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STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

HEARING HELD
JULY 12, 2006

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STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Wednesday, July 12, 2006.

The committee met, pursuant to call, at 9:57 a.m., in room 2118, Rayburn House Office Building, Hon. Duncan Hunter (chairman of the committee) presiding.

OPENING STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order. This hearing addresses standards for military commissions for trials involving war crimes. I also want to introduce a new Republican Member from California as a member of the committee, and we will wait until he arrives before we do that.

But I want to welcome our distinguished panel. We have with us today Mr. Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice; Mr. Daniel Dell'Orto, Principal Deputy General Counsel, Department of Defense; the Honorable Theodore Olson, former Solicitor General of the United States; and Rear Admiral John Hutson, United States Navy, retired, former Judge Advocate General, U.S. Navy.

Gentlemen, thank you for being with us. We look forward to hearing your comments on the recent Supreme Court decision on military commissions and where we go from here.

In Hamdan, the Supreme Court denied the government's motion to dismiss, stating the Detainee Treatment Act of 2005, which Congress passed at the end of the year, did not deprive the Court of jurisdiction. The Court also held that the President's rules for military commissions are not legal because they do not conform to the Uniform Code of Military Justice and because they do not conform to Common Article 3 of the Geneva Conventions.

I think we need to take a close look at each of these rulings, but before we go any further, we need to do a reset. Make no mistake about the United States is engaged in a war with terrorists. Whether we call it a Long War or a Global War Against Terror, or some other term, this Nation is at war. The enemy declared war in 1996 when Osama bin Laden declared a jihad against America. It continued on September 11th, and it continues today. We are at war, and we may be at war for a long time.

I emphasize this at the outset because we are here to address how America fights wars. All three branches of government are in-

volved in this discussion with the Supreme Court's decision in Hamdan v. Rumsfeld.

In Hamdan, the Supreme Court told us to start over when it comes to trying the enemy as war criminals. We need to start over not just because the Court told us to, but because we are in a new type of war against a new type of enemy.

Justice Thomas put it best in Hamdan. He said, and I quote: We are not engaged in a traditional battle with a nation-state, but with a worldwide Hydra-headed enemy who lurks in the shadows, conspiring to reproduce the atrocities of September 11th, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers.

So who are we dealing with in military commissions? We are dealing with the enemy in war, not defendants in our domestic criminal justice system. And on that point the background that I have seen on Mr. Hamdan is that he is accused of being a bodyguard for Osama bin Laden, a deliverer of weapons and a person who operated convoys for al Qaeda.

So we are dealing with the enemy in war, not defendants in our domestic criminal justice system, that is clear. Some of them have returned to the battlefield after we let them out of Guantanamo, and this committee has seen pictures of people who were released from Guantanamo after they asserted that they had had only a peripheral connection with the battlefield and that they would be behave themselves if allowed to return home, and later on they ended up carrying weapons, shooting at, and presumably inflicting injury on American soldiers on the battlefield.

So our primary purpose is to keep them off the battlefield. In doing so, we treat them humanely, and if we choose to treat them as war criminals, we will give them due process rights that the world will respect. But we have to remember they are the enemy in an ongoing war. In this new war where intelligence is more vital than ever, we want to interrogate the enemy, not to degrade them, but to save the lives of American troops, American civilian and our allies. But it may not be practical on the battlefield to read the enemy their Miranda warnings.

Classified information is another area which we need to look closely at. Do we want to give the enemy the sources and methods of how we obtain information? Court-martials in Federal criminal trials have special rules to protect classified information for our soldiers and civilians, but do we want to give battle intelligence to terrorists? In time of war it may not be practical to apply the rules of evidence that we do in civilian—the same rules of evidence that we do in civilian trials or court-martials for our troops. Will commanders and witnesses be called from the frontline to testify in a military commission, or can we use reliable hearsay and sworn affidavits? I note that hearsay is allowed in international war crime tribunals for Rwanda and Yugoslavia.

Justices Stevens and Kennedy, who both shaped the Hamdan opinion, each stated that there could be justification from deviation from the old rules in this new war. Justice Stevens simply said the President did not make such a justification for the rules regarding

military commissions, although he said such a justification might be proper if, and I quote, some practical need explains deviations from court-martial practice.

Justice Kennedy said, again I quote, ''If Congress after due consideration deems it appropriate to change the controlling statutes in conformation with the Constitution and other laws, it has the power and prerogative to do so.''

So let's see if there is a need or practical reason to change the rules. We have to give the executive the tools to fight this war. This is not a separation of powers issue; it is an issue of how to defeat the enemy. The Supreme Court says that we need congressional participation, but in doing so let's not forget our purpose is to defend the Nation against the enemy. We won't lower our standards, we will always treat detainees humanely, but we can't be naive either.

The war started in 1996 with the al Qaeda declaration of jihad against the Nation. The Geneva Conventions were written in 1945, and the Uniform Code of Military Justice (UCMJ) was adopted in 1951. In that sense Hamdan may be broader than war crimes trials that may be the start of a new legal analysis of the long war.

It is time for us to think about war crime trials and a process that provides due process and protects national security in the new war. So I think that really is the essence of what we need to produce in this effort that Congress is going to undertake, and that is a balancing of these two goals, national security and due process, fair play for those who are detained.

Whatever we decide, we will uphold basic human rights and state what our compliance with this standard means for the treatment of detainees. I am sure we can do this in a way that is fair and the world will acknowledge is fair. Each witness here today is uniquely qualified to address these questions.

And so, gentlemen, thank you for being with us, and before we go to your statements, I would like to turn to my good friend from Missouri, Mr. Skelton, whose father was involved in the litigation of one of the key cases that was cited by the Hamdan court ex parte. I look forward to his comments and the comments from all my colleagues, and I would also like to mention that Ms. Sanchez has proposed a provision for a commission that she offered—has offered in our last markup, and she has worked this issue, and she should be commended for that, and we will be looking at her proposal as well as proposals and recommendations and suggestions of all Members.

So at this time I would like to turn to the gentleman from Missouri, Mr. Skelton.

STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. SKELTON. Mr. Chairman, thank you very much. I join in welcoming the witnesses.

Mr. Chairman, I am going to be brief and ask that my longer statement be entered into the record in the interest of going straight to the testimony and to the questions.

We in Congress have a responsibility to those who serve in uniform in the same way we are committed to ensuring that our forces have the best equipment when they go into battle. We will do everything, I will repeat, we will do everything to make sure the enemy is taken off the battlefield and not given another opportunity to kill American soldiers and marines.

We take this as our charge, but we must do so in a way that conforms strictly to the rule of law with our core values as Americans. That is what our troops fight for.

Mr. Chairman, I am glad you mentioned Ms. Sanchez's proposed legislation. She has been working on this for a good number of actually years, if I understand correctly, and has anticipated the outcome of this case.

The Supreme Court spoke loudly and it spoke clearly when it ruled in the Hamdan case, and we can and we must craft a system for aggressively dealing with accused terrorists and war criminals that holds them to account, but we must do so in a way that meets the standards that are laid out by the Supreme Court decision.

The Court has given Congress a clear charge to craft a system that provides basic due process. We can and we must get this right. The worst thing we can do, Mr. Chairman, is for another Supreme Court decision to kick back what we do.

So to do so, I believe we must look carefully at tried and true existing systems of law like the Uniform Code of Military Justice that may provide a basis for a solution. We must consider the modifications that need to be made to make commissions most effective as a tool in the war on terror.

Mr. Chairman, this is not the first time that we have had tribunals or commissions regarding an enemy. In 1942 and 1946 again, we had commissions that were upheld at that time. But under this recent Supreme Court decision, it is possible to legislate a system that will keep terrorists off the battlefield and meet the Court standards.

This hearing is a good first step, and I compliment you, but we will need more hearings like them and will need to work together in a bipartisan, open process to figure out the best solution. This will take time and will take consideration. It is well worth it for our troops and for the outcome of the war on terror, and I look forward, Mr. Chairman, to undertaking this effort and hearing from our witnesses.

[The prepared statement of Mr. Skelton can be found in the Appendix on page 53.]

The CHAIRMAN. I thank the gentleman, and again, gentlemen, good morning. Mr. Bradbury, thank you, sir, for being with us. The floor is yours.

STATEMENT OF STEVEN G. BRADBURY, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. BRADBURY. Thank you, Mr. Chairman, Ranking Member Skelton and members of the committee.

The Supreme Court in Hamdan v. Rumsfeld held that the military commissions that the President had established were inconsistent with the Uniform Code of Military Justice and the Geneva

Conventions. It is important to realize, as the Chairman emphasized, that the Court did not question the authority of the United States to detain enemy combatants in the war on terror, and its decision does not require us to close Guantanamo Bay (GTMO) or release any terrorists. The Court implicitly recognized that the vicious attacks of al Qaeda triggered our right to use military force in self-defense, and that we are involved in an armed conflict with al Qaeda.

The Court furthermore made clear that its decision rested only on an interpretation of current statutes and treaty-based law. The Court did not address the President's constitutional authority and did not reach any constitutional question. Therefore, Hamdan now gives the Congress and the Administration a clear opportunity to work together to address the matters raised by the case, including the appropriate procedures to govern military commissions.

In moving forward after Hamdan, the basic question we must answer is how best to pursue the prosecution of al Qaeda and other terrorist combatants in this armed conflict. In trying al Qaeda terrorists for their war crimes, it is not appropriate as a matter of national policy, not practical as a matter of military reality, not required by the Constitution, and not feasible in protecting sensitive intelligence sources and methods to require that military commissions follow all of the procedures of a court-martial.

In my written testimony I have identified several provisions of the Uniform Code of Military Justice and court-martial procedures that are impractical to apply in the military commission context.

Mr. Chairman, all the issues with military commissions identified by the Supreme Court can be addressed and resolved through legislation. The Administration stands ready to work with Congress to do just that so that trials of captured al Qaeda terrorists can move forward again.

In its decision, the Court also addressed the application of the Geneva Conventions to al Qaeda fighters in our war on terror. On this point it is important to emphasize that the Court did not decide that the Geneva Conventions as a whole apply to our conflict with al Qaeda or that members of al Qaeda are entitled to the privileges of prisoner of war status. The Court held rather that the basic standards contained in Common Article 3 of the Geneva Conventions apply to the conflict with al Qaeda.

