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THE COMMANDANT OF THE UNITED STATES MARINE CORPS**

**BEFORE THE SENATE ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON PERSONNEL
MILITARY JUSTICE AND DETENTION POLICY – JULY 14, 2005**

Mr. Chairman and Members of the Committee, thank you for the opportunity to contribute to this important discussion concerning military justice and detention policy in the global war on terrorism. We understand the Committee is focusing on military justice aspects of detention policy in the Department of Defense, including the definition and classification of enemy combatants; legal aspects of the detention, review, and interrogation of enemy combatants; the role of military commissions, as well as responsibilities of the United States for the conduct of detention operations under U.S. laws, existing international treaty obligations and the law of war.

Our nation has faced many challenges since the deadly and savage attacks of September 11, 2001. The devastating loss of civilian lives and destruction of property and infrastructure of that day have been echoed in the cities and countries of our friends and allies, including Baghdad, Kabul, Istanbul, Bali, Riyadh, Madrid, Russia, Uzbekistan, and, most recently, London. The armed conflict with al Qaeda and its supporters continues. For as long as it does, we will continue to meet each challenge steadfastly and consistent with the rule of law.

Throughout this conflict, we have looked to the U.S. Constitution, U.S. statutes, U.S. treaty obligations, and the law of war to frame our actions. The President, acting as Commander in Chief, has taken action to defend the country and to prevent additional attacks. Congress, in the Authorization for Use of Military Force, September 18, 2001, supported the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks *** or harbored such organizations or persons."¹ Congress also emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."²

¹ Publ. L. No. 107-40, §§ 1-2, 115 Stat. 224.

² Ibid.

Consistent with this authority, U.S. and coalition forces have removed the Taliban from power, eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001" and "seriously degraded" al Qaeda's training capability.³ In the conduct of these operations, U.S. Armed Forces, consistent with the law and settled practice during armed conflict, have seized many hostile persons and detained a small proportion of them as enemy combatants.

On February 7, 2002, the President determined that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees because Afghanistan is a party to the Geneva Convention but al Qaeda – an international terrorist group – is not. He also determined that under article 4 of that Convention, Taliban detainees are not entitled to POW status. Even so, he directed the Armed Forces to treat such detainees humanely. Those who are members of al Qaeda, the Taliban or their affiliates and supporters are enemy combatants who may be detained for the duration of hostilities. Such detention serves the vital military objectives of preventing additional attacks, preventing captured combatants from rejoining the conflict, and gathering intelligence to further the overall war effort. The military's authority to capture and detain enemy combatants is both well-established and time honored.

Enemy Combatants

Enemy combatants are personnel engaging in hostilities during an armed conflict on behalf of a party to the conflict. Enemy combatants are lawful targets unless they are captured or wounded, sick, or shipwrecked and no longer resisting.

In a more conventional armed conflict between States, enemy fighters of a government are recognizable by their uniforms or fixed insignia, fight under responsible command, carry their arms openly, and otherwise abide by the law of war.⁴ Enemy fighters in the global war on terrorism are not recognizable in those ways – in fact, their strategy and tactics include hiding within civilian populations and deliberately targeting civilians in violation of the law.⁵ And, as private citizens, these enemy fighters do not have a law of war right to initiate and wage war. The law of war, including the Third

³ Office of the White House Press Secretary, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) (<www.whitehouse.gov/news/releases/2003/09/20030919-1.html>)

⁴ Lawful combatants include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power. They are entitled to prisoner of war status upon capture, and are entitled to "combatant immunity" for their lawful pre-capture warlike acts. They may be prosecuted, however, for violations of the law of war. If so prosecuted, they still retain their status as prisoners of war.

⁵ Unlawful combatants, or unprivileged belligerents, may include spies, saboteurs, or civilians who are participating in hostilities, or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor.

Geneva Convention, offer specific protections and privileges to conventional combatants, but not to terrorist fighters.

DoD doctrine currently defines an enemy combatant to be, "Any person in an armed conflict who could be properly detained under the laws and customs of war."⁶ The definition has the flexibility to meet the specific circumstances of a particular conflict. It has been adapted in War on Terrorism operations to define who is part of an opposing force. For example, the Deputy Secretary of Defense's Order Establishing Combatant Status Review Tribunals defined an "enemy combatant" for purposes of that order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."⁷ Consistent with these definitions, the Supreme Court has recently endorsed a similar definition of "enemy combatant" in a case involving the detention of an enemy combatant captured in Afghanistan. The Court stated that "for purposes of this case, enemy combatant . . . is an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (1994) (plurality op.) (internal quotation marks omitted).

