakness.

It is the first big step down a slippery slope from which we will find it difficult to recover.

We owe it to our forebears, who worked so hard and shed blood, to protect those values and to hand them down intact, not tarnished, to those who follow us. That is the courageous, wise, and honorable course of action.

We can preserve our values from a position of strength, not weakness. People say that this is a different kind of war than we have fought in the past. That is generally alleged in the context of justifying actions that we have taken or want to take of which we are not proud. Of course this war is different. All wars are "different" from prior wars. That's the nature of warfare. Muskets to rifles. British squares to hiding behind rocks and trees. Machine guns. Aviation. Carpet bombing. The list goes on. Warfare evolves but basic values remain.

So it is true that this is a different war in some respects but not in the fundamentals of warfare. In an asymmetric war, it is important to match our strengths against the enemy's weaknesses. Our greatest strength isn't the unmatched strength or courage of our Armed Forces, or our natural resources, economy, or essentially island nature of our land mass. Our greatest strength is our belief in human rights and the rule of law. That is what makes us strong. To the extent that we give that up, we disarm ourselves in the face of the enemy.

The enemy can't beat us militarily. They don't have a navy or an air force. They really don't even have an army and only few small arms. They have limited communication, command and control. Terrorism is their only weapon. That weapon isn't aimed so much at killing us or even breaking our will to fight. Rather, it is aimed at making us more like them, dragging us down to their level. In every way they accomplish that, they win a battle in the war. That is "victory" for the enemy. Victory for us is to remember who we are in the face of adversity. That reflects strength. To do otherwise comes out of weakness and fear.

Combat Status Review Tribunals

It should be pretty clear that if the CSRTs were ever really intended to adjudicate the combatant status of detainees, they are not adequately serving that purpose The CSRTs are neither fish nor fowl. They are neither compliant with the laws of war, nor with fundamental due process requirements. Article 5 hearings are intended to make status determinations -- who is a prisoner of war. The CSRTs do not do this. Nor do they comply with due process safeguards designed to guard against our detaining the wrong people.

Unlike the Article 5 "Competent Tribunals" required by the Geneva Conventions and utilized successfully in the first Gulf War, CSRTs have been ineffective in determining who is a prisoner of war and whether the United States is holding the right people. The Article 5 Competent Tribunals used in the first Gulf War made determinations very quickly after the individual was captured and in a geographically proximate location.

Indeed, Army Regulation 190-8 requires that this determination be made near the time of capture when witnesses and evidence are readily available. As a result, in the first Gulf War, upwards of 75% of those detained were released as having been simply caught up in the fog of war.

Now, the CSRTs have simply become a rubber stamp ratifying the characterizations of the status of the detainees made and proclaimed publicly by the chain of command up to and including the commander in chief. These public characterizations of status are well known to the officers constituting the tribunals.

To overcome the twin obstacles of conducting the CSRTs far removed from apprehension both in time and location would require a process that the CSRTs simply do not and at this point cannot employ. The detainee is unrepresented and has little or no access to the "evidence" against him. The burden of proof is misplaced on the detainee to disprove his "enemy combatant" status. It is almost impossible to disprove a status offense under the best of circumstances, let alone from Guantanamo without a lawyer. All the evidence against him is presumed to be "genuine and accurate" no matter the method by which it was obtained. Ex parte classified evidence is admissible. This is a presumption the detainee has little real opportunity to rebut. To say that he is able to present evidence on his behalf is simply naïve and ignores the reality of confinement in Guantanamo. All one has to do is read the highly redacted transcripts of the hearings to inevitably conclude that the process is a sham.

We often hear of the "new face of war." Tens of thousands of those new faces are military contractor personnel who are often armed but do not wear a uniform or operate within a recognizable military chain of command. They could well find themselves in the untenable situation of being indefinitely detained by an unfriendly foreign power which employed its own secret tribunal far away from the location of the apprehension both in time and space. Without representation, due process or appeal, they would be lost souls. One must consider whether the United States would find it acceptable if the continued, indefinite detention of our troops or contractors was based on the findings of an identical tribunal. I submit that we would find it appalling.

The Supreme Court held out the possibility in Hamdi that an "appropriately authorized and properly constituted military tribunal" could meet its due process standards. It is possible that the CSRT process would satisfy that standard for those detained in the future if they were conducted near the capture in time and place. Unfortunately, even if the CSRTs are authorized and properly constituted, they can never succeed in Guantanamo, not now.