Of course, the terrorists who fight for al Qaeda have nothing but contempt for the laws of war. They have killed thousands of innocent civilians in the United States and thousands more in numerous countries around the world. They openly mock the rule of law, the Geneva Conventions, and the standards of civilized people everywhere, and they will attack us again if given the chance.

When the Geneva Conventions were concluded in 1949, the drafters of the conventions certainly did not anticipate armed conflicts with international terrorist organizations such as al Qaeda. Be that as it may, we are now faced with the task of implementing the Court's decision on Common Article 3.

Last year, Congress engaged in a significant public debate on the standards that should govern the treatment of captured al Qaeda terrorists. Congress codified that standard in the McCain amendment, part of the Detainee Treatment Act, which prohibits cruel,

inhuman or degrading treatment or punishment, but, importantly, it defined that standard by reference to the established meaning of our Constitution for all detainees held by the United States.

We all believe that enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the war on terror. That assumption is no longer true.

In its ruling in Hamdan, the Supreme Court has now imposed another baseline standard, Common Article 3 of the Geneva Conventions. On the one hand, when reasonably read and properly applied, Common Article 3 will prohibit the most serious and grave offenses. Most of the provisions of Common Article 3 prohibit actions that are universally condemned such as violence to life, murder, mutilation, torture and the taking of hostages.

These are a catalog of the most fundamental violations of international humanitarian law. In fact, they neatly sum up the standard tactics and methods of warfare utilized by our enemy.

On the other hand, although Common Article 3 should be understood to apply only to serious misconduct, it is undeniable that some of the terms in Common Article 3 are inherently vague. Common Article 3 prohibits, quote, ''outrages upon personal dignity,in particular, humiliating and degrading treatment,'' a phrase that is susceptible of uncertain and unpredictable application. In Common Article 3 it is not defined by reference to our own Constitution as it is in the McCain amendment.

Furthermore, the Supreme Court has said that in interpreting a treaty provision, the meaning given to the treaty language by international tribunals must be accorded, quote, ''respectful consideration,'' and the interpretations adopted by other State parties to the treaty are due considerable weight. Accordingly, the meaning of Common Article 3, the baseline standard that now applies to the conduct of U.S. personnel in the war on terror, would be informed by the evolving interpretations of tribunals and governments outside the United States. Many of these interpretations to date have been consistent with the reading that we would give to Common Article 3. Nevertheless, the application of Common Article 3 will create a degree of uncertainty for those who fight to defend us from terrorist attack.

The meaning of Common Article 3, of course, is not merely academic, because the War Crimes Act makes any violation of Common Article 3 a felony offense.

We believe that the standards governing the treatment of detainees by the United States in the war on terror should be certain, and that those standards should be defined by U.S. law consistent with our Constitution and our international obligations. We look forward to working with Congress to protect the American people and to ensure that unlawful terrorist combatants can be brought to justice consistent with the Supreme Court's guidance.

I look forward to discussing those issues with the committee this morning, and thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bradbury, thank you.

[The prepared statement of Mr. Bradbury can be found in the Appendix on page 60.]

The CHAIRMAN. Mr. Dell'Orto, thank you for being with us today, sir.

Mr. DELL'ORTO. Thank you, Mr. Chairman.

The CHAIRMAN. Pull that up closer, make sure it is on.

STATEMENT OF DANIEL J. DELL'ORTO, PRINCIPAL DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. DELL'ORTO. Thank you, Mr. Chairman, Ranking Member Skelton and members of the committee. On behalf of the Department of Defense, please allow me to express my gratitude for the opportunity to appear before you today and for the prompt and careful consideration by the committee of necessary measures in response to the Supreme Court's decision in Hamdan v. Rumsfeld.

I join wholeheartedly Mr. Bradbury's statement and add just a few words of my own. The United States military has convened criminal tribunals other than courts-martial since the days of the very first Commander-in-Chief George Washington. From the Revolutionary, Mexican-American, and Civil Wars, on through World War II and the present, our Nation and its military have considered these tribunals an indispensable tool for the dispensation of justice in the chaotic and irregular circumstances of armed conflict.

The military commission system reviewed by the Court in Hamdan fits squarely within this long tradition. Tradition, however, is not the only justification for employing criminal adjudication processes other than courts-martial in times of armed conflicts. Alternative processes are necessary to avoid the absurd results of adopting protections for terrorists that American citizens do not receive in civilian courts.

The court-martial system generally is not well known or understood outside the military. One common misperception is that courts-martial must necessarily render a lesser form of justice because they fall outside the judicial branch, but the opposite is actually true. To protect in court those who protect us in battle and to avoid even the appearance of unlawful command influence, courts-martial are more solicitous of the rights of the accused than are civilian courts.

For every court-martial rule that is arguably less protective of the accused than its civilian analog, there are several that are indispensably more protective. For example, legal counsel is provided without cost not just for the indigent, but for all. The rights to counsel and against self-incrimination are afforded earlier in the military justice system than in civilian practice. Instead of indictment by grand jury, which convenes in secret without the defendant and defense counsel, the military justice system requires that for a general court-martial a thorough and impartial investigation be open to the public and the media, at which the accused and defense counsel may conduct pretrial discovery and call and cross-examine witnesses.

The court-martial process allows open and full discovery of the government's information by the accused, a process more open and automatic than discovery in civilian criminal prosecutions. The speedy trial rules are much more strict in the military justice system than in the civilian system. The statute of limitations that applies to most military offenses is shorter than the Federal statute

for terrorism offenses, and the rules for exclusion of evidence are more generous toward the accused than their civilian counterparts.

While tradition and common sense, therefore, provide strong support for alternative adjudication processes for terrorists and other unlawful enemy combatants, military necessity is perhaps the strongest reason of all. It is simply not feasible in time of war to gather evidence in a manner that meets strict criminal procedural requirements.

Service personnel are generally not trained to execute military combat and intelligence missions while simultaneously adhering to law enforcement standards and constraints.

Asking our fighting men and women to take on additional duties traditionally performed by police officers, detectives, evidence custodians, and prosecutors will not only distract from their mission, but endanger their lives as well. Intelligence gathering would also suffer terribly. It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial.

Similarly, full application of court-martial rules would force the government either to drop prosecutions or to disclose intelligence information to our enemies in such a way as to compromise ongoing or future military operations, the identity of intelligence sources, and the lives of many. Military necessity demands a better way.

As Mr. Bradbury stated, the Hamdan decision provides Congress and the President an opportunity to address these critical matters together, and we look forward to working with you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Dell'Orto.

[The prepared statement of Mr. Dell'Orto can be found in the Appendix on page 71.]

The CHAIRMAN. Mr. Olson, thank you very much for being with us today, and the floor is yours, sir.

STATEMENT OF THEODORE B. OLSON, FORMER SOLICITOR GENERAL OF THE UNITED STATES

Mr. OLSON. Thank you, Chairman Hunter, Ranking Member Skelton, and members of this committee. I appreciate the opportunity to appear before the committee to testify about a Supreme Court decision that has far-reaching implications for the President's ability to defend our national security and to perform his duties as Commander-in-Chief. No issue, I believe, deserves more thoughtful consideration from our elected representatives than ensuring that the American people are defended from a savage terrorist enemy that deliberately targets civilian lives and mutilates our soldiers in an effort to destroy our way of life.

It is altogether necessary and appropriate for Congress to consider a legislative response to the Hamdan decision. Indeed, all eight Justices who participated in the case recognized that congressional action could cure any perceived inadequacies in the military commissions established by the President.

In my written submissions to you, I address the questions of military commissions and the applicability of the Geneva Conventions and how that issue might be dealt with. I would like to today just focus on another aspect of the Hamdan decision that I don't believe will be covered by the other witnesses.

In response to the Justices' invitation to implement a legislative solution, it is my view that Congress should restore the status quo that existed prior to the Supreme Court's decision in Hamdan and Rasul v. Bush two years ago that for the first time in the history of the United States, and contrary to long-established precedence, held that Federal courts in the United States had jurisdiction over the capture, detention and treatment of noncitizen aliens captured on the battlefield and held beyond the sovereign territory of the United States.

The Supreme Court in that Rasul decision overturned Johnson v. Eisentrager, a Supreme Court precedent written by Robert Jackson that had stood for over 50 years, and held for the first time that the habeas corpus statute gave the Federal courts jurisdiction to supervise the custody of alien combatants held abroad by our military forces.

In the Hamdan decision, the Court held that the Detainee Treatment Act enacted by this Congress in response to the Rasul case, reasserting by Congress that the courts had no jurisdiction to hear habeas corpus petitions from enemy alien combatants held abroad, the Supreme Court in Hamdan reversed that decision and said that it did not apply, your legislation did not apply, to pending cases.

Since the emergence of the writ of habeas corpus several centuries ago in English common law courts, the writ has never been available to enemy aliens held outside a country's sovereignty. By requiring the President to justify his military decisions in Federal courts, Rasul imposes a substantial and unprecedented burden on the President's ability to react with vigor and dispatch to homeland security threats.

The congressional response to Rasul, as I mentioned before, was the Detainee Treatment Act that explicitly provided that no court shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay. No court, no jurisdiction.

Notwithstanding that clearly stated legislative language, the Hamdan Court held that the Detainee Treatment Act does not apply to those petitions that were pending at the time of the decision. That holding requires the Federal courts to adjudicate hundreds of other habeas corpus petitions filed by Guantanamo Bay detainees pending at the time that legislation was enacted.

Until the Supreme Court's Rasul decision, no court had ever suggested that aliens captured during hostilities and held outside the United States could challenge their captivity through a petition for writ of habeas corpus filed in a U.S. court. Indeed, none of the two million prisoners of war held by the United States at the conclusion of World War II was deemed authorized to file a habeas petition in a U.S. court challenging the terms or conditions of their confinement.

One can only imagine the chaos that would have been introduced into the effort to win World War II if each of these detainees or lawyers on their behalf had been permitted to file petitions in the United States courts immediately upon their capture in Europe, Africa, or in the islands of the Pacific. Yet that is precisely the circumstance that Rasul and Hamdan have created and that the President and the armed forces must face today in their fight against terrorism.