With respect to the definition and classification of enemy combatants, it is important to maintain flexibility in the terminology in order to allow us to operate effectively with coalition forces, and to address the changing circumstances of the types of conflicts in which we are engaged, and will be engaged. Generally speaking, the terms "Combatant," "Unprivileged Belligerent," "Unlawful Combatant," and "Enemy Combatant," are well-established in the law of war.

Detention Review Process

From the early stages of military operations in Afghanistan, the Department of Defense has taken steps to examine the status of captured personnel and determine the need for their continued detention. In a conflict in which the enemy does not use distinctive insignia or uniforms to distinguish itself from the civilian population, the Department has established review mechanisms to test and revalidate the status of each detainee as an enemy combatant.

Individuals taken into DoD control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, i.e., whether the individual is "part of or supporting forces hostile to the United States or coalition

⁶ See Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms* (as amended through May 9, 2005).

⁷ Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004).

partners, and engaged in an armed conflict against the United States."⁸ Individuals who are not enemy combatants are released.

Between August 2004 and January 2005, the Combatant Status Review Tribunals (CSRTs) reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still properly classified as an enemy combatant. The CSRTs gave each detainee the opportunity to contest the designation as an enemy combatant.

In December 2004, the Administrative Review Board (ARB) process began to assess whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release. This process remains ongoing and will review each detainee's status annually.

Commissions

With respect to the role of military commissions, their use is firmly based in international law, our Constitution, the Uniform Code of Military Justice (UCMJ), our nation's history, and international practice. The United States employed a military commission to try eight Nazi saboteurs during World War II. At the conclusion of that conflict, U.S. military commissions heard some 500 cases against enemy war criminals. Australia, Canada, China, France, Greece, Norway, and the United Kingdom used military commissions to prosecute another 1,166 cases against war criminals. In Article 21, UCMJ, Congress expressly recognizes military commissions and other military tribunals as a lawful and legitimate means available to the President to try violations of the law of war. Additionally, Article 36, UCMJ, codifies the President's authority to prescribe pretrial, trial, and post-trial procedures for military commissions. That they have not been used since World War II constitutes acknowledgement of the necessity for their use only in exceptional situations. Such is the case with respect to international terrorists who have violated the law of war. On November 13, 2001, the President authorized the use of military commissions in his Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." The President took this action in response to the grave acts of terrorism and threats of terrorism, including the attacks of September 11, 2001, on the Pentagon, the World Trade Center, and on the civilian aircraft that crashed in Pennsylvania.

After the President authorized the use of military commissions, work began within the DoD to establish, consistent with the President's order, the procedures to be used and

⁸ Dept of Defense, Fact Sheet: Guantanamo Detainees (<www.defenselink.mil/news/detainees.html>)

the rights to be afforded the accused. This process involved working to achieve certain ends, including: ensuring a full and fair trial for the accused; protecting classified and sensitive information; and protecting the safety of personnel participating in the process, including the accused. The use of military commissions for terrorists who violate the laws of war, as opposed to other trial alternatives such as the federal courts or military courts-martial, best provides the flexibility necessary to ensure that these equally important yet competing goals are attained.

Conclusion

The contemporary battlefield has challenged members of the DOD legal community as intensively as it has challenged the commanders and Soldiers, sailors, airmen and Marines they advise. The exceptional performance of our Judge Advocates at every level of command, and in particular in combat in Iraq and Afghanistan where members of the uniformed legal branches have been killed and wounded in action, has been essential to ensuring the overall excellent record of compliance with the Law of War achieved by our armed forces. For this, our nation should be justifiably proud.

This success has not occurred in a legal environment without its share of uncertainty. This complex legal reality has generated significant discussions, reviews and commentaries on how issues related to executing national security objectives should be resolved. DOD lawyers, both military and civilian, have worked long and hard to ensure that our forces had the tools to meet this threat while upholding the rule of law and preserving American values. We are confident that Judge Advocates and DoD civilian attorneys will continue to make essential contributions to our efforts to reconcile the unconventional nature of combating these threats with the traditional and historically essential commitment of our armed forces to conduct disciplined military operations in compliance with the Law of War.

Established principles of law have served us well to meet the challenges of military operations in the war on terrorism. We are confident that they provide the firm foundation for meeting future challenges.