The CSRTs have another fundamental problem, which is the extraordinary breadth of their jurisdiction. This goes far beyond traditional battlefield operations and fails to meet the requirements of the laws of war. Unless you buy into the characterization that the entire world is now a battlefield, it appears that very few of those detained at Guantanamo were captured on any real battlefield. Most were turned over to us by Afghan war lords in exchange for a bounty. Some were arrested from as far away as

Gambia, Bosnia, and Thailand. Most of those slated to be tried by military commission have been charged with conspiracy, support, and association type offenses, not traditional military, law of war, or even common law offenses. Of course, the vast majority are not charged with anything at all. Those attributes, combined with an overly broad definition of "unlawful enemy combatant" which potentially includes anyone considered to be a threat to national security, portends mischief and abuse.

I was an early advocate of affording detainees in Afghanistan, Iraq or elsewhere in the world the basic right of the Geneva Convention Article 5 Competent Tribunal. It had worked in the past and could have worked again. Plus, I believe we are bound by the Conventions to do that. When the Supreme Court, in Rasul, determined that those persons in Guantanamo were not beyond the reach of the law, I held out hope that the CSRTs would be implemented in such a way that they would satisfy the requirements of minimal due process. I have now come to believe that hope was in vain. In fact, attempting to put lipstick on this pig now, by adding in more due process protections, could actually be dangerous, because it risks further institutionalizing what is essentially an administrative detention system that is completely at the discretion of the President.

U.S. troops are more forward deployed than all other nations combined based on any way in which you count deployments—numbers of troops, frequency, locations. It is our troops who are most often in harm's way. The United States can ill afford to serve as a model for a process that we can't abide for ourselves. We dare not legitimize the CSRTs. The CSRTs can not be fixed. They mock justice and due process and must be jettisoned.

Habeas Corpus

To do away with the CSRTs necessarily raises the question of what would replace them in making the necessary determinations regarding continued confinement for those languishing in Guantanamo. The answer is self-evident. Restore the right of habeas corpus. I support the passage of S. 185 introduced by Senators Leahy and Specter.

There are approximately 385 detainees now in Guantanamo. This is not an overwhelming number. The so-called "habeas lawyers" are not a bunch of wild eyed nuts. They are for the most part respected lawyers from respected firms. Even if they were inclined to waste their own pro bono time and that of the courts as well as potentially disadvantage their clients' cases by frivolous petitions, the courts can deal with that.

Although the detainees at Guantanamo are not U.S. citizens or resident aliens, they are in our custody. The purpose of habeas corpus is to simply permit the courts to review that custody. We should not be afraid of that review. Unlike prior wars, the end of this struggle will not be readily apparent. There is no one to raise a white flag or sign the surrender document. The capture of bin Laden, if it ever comes, will not end terror. The harsh reality is that our struggle against terror will go on indefinitely. (This is particularly true if we continue to consider it to be a war that can be won by bombs, bullets, and body bags rather than by politics, diplomacy, and economics.) That being the

case, the detainees, most of whom have not been charged with a crime and will likely never see the inside of a courtroom, have essentially been sentenced to life without parole.

People argue that we haven't afforded the right to habeas corpus to prisoners of war in prior conflicts. That's true. But no one expected German prisoners, for example, to be detained in POW camps around the country for the rest of their lives. The end of the war marked their release.

The present situation is perverse in the sense that those against whom we have the least evidence of crime are treated the most harshly because they will not be prosecuted. David Hicks, the Australian detainee who is the only person convicted so far under the military commissions system, is the winner because he knows he will serve a very short sentence, and serve it in his home country. Those for whom the crime and evidence are nebulous are doomed to not know when or if they will ever be released.

It is also important to note that what restoring habeas would do is get the United States out of the untenable position we find ourselves in. It would enable determinations regarding the status of detainees that everyone would credit as legitimate. Some detainees would likely be released, others would be returned to confinement. The questioning and criticism of the United States regarding the continued detention of those in Guantanamo would, if not cease entirely, greatly diminish.

Military Commissions

Once the status of the detainee has been properly and fairly adjudicated, the question then becomes how he is to be prosecuted, if that is the appropriate resolution. I was an early proponent of military commissions. They had an appealing historical basis. I thought that they could be devised and implemented in such a way as to satisfy the twin requirements of due process and military exigencies. The last several years have proven me wrong on that score as well. They do not satisfy my own sense of due process, nor do they satisfy the requirements of Common Article 3 that they include the due process requirements considered to be indispensable by all civilized peoples.