The Rasul and Hamdan decisions impose a tremendous burden on our military personnel in the field. To begin with, as the Supreme Court explained in the Eisentrager decision 50 years ago, authorizing courts at the behest of enemy aliens to second-guess the decisions of military commanders will diminish the prestige of our commanders not only with the enemies, but with wavering neutrals.

The Court goes on: It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civilian courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Mr. Dell'Orto mentioned some of the complications, but they include: Will commanders be summoned from the field to give evidence and to explain the circumstances of the capture of combatants? Will detainees have access to counsel? Do they have the right to appointed counsel, Miranda warnings, the right to speedy trials? Will the Government be required to disclose sensitive intelligence information to demonstrate that its detention of enemy combatants is justified?

Those are just a few examples. I submit that Congress should act to restore the status of the habeas corpus jurisdiction that has existed throughout this Nation's history until two years ago. The Constitution places the decision to detain a noncitizen enemy combatant on the battlefield squarely within the domain of the President as Commander-in-Chief of the Armed Forces. Congress should restore the constitutional balance by amending the Detainee Treatment Act to clarify, as the Congress, I think, thought it did then, that Federal courts lack jurisdiction over habeas corpus petitions filed by detainees held outside the sovereign territory of the United States, no matter when those petitions were filed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Olson can be found in the Appendix on page 74.]

The CHAIRMAN. Mr. Olson, thank you very much.

Rear Admiral Hutson, thank for being with us this morning.

STATEMENT OF REAR ADM. JOHN D. HUTSON, (RET.), PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER, FORMER JUDGE ADVOCATE GENERAL, U.S. NAVY

Admiral HUTSON. Thank you, Mr. Chairman. Mr. Skelton, thank you. Thank you for holding what I think are incredibly important hearings on the issue of the day right now in prosecution of the war.

I want to start out by saying unequivocally that I want to be able to successfully prosecute terrorists; however, I believe that success-

ful prosecution entails a full and fair hearing which complies with the dictates of Common Article 3 to the extent that it is a regularly constituted court that comports with the judicial guarantees recognized as indispensable by all civilized peoples. I don't believe that there is any part of that, a regularly constituted court or judicial guarantees recognized as indispensable by civilized peoples, that the United States should or could try to avoid or evade in any way.

We shouldn't make this too hard or too complicated or try to get too cute with it. We know what those guarantees are. We should enthusiastically embrace them, we should celebrate them, we should shout them from the rooftops. We can do that from a position of strength, not from a position of weakness. It is those guarantees that make us strong.

We are the strongest Nation militarily on the face of the Earth, there is no doubt about that. Our strength as a Nation comes not from our military strength or from our economy or from our natural resources or the essential island nature of our geography; our strength comes from what we have stood for for generations. That is what gives us strength, and we should be proud of that and celebrate it.

I was an early supporter of the concept of military commissions, and I still am. I think it is the way to go. I was not a supporter of the way in which they were implemented in the second order. We should use commissions as a means whereby we demonstrate to the world what it is we are fighting so valiantly to preserve.

I was talking with a lawyer yesterday from Human Rights First about the Hamdan decision and my testimony in this hearing, and she made a comment to me that I thought was very profound and compelling, which was that Hamdan was not—the Hamdan decision was not a revolution, it was a return. It was returning us to where we should be. It shouldn't have been a shock, it should have been ho-hum. It was return to business as usual.

The United States stands for the rule of law, and we have for years. It is not a rule of law if you only apply it when it is convenient. It is something else. For too long this has been a discussion between the executive branch and the courts, and it is time, as you know by conducting these hearings, to return the conversation to the proper forum, which is to say Congress.

If Hamdan stands for anything, it stands for the proposition that Congress has to engage thoughtfully and deliberately in these issues. There are those who advocate the Congress simply reaffirm what the President did prior to Hamdan with military commissions. I think that would be a dramatic mistake. There are those that would say we should start out and pull out a clean sheet of paper and start writing. I think that is not the easy way to do this.

This can be easy, and I mean E-A-S-Y. It can be easy. On every bookshelf of every U.S. military lawyer stationed anyplace in the world sits a burgundy soft-covered book. That book is the envy of every armed force on the face of the Earth. It contains the Uniform Code of Military Justice and the Manual for Courts-Martial. We should use that as the model.

I am glad that the prior witnesses have talked about the strength and the beauty of the Uniform Code of Military Justice and the Manual for Courts-Martial. Those documents can be modi-

fied in such a way as to avoid the list of horribles that have been listed. Article 32 can be modified or eliminated.

I agree the media talks about it generally as the military equivalent of the grand jury investigation, and that is not even close. Article 32 is so much more than the grand jury investigation. The modifications—and I don't want to use the word relax, relaxing the UCMJ or the rules of evidence—the modifications to the UCMJ and the military rules of evidence and procedure have to be very narrow, they have to be very specifically tailored, they have to be justified, and if those things are done, I don't think any court is going to have any problem with using the UCMJ and the Manual for Courts-Martial.

We decided, this Nation decided, early on that this was going—we were going to deal with terrorism as a war rather than as a criminal activity, and I think that was a good decision, but that in itself is a new paradigm, and what we have done is say in this war we are now going to start prosecuting people. We didn't prosecute Hitler's driver or bodyguard and probably wouldn't have if we had captured him. This is different. We are taking people who are coming in off the battlefield, and rather than just holding them, which we could do, we want to prosecute them. That is fine, but if we are going to do that, we have to do it in accordance with certain rules that are generally accepted as indispensable by civilized people.

I am proud to be a lawyer. I think our system of justice defines how good this country is. I think that we have the opportunity now to demonstrate to the rest of the world what that system looks like, and, with some minor modifications to the UCMJ, we can do that.

We shouldn't reverse-engineer the commissions, assuming that everybody is guilty, and then create a commission that is geared to proving that point. We have to start at the beginning. And I would suggest that we do that with the Uniform Code of Military Justice.

Thank you, sir. I look forward to your questions.

The CHAIRMAN. Thank you very much, Admiral Hutson.

[The prepared statement of Admiral Hutson can be found in the Appendix on page 96.]

The CHAIRMAN. Gentlemen, let me ask you to do something that is a little unlawyerlike, but I think to kind of tee the ball up here for the committee. Give me a one-liner, what did you think Hamdan told Congress? Think about that a little bit. If you can give that to us in one line, what do you think?

Mr. Bradbury.

Mr. BRADBURY. I guess the one line, Mr. Chairman, I would say is that it is up to Congress now to design the procedures for military commissions and make the decisions as to what makes sense in a trial, in an al Qaeda terrorist versus a trial of a U.S. servicemember. Those are two different things. It is up to Congress to decide, and we are here to work with you to make that happen.

The CHAIRMAN. Mr. Dell'Orto.

Mr. DELL'ORTO. Mr. Chairman, if I were to try to condense this into a very short answer as you have asked me to, I would say that, in slightly modifying what Mr. Bradbury said, the Supreme Court apparently found no underlying flaw in the commission proc-

ess as established. It simply said the President did not consult with the Congress.

We have been many, many years in the process of trying to try the detainees who we believe have committed war crimes. All Congress needs to do, assuming it has taken the opportunity to review the commission process as it is currently configured, is to ratify that process, and we can move on very, very quickly. And that is what I think the Supreme Court has signaled to this Congress.

The CHAIRMAN. So it was a requirement for the participation of Congress with the executive that was the essence of the opinion.

Mr. DELL'ORTO. I think that is the essence of it, Mr. Chairman.

The CHAIRMAN. Mr. Olson.

Mr. OLSON. I believe the Supreme Court said that Congress needs to approve the method of formation and the procedures to be used with military commissions, but that judges will retain jurisdiction to second-guess the execution of those decisions in every case; and that when this Congress said no court shall have jurisdiction to hear or consider habeas corpus applications filed by the detainees in Guantanamo, Congress didn't mean what it said; and that as long as that judicial jurisdiction to second-guess military decisions exists, we will have the judiciary participating in the conduct of military operations wherever they occur. And that gave this Congress an opportunity to say again what it tried to say in the Detainee Treatment Act.

The CHAIRMAN. Thank you.

Rear Admiral Hutson.

Admiral HUTSON. I think that they were saying to constitute a court that is consistent with universally accepted judicial guarantees.

The CHAIRMAN. Okay. Just to take that last description by Rear Admiral Hutson, if you look at Geneva Article 3, Common Article 3, and it talks about regularly constituted court, that is presumably the product that would be—if we put together a body of law to govern these procedures, that would satisfy those particular words in Article 3; is that what you are talking about, Admiral Hutson?

Admiral HUTSON. Yes, sir. I think if this body creates the court, it is regularly constituted.

The CHAIRMAN. Then you have spoken, Rear Admiral Hutson, about standards that are manifest in the Uniform Code of Military Justice, basically standards of fairness for defendants' rights. Do you agree that the exigencies of the battlefield would reasonably reduce the scope of those rights, or do you think that the full rights of the UCMJ should be afforded or that the base of the UCMJ should be used? I am trying to understand precisely your position.

Admiral HUTSON. Absolutely. The exigencies of the battlefield and war on terror would necessitate—Article 3 didn't come down from Mount Sinai on a stone tablet, but there are guarantees that are embedded in the Uniform Code of Military Justice that comport with those judicial guarantees generally accepted, and I think those are the presumption of innocence, independent judiciary, all of those kind of things; facing your accuser, knowing the evidence consistent with military rule of evidence 505 which talks about how to deal with classified evidence in a very complete way, so that, yes, sir, I believe there are modifications that have to be made.

The CHAIRMAN. What I am reminded of is we went through the Guantanamo exercise when those—all the issues surrounding Guantanamo were elevated to a status where it was reviewed strongly by the committee, and what struck me fairly profound was a fairly high number of folks out of the 310 or so that were released were proven to have returned to the battlefields and taken up arms against our troops.

And that one thing that you said a minute ago caught my attention was—and tell me if I am wrong, but you said to the effect that there is nothing wrong with warehousing some of these people over a period of time to keep them from returning to the battlefield. And you understand the enormous pressure that was put on the Administration to prosecute or release. Did I understand your statement correctly?

Admiral HUTSON. Well, I would modify your description of it slightly. I believe that the United States can capture terrorists and warehouse them. I think it is going to create—we are going to run into a diplomatic wall and a political wall and a pubic relations wall before we run into a legal wall. The war on terror is certainly different in the sense that it is going to go on for probably a much longer period of time, and that is going to cause people some problems.

All I am saying is that we can't presume that they are guilty and create a system to demonstrate that fact.

The CHAIRMAN. Okay. I am reminded, I think one of the early cases that we learned in law school, I think it was Davis v. Mississippi, where a person murdered an elderly lady and left his fingerprints on the window sill, and the fingerprints later were matched up with a person who had been taken out of an unconstitutional lineup. And so that was one of the cases where it was fairly clear that the exclusionary rule was intended to apply even though guilty people would go free. But that was a pain that our society was willing to suffer and a loss that we were willing to suffer to let the murderer walk out the door to ensure and discipline our system so that the appropriate procedures were followed.

In this case the pain that we might see is an enemy combatant returning—if he can't confront his accusers because the sergeant who said, that guy was manning the rocket-propelled grenade, that sergeant may be dead or unavailable to be—to confront the accuser, so—or to confront the accused, so the accused goes free. The pain would be manifested and reflected in perhaps dead Americans on the battlefield.

And so the question becomes on your scale of balancing this need for basic rights for the accused with our basic need to be secure and to protect our soldiers, where do you think we should move that forward? What are your thoughts? Hearsay evidence, right to confront accuser, that type of thing. I would like to ask all the members of the panel that. In fact, go ahead, Admiral Hutson, and move right down the panel.

Admiral HUTSON. I would say, sir, that the evidence would have to have some apparent authenticity and validity in order to be introduced. You can't just let in everything. There has to be some sort of standard, and apparent authenticity and validity may be a reasonable standard to use.

If you have fingerprint evidence in your example in Davis, if you have fingerprint evidence, but the chain of custody isn't perfected, I wouldn't have any problem introducing that in a military commission. I would have a problem introducing it in a court-martial of a U.S. troop, but acknowledging your acknowledgment of the difference of the battlefield, that would probably be acceptable to me.

But I do think, Mr. Chairman, that there is a balance, and there may have to be to some extent a sacrifice, maybe not as dramatic as the case you point out in Davis, but there may have to be a sacrifice if we are going to do this in a way that we are proud.

The CHAIRMAN. Mr. Olson.

Mr. OLSON. I yield to Rear Admiral Hutson and Mr. Dell'Orto and Mr. Bradbury with respect to the specifics of how those judgments might be made. The point that I think is important is that when you are fighting an enemy like this—one that defies all civilized rules, that intends to be as savage as possible to the most vulnerable people in the world, that has no scruples or principles, and that will go back every time to the battlefield, maybe not to the battlefield, but to a synagogue or a school bus—we have to have some flexibility built into the system so that the President as Commander-in-Chief and military officials down the line have some flexibility.

You talked about the exigencies of the circumstances. I think there has to be flexibility and freedom to exercise discretion by the executive. We accord a presumption of some discretion, some deference to the Federal Communications Commission (FCC), to the Environmental Protection Agency (EPA), to the Army Corps of Engineers in court decisions, but there was no deference to the President's judgments about the practicalities of military commissions by the Supreme Court in the Hamdan decision, so that when you legislate in this area, if you do, I would urge Congress to make sure that there is room for discretion, depending upon the circumstances of the particular case, and that exercise of that discretion will be accorded some deference by any agency or court reviewing it to understand the circumstances, because the price that military officials will pay if their judgments are second-guessed and not accorded some deference later on in court may be very, very high. Someone may be prosecuted for a war crime for exercising perfectly reasonable judgment with respect to the putting on of a case with respect to an enemy combatant or capturing one.

The CHAIRMAN. Thank you.

Mr. Dell'Orto, any comments?

Mr. DELL'ORTO. Mr. Chairman, I had the privilege of serving on active duty for almost 28 years, the first 8 years as a field artillery officer and the balance of my career as a judge advocate officer, and spent time mostly in the criminal law arena. Our system as it currently exists, the court-martial system, is a fantastic system, and it has come to unfold, develop, evolve over the years at the urging of Congress because it has taken very good care to ensure that that system has been developed in a way that will provide the greatest amount of protections to our soldiers.

But I don't want a soldier, when he kicks down a door in a hut in Afghanistan searching for Osama bin Laden, to have to worry about whether when he does so and questions the individuals he

finds inside, who may or may not be bin Laden's bodyguards or even that individual himself, to worry about whether he has got to advise him of some rights before he takes a statement. I don't want him to have to worry about filling out some form that is going to support the chain of custody when he picks up a laptop computer that has the contact information for all manner of cells around the world while he is still looking over his shoulder to see whether there is not an enemy coming in after him.

I want us to be able to do what the President said we should, guarantee a full and fair trial to these terrorists that would include such things as the presumption of innocence at the outset of the trial, that would include a standard of proof that puts the burden on the prosecution that requires that he be found guilty by proof beyond a reasonable doubt, that provides him with counsel, that does so many things that our system of justice in the United States calls for. And I would say that the military commission procedures that have been established to date do all of those things in a way that takes into account what practicalities, practical difficulties, are associated with trying to gather this evidence around the world in various and sundry places that will place great limitations on our ability to adhere to the standard, the standard rules that we employ in our courts-martial process and in our civilian court process.

I think we have already done that, and, again, that is why I urge that particular process as the starting point to get to the Congress's approval of the procedures that can be used to satisfy what the Supreme Court has told us and the Congress need to be done.

The CHAIRMAN. Thank you.

Mr. Bradbury, where is that balance?

Mr. BRADBURY. Mr. Chairman, I think the fundamental point, I think, is simply that the procedures have to be flexible consistent with fundamental fairness. I think there is a lot of flexibility in light of the circumstances of the apprehension of these folks, the kinds of evidence that is necessary to convict them, and the military necessity. And so, for example, running down some of the things that are provided in the UCMJ that I think need to be adjusted or eliminated in the context of a military commission proceeding, the Article 32 investigation that precedes a prosecution needs to be off the table and needs to be done through a different means.

The right to counsel that is given, under the UCMJ it is given when the individual is first suspected of having committed a crime, and he gets counsel right away and gets Miranda rights right away, that is inconsistent with simply needing to question individuals to get intelligence from them.

Hearsay rules. International tribunals such as the international criminal tribunals for Yugoslavia and Rwanda allow the use of hearsay evidence. It is recognized that it is simply as a practical matter necessary when you talk about crimes that have occurred in far-flung places of the world. You are not going to be able to get every witness in life for testimony. You are going to have to allow the use of hearsay evidence where the fact-finder determines it is

probative, it is sufficiently reliable, and it is not outweighed by undue prejudice. So you need that flexibility in hearsay rules.

Classified evidence. We absolutely have to carefully control exposure of the terrorist detainee to classified sources and methods. There are ways to do that that the commission can police to ensure fundamental fairness, using summaries, using substitutes. We also in the current military commission process would allow the detainee to have counsel cleared in to get access to classified information that is actually going to be used as evidence. But we think you can do that in a way that is consistent with fundamental fairness, and that should be something that a court on review, for example, through the Detainee Treatment Act, the standards of review, would be able to review after the fact.

So those are a few of the critical things that absolutely need to be flexible in order to make a military commission process that has historically worked work in this context.

The CHAIRMAN. Thank you, gentlemen.

The gentleman from Missouri, Mr. Skelton.

Mr. SKELTON. Mr. Chairman, thank you.

I am going to be brief. But I think we should remind ourselves the purpose of all this is protection of our young people in uniform. At the end of the day, that is really what we need to keep in mind, to devise a system that will do that.

The Chairman said something about a one-liner. Let me ask this, if this is not consistent. We in Congress must provide a regularly constituted court, which could be court-martial, UCMJ, Federal court, or a specially designed Federal court or a tribunal; second, a minimum of due process under the Geneva Convention Common Article 3; and third, Congress must authorize departure from the courts-martial or Federal rules and procedures in the event that military commissions are established.

Did I leave anything out, gentlemen? Isn't that really what the Court said, those three items?

Mr. BRADBURY. I am not sure, Congressman, the Court spelled it out in exactly the way you have. I think that is consistent with what the Court held, and I think if Congress were to enact a statute that does what we have described here, it would satisfy all of those requirements.

Mr. SKELTON. That is my question.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

The gentleman from Colorado, Mr. Hefley.

Mr. HEFLEY. Thank you, Mr. Chairman. I think one of the struggles we have, and I think you referred to it, and I think many of us have struggled with this, is this question of whether it is a crime or whether it is war or whether it is a crime during times of war. And as one of you mentioned, in the Second World War, we didn't try the average soldier on the battlefield. We kept them, we put them in concentration camps, and we kept them until the war was over, but we didn't try them. And I guess I would ask, what should we be doing with these people regardless of their rank in the bin Laden hierarchy? What should we be doing with them? Should we be warehousing them, should we be keeping them in the concentration camp like in wartime, or should we be trying them

like they were criminals? I don't have much—a good feeling about what we ought to do on that.

Mr. DELL'ORTO. Congressman Hefley, we certainly have the right under the law of armed conflict, having captured combatants on the battlefield, to detain them for the duration of hostilities. That is long settled, recognized not only under the law of war, but by our courts. We can detain them until the end of the conflict.

During World War II, as someone has already mentioned, we detained hundreds of thousands of lawful enemy combatants in various camps around the country. I wouldn't call them concentration camps. We had them at many of our posts and installations around the country. We could have had some in Colorado for all I know.

Mr. HEFLEY. We did.

Mr. DELL'ORTO. I can remember buying a Christmas tree from a former enemy POW at one of my military assignments in Baumholder, Germany, who can describe his experience at one of our camps at Fort Knox, Kentucky. He thought it was a great experience. He spent his time in captivity working in the mess hall probably peeling potatoes or at the officer's club. He thought—he was fine with that, and he was very much a friend of our forces over in Germany.