Exhibit 1 in that regard is the recent trial of David Hicks wherein the judge demanded that the defense counsel agree in writing to comply with court rules that had not yet been promulgated. The penalty for his unwillingness to do that was that he was prevented from representing his client.

Admitting coerced evidence is another exhibit. Under the Military Commissions Act, if evidence is obtained through coercion which may include cruel, inhuman, or degrading (CID) treatment before enactment of the Detainee Treatment Act (Dec 30, 2005), it is admissible if found to be reliable, probative, and in the interest of justice.

If coerced statements are obtained after that date, they are admissible if the coercion does not rise to the level of CID. The commission may know for a fact of the coercion, but

how then can it ever really know of the reliability of the coerced evidence? If the confession of a defendant obtained at a secret CIA prison is offered as evidence, do any of us here have real confidence that it was not obtained under duress or that it is reliable?

The tragedy is that the accused may be a real terrorist, but we simply don't know that based on his confession. Article 3 courts and courts-martial refuse to admit coerced testimony not so much because to admit it would encourage further coercion although that is certainly part of it. We don't allow it into evidence primarily because it is unreliable. Of course, it appears to be probative; in fact, it is too probative. These cases are different only because, in spite of what we say, we do presume the detainees to be guilty—if not of the charges alleged, at least of something. The goal of admitting coerced testimony is to substantiate that presumption. We have reversed engineered a judicial process, starting at conviction and working backward to apprehension.

These rules fly in the face of generations of U.S. history supporting due process and human rights. Unfortunately, we have a plethora of recent examples of how tricky the lines are between torture, cruel, inhuman and degrading treatment, and "mere" coercion. Making these distinctions important in a judicial proceeding is fraught with peril. Indeed, it is blurring those lines that got us in the mess we are in now where evidence obtained by cruelty before December 30, 2005 is admissible but not if it was obtained after that date. We need to reaffirm the bright line that simply prohibits the use of any coerced testimony no matter what its presumed reliability, probative value or interest of justice. Admitting coerced testimony is, by definition, *not* in the interest of justice.

The procedures and standards relating to the introduction of classified evidence also should be improved as S. 576, discussed below, would do. Under the MCA, the defense counsel may never see or know of information relating to classified sources, methods or activities which may tend to lessen the weight given to out of court statements introduced by the prosecution. The military judge may require the trial counsel to provide an unclassified summary "to the extent practicable." S. 576 would give the military judge discretion to order full disclosure. S. 576 also authorizes the military judge to dismiss charges or take other actions in the interest of justice in cases where a substitute for exculpatory evidence is not deemed to be adequate. The MCA makes no such provision.

One of the basic tenets of any system of justice and a fundamental aspect of due process is judicial review. Military commissions are inadequate in this regard as well. The initial review by the newly created Court of Military Commission Review is limited to matters of law which "prejudiced a substantial trial right" of the accused. It may not address factual matters. Thus, subsequent reviewers are unable to address factual matters including guilt or innocence. Factual guilt is left exclusively in the hands of the military commissions, an inexperienced and untested court which, at this moment, has tried only one person.

The proof of the failure of the military commissions is amply demonstrated by their abysmal record. After all this time, with fits and starts, we have managed to convict precisely one detainee who was sentenced to nine months—to be served in Australia—for

a crime that didn't exist as a war crime when he committed it. On the other hand, there are a number of convictions from federal district courts for serious offenses resulting in serious punishment. Why do we continue to beat our head against the wall of military commissions? We tried them. They haven't worked well. Let's move on to something else and actually get some convictions. If in that process we risk also getting some acquittals, that's the price we pay for due process. We are too great a country to shrink from this. And, honestly, the reality is that there are certainly some innocent people being held in Guantanamo.

The federal courts are well equipped to handle these cases. The Classified Information Procedures Act (CIPA) provides a framework for dealing with national security information. Indeed, federal courts have far more experience in these matters than do newly created military commissions. Physical security is certainly a concern but, again, not an insurmountable issue.

S. 576 A Bill to provide for the effective prosecution of terrorists and guarantee due process rights

This proposed legislation would address many of the most serious flaws of the Military Commission Act. These include narrowing the definition of "unlawful enemy combatant," ensuring respect for and adherence to the Geneva Conventions, excluding coerced testimony, improving rules regarding intelligence information and hearsay, and providing for appeals to the Court of Appeals for the Armed Forces.

All of these legislative fixes would significantly improve the military commissions and they would go a long way to repairing the standing of the United States among our allies.