We did during World War II try some number of unlawful combatants, or, I am sorry, people who had committed war crimes, Yamashita; the German hierarchy for the crimes that they committed that violated the laws of war. Now, if a lawful combatant, a soldier in the German Wehrmacht, during World War II shoots one of our soldiers during combat, he has the immunity that goes along with participating as a lawful combatant in a combat action. I mean, that is what happens in war. You shoot him, he shoots you or shoots at you, and he, because he is—assuming he is fighting lawfully, wearing a uniform, reporting to a chain of command, follows the laws of war, carrying his arms openly, he is a lawful combatant, a privileged belligerent who is not going to be tried for his lawful activities on the battlefield. But if he goes into a farmhouse and lines up a bunch of civilians and shoots them, he has committed a non—those are noncombatants. He has committed a war crime and is being subject to punishment for that. Or if he directs that sort of activity as Yamashita did and takes no regards for the consequences of what his soldiers do on the battlefield as they rape and pillage, he is subject to trial for an unlawful—for his unlawful acts.

What we have here are people who don't wear uniforms. They don't carry arms openly. They don't distinguish themselves from the civilian population anyway. They don't follow the laws of war. They are without any discipline in the way they conduct their combat. They deliberately attack civilians. They behead people, they mutilate people. And so they are in theory at all levels unlawful combatants. We are—we have charged ten of those people and probably have another several dozen others who are likely to be candidates for military commissions because their activities rate—are at such a significant level that we believe they should be tried as war criminals under the military commission process, the process that we have had, or at least the tradition we have had, of conducting these sorts of tribunals throughout our history.

So I don't know if that answers your question. It is a long answer, but I have tried to sort of put this in context.

Mr. HEFLEY. No, it is very, very helpful. Since these are unlawful combatants, so many of them, maybe most of them, do the rules of the Geneva Conventions apply? Because those were drawn up to deal—weren't they primarily—with lawful combatants?

Mr. DELL'ORTO. And those who are not part of the fight, so we have the third Geneva Convention that deals with prisoners of war that, like the people I described who were at our camps around the United States during World War II, they would be covered today under Geneva 3, and they would receive all sorts of rights.

Now, they could be punished for things that they did in the camp. If they beat up a guard, they beat up another detainee, they could be punished under our system for those acts, but they are not going to be punished for their lawful activities on the battlefield.

Mr. HEFLEY. Thank you very much.

The CHAIRMAN. The gentleman from Arkansas, Dr. Snyder.

Dr. SNYDER. Thank you, Mr. Chairman, and thank you for holding this important hearing. I wanted to—we only have five minutes, so I am going to ask quick questions, maybe get quick answers.

Going along with what Mr. Hefley talked about, I will go to you, Admiral Hutson, is it an accurate description to say that what we are all dealing with today and the changes we are talking about, the proposals are to deal with the legal system to be set up for those going to trial; the Hamdan decision did not deal with those detainees who are not going to trial? Is that an accurate description, Admiral Hutson?

Admiral HUTSON. Yes, sir. One of the reasons we are wrapped around the axle about this is because we are trying to prosecute people. That is the issue.

Dr. SNYDER. And what we all as the Congress and what Chairman Hunter is holding these hearings about is what changes are we going to make for those that we are taking to trial? We are not talking about changing processes now for those that are not going to trial. Is that an accurate description?

Admiral HUTSON. I believe that is what the committee is about. Yes, sir.

Dr. SNYDER. Mr. Olson, it is great to have you here. I don't recall you being before our committee before, but I tell you I want to disagree with you when you call for a restoration of the status quo. I feel like—you know our good friend Gene Taylor here who lost his home in Hurricane Katrina, and I think when you have something struck down, you don't want to build it back just the same as it was status quo, you want to do it better. And I think we have an opportunity to do better in terms of worldwide opinion.

I also want to comment or just make the comment I think two or three of you in both your written statements and your statements here today talk about the problem on the chain of evidence in a door-to-door search or a Miranda warning. I mean, who the hell is saying that? Nobody is saying that. I mean, I have talked to my Republican colleagues. I am not aware of anyone who is saying, gee, we are going to have to have the Miranda warnings in the chaos of war, or we are going to have a real chain of evidence prob-

lem when people are passing this stuff along, being shot at, here you have to sign here, Sergeant. Nobody is saying that. Let's just declare that as a red herring.

There is not going to be nothing coming from any Member of Congress that says we are going to have Miranda warnings on the battlefield or chains of evidence as we normally think of them when we all watch Miami CSI. Those are red herrings. They are not going—it is not going to be on the table.

I want to ask, last night I ran into Representative Butterfield, who we all call Judge Butterfield because of his legal background. I said, Judge, this stuff is complicated. And he said, no, it is not. It is pretty easy. And then, Mr. Hutson, you came here today and you said it is easy, and you spelled the word for us, E-A-S-Y, which is helpful because we are House Members. We like to hear words.

And then you made it so easy because you attach—Mr. Chairman, just for our record, he—is this part of his statement that is admitted to the record where he has proposed amendments? I want to read this one section in which you are suggesting changes. It is 836, section 36; the title of it: The President May Prescribe Rules, which is current law. And the addition you suggest—and this is the new language you suggest. I am going to read it.

"To the extent that the President considers it impracticable for the regulations for military commissions and provost courts to apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, the procedures in military commissions and provost courts shall, subject to any applicable rule of international law and with the exception of section 832 of this title (article 32), apply the principles of law and pretrial, trial, and post-trial procedures, including modes of proof, prescribed for general courts-martial."

Well, the key part of that, if I am correct, Mr. Hutson, is that—the lead-in phrase, "To the extent the President considers it impracticable," is what you are saying there that if the President determines with the advice of these gentlemen at the table—of course we are not going to have Miranda warnings on the battlefield, we are not going to have strict chains of custody for evidence. Describe it. It seems to me what that provision that you are suggesting we adopt deals with the concerns of the gentleman to your right. Is that a fair description?

Admiral HUTSON. Yes, sir. It is a fair description, and we try to track basically the thrust of the Hamdan decision. With respect when Mr. Bradbury used the word "flexible," it kind of sends a chill up my spine because it just sounds too flexible, but I think that if the President is saying that it is impracticable to do this for the following reasons, Article 32, Article 31, those kinds of things, he can make that determination, report it to Congress, and we will move on, and we will actually get some trials, we will actually complete this job.

Dr. SNYDER. May I ask one quick follow-up, Mr. Chairman?

And what you are suggesting is that these would be—the President's rules would be not on a case-by-case basis, but——

Admiral HUTSON. No.

Dr. SNYDER. Lay down a report to the Congress.

Thank you, Mr. Chairman, for holding this hearing.

Mr. DELL'ORTO. Mr. Chairman, may I respond?

The CHAIRMAN. Oh, certainly. Any members of the panel can respond. Certainly.

Mr. DELL'ORTO. Congressman Snyder, we have been looking at this particular question, as you can imagine, and let me give you some of our preliminary assessments again. These are preliminary, and so we have got—we do have much more work to do.

To do what you suggest or what Admiral Hutson suggests, preliminary assessment would indicate that 110 rules for courts-martial, 73 military rules of evidence, and somewhere between 145 and 150 articles of the Uniform Code of Military Justice would require some form of amendment to permit us to take the existing structure and adapt it for military commission process. That is a gutting of the Manual for Courts-Martial and the Uniform Code of Military Justice.

If you look at the current structure that we have in the military commission order, comments from the President's military order, we have a process there that we believe comports very, very well and compares very favorably with both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

To the extent we have to do this in order to approach or to satisfy the Common Article 3 requirement that we have a system that comports with these international norms of indispensable rights that the citizens of the world would be happy with, then we believe that if our structure as it is currently laid out matches what the international community has already said is workable, we are already there or just about there, and the minor tinkering that would have to take place with respect to the existing structure for military commissions is, in my estimation, and as much as I have to—I hate to disagree with Admiral Hutson, a much easier process to undertake than to try to, as I described it, gut the Uniform Code of Military Justice and the Manual for Courts-Martial.

Dr. SNYDER. And I think that is the kind of discussion we will have over the next few weeks and month or two, and I suggest, Mr. Dell'Orto, the Chairman will want you to provide us your analysis of that in the way we can all analyze it just like we have Mr. Hutson.

Mr. BRADBURY. Mr. Chairman and Congressman Snyder, I just wanted to add one point, and that is that I don't think that the implications of the Court's decision in Hamdan are limited exclusively to the question of procedures for military commissions, because as I tried to lay out in my testimony, the Court's ruling on Common Article 3 was an interpretation of the scope and application of that, of Common Article 3, and contradicted or superseded the President's determination in 2002 that Common Article 3 does not apply. The Court essentially said this is not an international conflict, and therefore Common Article 3, which in the past has been read to apply only to internal conflict, civil wars, if you will, now has general application in our war with al Qaeda, and that has implications and ramifications beyond simply the procedures for military commissions.

The CHAIRMAN. Okay. Any other responses?

I thank the gentleman from Arkansas.

The gentlelady from Michigan, Mrs. Miller.

Mrs. MILLER OF MICHIGAN. Thank you, Mr. Chairman. And thank the witnesses for all appearing before the committee today. We appreciate your service to the Nation and appreciate your testimony here today.

I have been trying to listen to this. I am not an attorney. There is a lot of legalese going on here. I don't even have a college degree, but I am one of the few Members of Congress. I am not proud of that, but that is just the way it turned out in my life, but I think I am a reflection of middle America.

I will tell you, listening to the Supreme Court ruling, it just struck me as being incredibly counterintuitive, and when we think about the type of enemy that we are facing today, a new type of enemy, one that hides in the shadows, one that preys on the innocent, one that wants to kill us, and it has been—they have been categorized as—how we need to be civilized, these people do not meet the basic standards of civilized human beings. I think it is very difficult for us as Americans to even get our mind around the concept of a suicide bomber teaching a young person to be a suicide bomber and what that means. I mean, I don't consider that to be civilized behavior.

And as we have talked today about what the Supreme Court ruling actually says, that we need to have congressional participation in this, perhaps this could be very easily handled. As you mentioned, it could be easy. Could it be as easy as what Mr. Dell'Orto—I hope I am pronouncing your name correctly—has suggested, that we actually just ratify what the executive branch and the DOD has done and move on? That is my question.

Mr. DELL'ORTO. Ma'am, I believe that that is—that would be a very desirable way to proceed.