There are three tweaks that I would make to strengthen the bill. First, I would address the issue of retroactivity of certain crimes under the MCA including the crimes of material support of terrorism and conspiracy. Second, the bill does not eliminate section 1004 of the DTA or section 8b of the MCA which allow for retroactive immunity for abuse of detainees. And finally, the bill creates a new crime of "cruel, inhuman and degrading treatment or punishment" as defined in the DTA, while retaining the crime of "cruel and inhuman treatment" defined in the MCA. These conflicting definitions could cause confusion.

The terms "War" and "Combatants"

In the wake of 9/11, there was near unanimity among Americans that we should treat the horror of that day as the opening salvo of a war. It felt like Pearl Harbor must have felt. I certainly applauded that decision. The phrase "Global War on Terror" resonated with us and rallied and unified us at time we needed to rally and be unified. It also provided the kind of shock to the bureacratic system that was needed to force new thinking and approaches to securing our ports and our borders. But in retrospect, we relied on that metaphor to take a number of actions that wise people should now reconsider.

In what is perhaps an overly broad generalization, the people we have detained fall into several groups. Some are just low level drivers, kangaroo skinners and the like who are basically the equivalent in seniority of privates. Others are hapless professionals or semi-professionals who were at the wrong place at the wrong time or irritated the wrong war lord. Some, like KSM, really are terrible people who have done and mean to do us harm.

We must more effectively and fairly sort through these groups to separate the really bad guys from those feckless or unfortunate others. Habeas Corpus can do that. CSRTs cannot. Then, we must prosecute the real terrorists. As we have seen, the military commissions cannot do that effectively. Federal courts can.

Moreover and significantly, to label this struggle as a "war" and the really bad actors as "combatants"—unlawful or otherwise—gives them a status they don't deserve. They are not combatants in a war; they are criminals and thugs. They should be prosecuted as such.

By labeling this as a war and the enemy as combatants we have unwittingly afforded them a rhetorical advantage that tends to put them and us on an even plane in the eyes of many others. This apparent equality resonates loudly in certain parts of the world and gives the enemy an advantage they would not have if we were dealing with crimes and criminals. KSM even compared himself favorably to George Washington at his recent CSRT hearing, in between confessing to the depraved murder of Daniel Pearl. This is abhorant to any decent American, and to decent people everywhere. But our characterization of KSM as a combatant and of the struggle in which we are engaged as a war gives him and others like him a platform on which to declare themselves warriors, boosting their credibility with potential recruits to the cause. This violates the first rule of counterinsurgency: delegitimize the enemy.

Intellectually, emotionally, and legally we need break out of this box in which we are trapped and change our thinking about the characterization of whom it is we are fighting. If we continue to raise them to the status of combatant, we can't expect others to consider them otherwise.

The overly broad definition of "unlawful enemy combatant" creates yet another very real problem. The definition in the MCA scoops up those who "purposefully and materially" support hostilities against the U.S. Given the global nature of this struggle and lack of limitation on the definition, this would include people found anyplace on the face of earth. Far from any real battlefield, they are believed to have supported hostilities by, for example, donating to a charity that somehow is thought to support terrorists. They are apprehended, sent to a prison, have no right to test their incarceration via habeas corpus, have no lawyer, and no hope of release.

Regardless of the plight of the detainee in that scenario, what does that do to the United States? Would we abide another country that used that definition for the basis of the detention of an American?

The definition should be tightened to include only those who have directly participated in the planning or execution of actual hostilities against the United States. A rule of thumb might be that if you can't prosecute them or shoot them, you can't incarcerate them. Again, this would come from a position of strength, not weakness.

Conclusion

The United States boasts a judicial system that is the envy of the rest of the world. It is fair and expeditious. Guilt or innocence is determined, and if guilt, appropriate sentences are assessed and carried out. The majesty of due process is realized and exulted. We should be shouting this from the rooftops. We should use these cases as a world stage in which we demonstrate to everyone's satisfaction that our system is the best. It works even under the most difficult circumstances.

Instead, we are burying that system under the weight of Combat Status Review Tribunals and Military Commissions which don't work and bring upon us the opprobrium of the rest of the world, not to mention affording a strategic advantage to our opponents. We are missing the greatest opportunity since 1946 to demonstrate to the world and history what the United States stands for and how strong we are. Justice Jackson would not be pleased.

We should have the courage to change and improve what we have done before. We must steer by the stars, not by the wake.