Admiral HUTSON. You might not be surprised to hear that I disagree with respect to Mr. Dell'Orto. I think that—and I don't disagree with your characterization at all. It goes back to what Congressman Hefley pointed out, though I think—which is that we have got the war on terror, and then on the other hand we are talking about prosecuting people. And what some of my colleagues here at the table have said—and to some extent, the way you phrase the question flies in the face of what Mr. Dell'Orto said earlier about presumption of innocence, you know. He said—we need to ensure that there is a presumption of innocence if we are going to prosecute people. Remember, I am saying that we don't have to prosecute them, but if we decide that we are going to prosecute them, then we have to afford them those rights, which include not presuming that they are cutting everybody's heads off and they are suicide bombers, but that we just buy into this presumption of innocence deal, and if we can do that, then we can create a system in which we will really be able to prosecute. But I think that if the opinion—and particularly Justice Kennedy's discussion of the present or the pre-Hamdan commissions makes it pretty clear that there are some legal difficulties with it that would make simply this body simply endorsing what had been done before, although you would fix the regularly constituted part of it, I think you are going to run headlong into the indispensable guarantees part of what the Court said.

Mr. OLSON. I think it is a very, very good question. It is a very, very sound basis upon which to resolve this problem. Either, as Mr. Dell'Orto said, you start with a massive gutting of the Uniform Code of Military Justice, which was not created for this type of situation at all, it was created for our servicemen and women and has all sorts of rights in there. It does have the equivalent of Miranda rights in it, or the right to be cautioned that statements may be—either you start with something that is utterly unworkable and inappropriate and not designed for this process, or you start with what the President carefully and thoughtfully put together that was designed with the experts in the Defense Department to deal with these circumstances, and then if there is something wrong with it, add something to it.

So that is—that I do think is the right way to go. It makes perfect sense. The only two things that the Supreme Court found that specifically talked about—anyway, that was wrong with the procedures was a quibble with respect to the standard for the admissibility of evidence. My own personal opinion is that what the President had outlined in the commissions made perfect sense, given battlefield conditions and the difficulty of obtaining evidence and that sort of thing, and the right to the accused—right of the accused to see sensitive national security classified information, that would be insane, in my judgment, to give to terrorists.

So that the two things the Supreme Court found wrong that I was able to read in the opinion anyway are things that I think you would agree the President got it right. But if there are some things wrong with it, then that is the platform, that is the basis upon which to start.

Mrs. MILLER OF MICHIGAN. Thank you very much.

The CHAIRMAN. Okay. I thank the gentlelady.

The gentlelady from California, who has spent a lot of time on this issue, Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman, and thank you, gentlemen, for being before us today.

I have—I did begin to work on this several years ago after I went to GTMO and took a look at what was going on, and actually I have taken a lot of time to talk to the prosecutors who have been at GTMO and have been working through this, and, of course, I have some legislation issue.

As you will know, I introduced in 2004 and again in 2005 and brought it up in our authorizing meeting, and at that meeting I said, you know, after June in the Hamdan case we are going to be visiting this. So here we are.

I think that Justice Kennedy and Justice Breyer got it right when they said nothing prevents the President from coming back to Congress to obtain legal authority for military commissions to proceed. And having looked at the Federal courts and looked the courts-martial and the UCMJ, I do think this is the place to put it in to constitute a commission in which to do this.

My questions have to do directly with some of the—two of the areas, the area of evidence and the area, if we get to it—and I guess we are going to have a second round, maybe I will get to the other later, but here are some of the questions I have. I am going

to read a couple of them and then have—you will know who gets to answer to these.

In the oral argument before the Supreme Court, Mr. Hamdan's defense counsel argued that military commissions weren't necessary because he said that his—that Hamdan could be tried by regular courts-martial. Mr. Dell'Orto and Mr. Bradbury, if you are correct in your assertion that routine evidence rules would make it impossible to prosecute most al Qaeda cases in regular courts-martial, and I believe you are correct in that, wouldn't you expect that Mr. Hamdan's first motion in a court-martial would be to suppress most of the government's evidence? And wouldn't such a motion be made by any competent defense counsel, and wouldn't it likely succeed in gutting the government's case?

It seems to me that this would be the practical effect of sending these types of cases to court-martial. Would you agree and maybe expand a little on that? And let me give the other question that I have, and then maybe you can all answer to this.

Again, the rules of evidence, all of you, including Admiral Hutson, accept the view that different rules of evidence are required for war crimes cases. The usual reasons cited for this are the deviation from gathering, etc. The evidence in war crime trials would likely include hearsay, evidence without a clear chain of custody, and interrogation products obtained without Miranda warnings and other safeguards against coercion. And in this I would say to my colleague Dr. Snyder, red herring might be when we talk about Miranda rights on the battlefield, but when you look at Miranda being required to be used during all the years of interrogation of a suspect, I think then it is not really a red herring, and certainly hearsay is not.

So a single rule of evidence in military commission order number one is that evidence shall be admitted if the evidence has probative value to a reasonable person. This standard is very similar to the role of admissibility used by the International Criminal Tribunal used by the former Yugoslavia which states that a chamber may admit any relevant evidence which it deems to have probative value. And, of course, the International Criminal Tribunal for Rwanda uses the nearly identical standard as well.

In view of the similarity of these standards, there seems to be an international consensus that war crime trials require broader and different approaches to admissibility of evidence. So the questions would be, what additional rules regarding admissibility or exclusion of evidence are essential to ensure reliable verdicts in military commission cases? And if it is commonly accepted that coerced admissions are not reliable and therefore lack probative value, do you believe that this standard, probative value to a reasonable person, is sufficient to exclude evidence derived from coercive interrogations? And how would you fashion a rule of exclusion that prohibits admission of statements obtained through coercive interrogations?

Mr. DELL'ORTO. You probably haven't given me enough time to think about the approach I would take as a defense counsel to the Hamdan. But certainly I would—I would challenge the admissibility of any statement he has made.

For one of my first challenges, one of my first motions would have been to dismiss on the motion of a lack of a speedy trial. Hamdan has been in our custody for three years, four years, whatever it has been at this point. The military—the rules for court-martial require that he be brought to trial within 120 days, if I recall correctly—again, I am going back some period of time—of the time that he was put in custody, and so that is one of my very early motions I would make to get my client out of jail.

So I see great problems. And again, if I were quicker on the draw, I could probably give you four, five, six, or seven, eight or nine other motions I would be dropping very quickly in that case based upon rules of evidence, rules of courts-martial.

Let me ask some of the others to answer some of the other questions, and I will get back to you to follow on, and to be quite honest, I had an answer to the third part of your answer, but I can't recall right now.

[The information referred to can be found in the Appendix beginning on page 115.]

Ms. SANCHEZ. Thank you.

Mr. BRADBURY. Congresswoman, I would say I would agree with your description of what a defense counsel would do in Hamdan's case or another one of these cases if brought in the construct of the UCMJ. I mean, absolutely that is what I think would happen. All those motions would be interposed, and chain of custody of evidence, and all of those issues that would impede a trial under the UCMJ framework would have to be addressed, and it would be very difficult to go forward under those conditions.

I wouldn't say that the standard needs to be that none of these—that prosecutions would be impossible. I think the standard is that it is as a general matter a judgment. In this case it would be a judgment by Congress working with the Administration and framing legislation, a judgment that the use of those procedures is impracticable as a general matter in these kinds of cases.

As to the coercive statements point, first of all, as the rules of the military commission process currently in place make clear, and as our treaty obligations suggest, we do not use as evidence in military commissions evidence that is determined to have been obtained through torture. That is simply not admissible if it has been obtained through torture. And that is consistent with our treaty obligation. It is a worldwide policy for the United States, and it is reflected in the rules currently for the military commissions.

But when you talk about coercion and statements obtained through coercive questioning, there is obviously a spectrum or gradation of what some might consider pressuring or coercion short of torture. And I don't think you can make an absolute rule. Again, I think it needs to be a judgment that is made by the fact-finder, and the way that that is addressed in the Detainee Treatment Act, which addressed judicial review of the combatant status review tribunals, those tribunals that judge that the detainee is an enemy combatant at the outset of the process, the way Congress dealt with that was to say that the commission is to weigh the probative value of that evidence, basically to weigh the probative value against the undue prejudice that might occur to the process from

the use of evidence that may have been obtained through coercion. It didn't create an absolute exclusionary rule.

I think an approach like that is certainly more appropriate because arguments will always be made—when you don't have something like Miranda rights, arguments will always be made that, oh, the questioning was coercive, even when we can agree it doesn't amount to torture, it doesn't—it doesn't violate some fundamental standard of conduct that might apply. So you need—again, it is an area where some flexibility is needed.

Ms. SANCHEZ. It sounds to me like you are saying that the minimum value would be the probative value to a reasonable person, which is what we see reflected in the standards, quite frankly, of the other tribunals that we see around the world with respect to war crimes.

Mr. BRADBURY. Yes. I think that is right.

Ms. SANCHEZ. And I think it is very important for us to understand because someday we will catch Osama bin Laden, and then we have to decide how we are going to try him. And this is why these hearings and what we do becomes so important.

Anybody else?

Admiral HUTSON. Yeah. If I may, I would draw a bright, clear line with coercive evidence for all the reasons that we draw that bright clear line having to do with the probative value of it, but also having to do with inhibiting interrogators or police, civilian context, from engaging in that kind of activity. I think that that is an important thing, and I also think that it is important for the reputation of the United States internationally.

As I am sure you know, there is a raging debate with regard to the impact of non-U.S. law on the United States. I kind of fall in the middle of that. I guess what they are doing in international tribunals is interesting to me, but certainly not determinative. I would add to the probative value, it has to—you know, it has to have that at least, but I would add apparent authenticity and validity. There has got to be some standard by which the evidence is judged and admitted. We can't just throw everything in there and then let the finder of fact sort through it. That is the reason you have a judge, which is one of the reasons that using a court-martial kind of system with modifications has value, I think.

The CHAIRMAN. The gentlelady could reserve. We will have the responses to the last—her last question here in the second round if we could, and let's go to the gentleman from Texas, Mr. Conaway.

Mr. CONAWAY. Thank you, Mr. Chairman.

Mr. Dell'Orto or Mr. Bradbury, could you describe for us what the President's plan is that you simply want us to put into law? And also, what is the legal phrase for applying—creating a crime, and then say you were committed before the law was put in place. There is a legal phrase that I have lost.

Mr. BRADBURY. Ex post facto.

Mr. CONAWAY. There you go. Would these changes—ex post facto apply to the detainees in Guantanamo if we do, in fact, make these changes in the law?

Mr. BRADBURY. If I could say yes, they would apply, and that would not be an ex post facto, because ex post facto concepts go to

the substance of the law, not by the procedures by which you are tried. So it would not be—if you are creating a brand-new crime and saying now people are subject to a brand-new crime, you can't apply that ex post facto to a U.S. citizen under our Constitution.

But here we are not talking about creating the substance or elements of crimes. We are talking about the procedures that would go into the bodies that would try those persons for those crimes, which are war crimes, crimes under laws of war.

Mr. CONAWAY. Okay. Would one of you describe the President's current plan?

Mr. BRADBURY. Well, I think the plan is to work with Congress.

Mr. CONAWAY. No. Oh, no, I am sorry. The tribunal that was struck down that you are saying we need to codify, would you describe for us what that tribunal currently looks like had it not been stuck down?

Mr. DELL'ORTO. The current tribunal that has been struck down? Again, it has many of the fundamental—it would be very recognizable to most people in terms of many of the things that are already incorporated. You know, we have a presiding official who is a military trial judge, an experienced trial judge, the same judge who would be trying cases in our courts-martial process.

We have the rule of evidence that we have already described, which is a very—which is a more general rule than we are used to in our civilian practice that is—admits a broader swath of evidence.

We have appellate review in the review panel that has—of decisions that come out of the tribunal that includes four very distinguished individuals, Judge Griffin Bell, former Attorney General of the United States. We have Secretary—former Secretary of Transportation William Coleman. We have Judge Biester, who is a trial judge in Pennsylvania, and we have Chief Justice Frank Williams, who is the Chief Justice of the Rhode Island—Rhode Island Supreme Court as the four members who constitute the review panel of the appellate court, if you will, of the results of these trials.

We have provisions for interpreters. We have provisions for ensuring that the accused is presented the charges which he will be facing well in advance of trial.

We have provisions of assignment of military counsel, the same counsel—the same type of counsel who would defend our soldiers, sailors, airmen and marines and coastguardsmen, and they are courts-martialed, and they are defined as military defense counsel for the accused detainees. The accused detainee has the right to obtain a civilian counsel, assuming that civilian counsel meets certain qualifications that are set out in the rules. We have a requirement that for any charge for him to be convicted. Two-thirds of the members who sit on the court panel, which includes the presiding officer and up to, I guess, six other members who would be military officers just as we have in our court-martial process, would be the ones who would adjudicate guilt or innocence, and a judge's sentence ought to be reviewed by the review panel—the appointing authority of the review panel when all of that is done.

I don't know if that gives you a sense of sort of the basic framework. I could go on with much more detail if we had more time, Congressman.

Mr. BRADBURY. I would say, Congressman, that fundamentally these are procedures that are built on past military commissions that have historically and traditionally been used by the United States during times of armed conflict. And the use of military commissions and procedures like that go all the way back to George Washington when he was general during the Revolutionary War, and it has been a tradition through armed conflicts in our Nation's history of using traditions like this, although these commissions add additional procedural protections that have not been in past commissions.

Mr. CONAWAY. Okay.

Mr. DELL'ORTO. And I would also add, Congressman, since I was there at the start and took part in much of the drafting process, that we looked at the Manual for Courts-Martial as we were putting this together to borrow from it many of those things that are—that are sort of at the foundation of the UCMJ and the Manual for Courts-Martial.

Mr. CONAWAY. Thank you, sir. Appreciate it, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

And the gentlelady from California, Mrs. Tauscher, is recognized.

Ms. TAUSCHER. Thank you, Mr. Chairman. Thank you for being here.

I think we all can stipulate that we are with Common Article 3 interested in dealing with the potential of finding Osama bin Laden and being able to bring him to trial in a trial that we all understand is one of transparency, and where evidence potentially is gathered, and where we can find an adjudication process where the world sees Osama bin Laden put to trial in a fair way and a timely way, where he is potentially found guilty, and then he has a sentence that is commensurate with his heinous crimes. And I think that is the place we all have to start from.

As my great colleague from California, Ms. Sanchez, has said, we have to kind of look to the future as we look into the past as we try to preserve all the great things that we have. And I am personally for looking at the reforming of the UCMJ and making sure, as Admiral Hutson has suggested, that we have things that have worked and build on them and move forward.

I think one of everyone's concerns is this issue of—that we are hearing bantered around in the press that potentially classified information would have to be made available, as both Mr. Dell'Orto and Mr. Bradbury have suggested, to defendants, and that, of course, would create a national security crisis for us. But I think we—the analysis that I have been shown is that both the Classified Information Procedures Act, CIPA, and the military rules for evidence for courts-martial, which is modeled after CIPA, protect the disclosure of any classified information whose disclosure would be detrimental to national security. Apparently this would apply in anything that we do going forward that would include reform of the UCMJ for potential military commissions. Do you all agree?

Mr. DELL'ORTO. Congresswoman, let me make two brief comments on that. One generally. When we try these defendants in these commissions at some point relatively soon, we must be mindful of the fact that we are trying them while the conflict continues. It is not as though we were conducting these trials at the end of

World War II where much information that might have been highly sensitive, highly classified, that we certainly did not want to reveal to the enemy, would not be as critical a piece of information. Today if we are in the classified arena with some of this information, whether it is information collected through national technical means or sensitive sources and—sources that we have on the ground in other countries, that is—those are key ways that we are getting information about this particular enemy.

Ms. TAUSCHER. But that is the challenge of the asymmetry of this fight.

Mr. DELL'ORTO. Exactly. And we can't let him use our process, our due process, our legal system as one of his other weapons as he carries on this fight.

Another factor to consider with respect to the military rule of evidence, I think it is 505, as Admiral Hutson indicated.

Ms. TAUSCHER. That is right.

Mr. DELL'ORTO. With respect to handling classified information, normally when we are trying somebody in or a soldier in our courts, we are trying him for something he has done with evidence that he has already had access to. He has mishandled that information. He has given it over to the enemy. He has been derelict in the way he handles it, and so he has already seen that evidence. We are not presenting to him anything that he hasn't already seen. And so the concern there is not that the accused doesn't see it, because he already has seen it, but that the world doesn't see it.

The third point I would make, and I am sad to have to say this, our track record in military courts-martial, in trying cases in which there is classified information, is not particularly good. We have had success in some cases, but I will tell you both at the trial level and at the appellate level, if you look back through the case histories, the histories of those cases, we have on balance done a much more poor job of prosecuting people than we would—than we have as a general proposition in cases that don't involve classified information.

Ms. TAUSCHER. I think this is really an area of jurisdiction where we have to be enormously creative at the same time that we have to deal with the rule of law and the law of war. And this military rule of evidence 505, as you suggest, is one of those sticky wicket places where I think we are going to have to have counsel from various venues, Admiral Hutson. I hope you will help us with this, too, Mr. Olson.

But for the record if you would each get back to the committee and me specifically as to your suggestions on how we deal with this issue, because obviously this is a baby in the bath water issue. We don't want to have to divulge sources and methods, other operations that are going on, people in theater, identities of people at the same time that we are trying to adjudicate in a swift and in a fair way these potential captives.

So I really want to yield right now because I know we have other people, but I think this is a very important issue. If anybody ever—if anybody else has a quick comment, I am happy to accept it.

[The information referred to can be found in the Appendix beginning on page 119.]

Admiral HUTSON. If I may, let me just say that I think it is very, very difficult for the United States of America to say to anybody, we know you are guilty, we can't tell you why, but there is somebody that says you are guilty; we can't tell you who, but we know they are reliable; we can't tell you how we know that, but you are guilty.

The CHAIRMAN. Thank the gentlelady. The gentleman from Connecticut, Mr. Simmons.

Mr. SIMMONS. Thank you, Mr. Chairman, for this hearing, which I consider to be historic; times of stress or times when our values really need to be preserved and protected. And I remember after the Boston Massacre in 1770 in Boston, Massachusetts, John Adams defended the British Redcoats. It was an unpopular decision for him to make, but that is what he did. And during World War II, 1942, April, May of 1942, when Hitler sent eight saboteurs to Florida and Long Island, Kenneth Royal, an Army colonel, took the very unpopular position of defending those saboteurs, six of the eight of whom were electrocuted here in Washington, D.C. So I commend the Chairman and the Ranking Member and the members of the committee as well as the panel for taking on this difficult issue.

I served for over 37 years in the U.S. Army. I consider the UCMJ as something that was created for us as military personnel, and I can't see clearly the application to enemy combatants or terrorists, as one of my colleagues said. These are folks that do not respect the rules of law. They take hostages, they kill noncombatants and innocent civilians, they cut people's heads off, et cetera, et cetera.

So I guess my question goes to the issue of what kind of model is going to work best. A colleague of mine who is a Coast Guard attorney has written an op-ed calling for a national security courts system, which take a little bit from the UCMJ and a little bit from military tribunals, and what he refers to is a new kind of law for a new kind of war. A new kind of law for a new kind of war. We have our traditional criminal courts. We have our tribunals and commissions. We have our UCMJ. But it occurs to me that we are in a new kind of war. We are trying to maintain our respect for our values in dealing with people involved in this new kind of war, and perhaps it is incumbent upon the Justice Department, Defense Department, and this Congress to shape an altogether different model for differing justice in this framework, and I would be interested in your comments. But before I hear the comments, I would like to ask the Chairman if we could insert this op-ed piece into the record.

The CHAIRMAN. Without objection, we will put it in.

[The information referred to can be found in the Appendix on page 101.]

Mr. SIMMONS. Gentlemen, a new kind of law for a new kind of war?

Admiral HUTSON. Mr. Simmons, I am generally familiar with that kind of concept, and I find it very intriguing. I am not sure it is the most efficient way to do it. And I take your point about the UCMJ.

The UCMJ, as it is presently constituted, is clearly there to protect the rights of U.S. servicemembers and to efficiently prosecute

them when they need to be prosecuted, and has done that very well over the years. What I am suggesting is that you could build on top of that an enduring, regularly constituted court to do the same kind of thing that that proposal would do. I think that, you know, certifies the sort of court—is certainly possible to create a court that is regularly constituted because this is the body that authorizes it, and that it protects the fundamental, you know—the words out of Article—Common Article 3 that we have been talking about, considered—the judicial guarantees considered to be indispensable by civilized peoples. A court, some other kind of court, could do that, absolutely, sir.

Mr. SIMMONS. And you reference the FISA Court that was created in the 1970's to deal with a specific problem.

Admiral HUTSON. Right.

Mr. BRADBURY. Congressman, I will jump in and say I agree with you completely. It is a new kind of war, and it does require a new kind of rules. That is what the President was trying to do, I think, and the Secretary of Defense with the existing military commission structure, and now what this Congress needs to focus on, I think a military commission-type approach is the right way to go.

I think that rules that will need to be focused on, obviously, like use of classified information, I don't believe that using the Classified Information Procedures Act or CIPA is the right way to go. That is designed for criminal trials of U.S. citizens in U.S. Article 3 courts and the use of classified information in that context, and it really impedes the government's ability to go forward with prosecutions, which in these circumstances ought to be allowed to go forward under different rules, and we can work on what those rules ought to be.

The final thing I would say in terms of setting new rules for this war on terror is that we really think Congress needs to do something to bring certainty and clarity to the application of Common Article 3 and some of the vague phrases in Common Article 3 that I referenced in my testimony, because an important part of what needs to be done to bring sureness and certainty to those folks on the front line who are handling detainees—because again, the concepts in Common Article 3 have never been applied previously to an international conflict with a terrorist organization like al Qaeda, and we need to set those rules going forward for the United States, and we think they should be defined by U.S. law.

Mr. SIMMONS. I thank the Chairman, and I thank the panel.

The CHAIRMAN. Thank the gentleman.

The gentleman from New Jersey, Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman.

In listening to the testimony and reading it this morning, it appears to me that we have two points of consensus and two very practical dilemmas. First, I think there is a consensus that none of us wants to treat Osama bin Laden's bodyguard the way we would an American citizen accused of car theft. There is just no sense that the normal rules ought to apply.

And then second, I don't think anyone is saying that we should run an arbitrary process that does not command respect around the world as being transparent and fair. I think we are all saying essentially the same thing. The practical considerations I would

like to focus on go to the discovery problem and the Miranda warning problem.

Mr. Bradbury, I want to ask you a question about the discovery problem. Let us assume that we have a person who is not a U.S. citizen who is accused of participating with al Qaeda, and among the pieces of evidence against that person is testimony from a peer that this person has been engaged in terrorist activity. Also on the record is the fact that the accuser of the person has some normal garden variety grounds to be biased and prejudiced against that person. Let's say there has been a romantic entanglement involving three people or a dispute over a commercial dispute; someone has a motive to tell a lie about the person. Should that fact be discoverable by the defense in the military commissions that we are talking about?

Mr. BRADBURY. Well, in your question, Congressman, is the other person who has given the evidence an intelligence source for the United States who needs protection? Because that raises yet another set of issues. But assuming that is not the case, then the identity of that person would be made known to the detainee defendant and his counsel, and the statement that may have been taken from that person—the person let's assume is not available to appear at the military commission trial, so you are going to need to use some kind of hearsay statement, some kind of sworn statement or other statement that can be verified, and the fact-finder determines it is probative, it is reliable to rely on it, then I think in that hypothetical that the detainee defendant would—if he knows who that person is, would be able to raise issues about the bias of that person or the accuracy or correctness of the statements—of the statements made.

If that person is an intelligence source for the United States, then that raises additional issues that would need to be dealt with, because information about an intelligence source cannot—we cannot allow that to get out to other terrorists who wouldn't take very long to dispatch that.

Mr. ANDREWS. What if it is the first assumption, and the accuser is not an intelligence source, but the accuser's identity was discovered by an intelligence source? So, in other words, in the fact-gathering process to make charges against the detainee, an intelligence source tells our intelligence agencies, you know, yeah, this guy over here has some interesting information about the detainee. What about that?

Mr. BRADBURY. Well, I think there would be a way consistent with fundamental fairness not to have to disclose to the detainee in these proceedings such that we might compromise our intelligence sources the providence of that—of that chain, in other words, how we came to that person, because that would in and of itself reveal a confidential intelligence source. But the tribunal may know that and judge that it is reliable.

Mr. ANDREWS. If that issue itself were litigated in discovery, it should be the tribunal who determines whether it is a discoverable fact or not?

Mr. BRADBURY. In the first instance, I think so, yes.

Mr. ANDREWS. And that would be an in camera proceeding?

Mr. BRADBURY. Well, in terms of the intelligence information that is at issue, if there is any, the classified information could be presented to the tribunal in an ex parte, in camera process that, in fact, is done, for example, with the International Criminal Tribunals for Rwanda and Yugoslavia where lots of times you have state secrets of the various nations involved or that may be very sensitive, and defendants may try to get discovery of that sensitive information, and in those tribunals it is available to go ex parte in camera to the tribunal to make a case for not presenting that information.

Mr. ANDREWS. Were the discovery results you just articulated included in the order that was invalidated by the Supreme Court?

Mr. DELL'ORTO. I believe they were, Congressman, to a large extent. I mean, the prosecution is obligated to provide to the defense all the evidence it is prepared to present as part of the trial, and to the extent you get into these collateral issues of the identity of the—of the intelligence source themselves that must be protected, I mean, that information I would think would be part of the file that would be—that is presented to the defense counsel.

Mr. ANDREWS. Admiral Hutson, I want to ask a question about Miranda warnings. Is it your understanding under the military justice code that a person who is suspected, once the suspicion is established, it triggers the right to be represented by counsel; is that your understanding?

Admiral HUTSON. Yes, sir.

Mr. ANDREWS. Do you think that right should extend to suspected detainees; they have a right to have counsel present with them during their interrogation?

Admiral HUTSON. I think that once you take them—you know, we keep talking about the battlefield, and the world is the battlefield in some respects, but once you take them from where they are and put them at Guantanamo, if you are interrogating them for purposes of prosecution, then I think you do. If you are interrogating them for intelligence purposes, and you may be able to draw a bright line between the two where the intelligence—the intelligence interrogators are not sharing information with the prosecution interrogators. So I see a difference in that regard.

Mr. ANDREWS. The bright line seems awfully difficult. If you ask the detainee whether he was part of conversations about a possible plot to blow up the Holland Tunnel, is that an interrogation for the purpose of prosecution, or is it an interrogation for the purpose of intelligence gathering?

Admiral HUTSON. Well, you ask them two different times. One time you ask them is the intelligence inquiry, and the other time is the prosecution inquiry.

Mr. ANDREWS. Who decides whether the lawyer should be present before the interrogation?

Admiral HUTSON. I think the rules decide that, the rules that you set up decide that.

Mr. BRADBURY. Congressman, if I may, I think this—just to illustrate this would be entirely unworkable. I think when we have detainees at GTMO or elsewhere in the war on terror, we need for intelligence purposes to be able to question them in an unfettered way, and when we have exhausted the intelligence we think we can

get, and we think we have got a case to make, we can then initiate a war crime prosecution, and at that point they can have counsel and they can have the availability of counsel, and we can move forward with a fair process. But we cannot intermix the two and try to draw that line because it is just going to impede our ability to protect the country through vital intelligence gathering.

Mr. ANDREWS. Thank you. I see my time has expired. I appreciate it.

The CHAIRMAN. I thank the gentleman.

Another gentleman from New Jersey, Mr. Saxton.

Mr. SAXTON. Thank you, Mr. Chairman, and I think it is great that we are holding this hearing today. It is very important set of subjects, I guess you would call it.

I would like to ask a little bit different question, if I may. Based on my observations, the necessity for collecting information in prosecuting this war is historically different than it has ever been before. During the process of carrying out our oversight responsibilities, it seems to me there are certain conclusions one can come to in a practical sense, and one of those conclusions is that detainees provide a constant flow of information that is necessary for us to conduct successful operations.

They are not the only source, but they are one of the sources and an important source. It has been suggested here today by Mr. Hutson, and I respect his opinion, that the UCMJ has been used as kind of a model for prosecutorial proceedings. Given the need, that we all know about, to collect information on this enemy, what effect would the adoption of a process such as that suggested by Mr. Hutson have on our ability to collect information?

Admiral HUTSON. Sir, I don't think it would have a significant effect one way or the other. You can prosecute them first, and interrogate them, get the intelligence information after you have convicted them if they are convicted. You can get the intelligence information and then prosecute them.

We run again, and your question points up the point that Congressman Hefley made earlier about conducting the war and at the same time that you are conducting the war, you are prosecuting in a judicial sense the people that you have taken off the battlefield, and that creates its own difficulties.

But I think that we run into serious problems when we try to combine the two, the warfighting on one hand and the prosecution on the other. If we want not to prosecute them, that's fine. But if you are going to prosecute them, I think that you need to do it in accordance with the generally accepted rules.

Mr. BRADBURY. Congressman, I think, again, with respect that points out the complete unworkability of applying in whole cloth the UCMJ procedures to military commissions. If the proposition is we have to try them and convict them and get them in prison as a convicted war criminal first before we interrogate them to get vital intelligence then we put Americans at risk and our soldiers at risk because we are not getting intelligence that we may need and we may need it right now. That has to come first.

Whatever the procedures that are in place and the lines that are drawn, they can't impede that vital necessity. And so I think a lot of the other specifics we have talked about here today help estab-

lish and clarify why the various procedures need to be flexible in certain respects to make this all work.

Mr. DELL'ORTO. Congressman, let me get back to the premise of your question because I think it is important. What is different about today than other combat we have engaged in in the past? Particularly going back to World War II and Korea, as a matter of general intelligence, you sort of know who the enemy is, who is arrayed on the other side of the line of battle. You know his order of battle. You know his division commanders, his battalion commanders. You probably know down to the company command level who these guys are.

And when you take captives during that process, you generally know that the private, the corporal or sergeant doesn't know much beyond what happened that day or what may be planned for tomorrow. If you get the general, you get the brigade commander who is a colonel, he is going to have more information. You are going to know to focus your information on him.

When we pick up these guys, and Hamdan is probably a classic example—if he goes by his military occupational specialty, he is a driver. And what does that mean? He technically probably wouldn't know much and probably wouldn't be doing much as part of the battle, if you will, or the war, and yet it turns out he happens to be the driver for bin Laden. He happens to be a guy who moves weapons. He happens to be a guy who I think runs money as well. He does many, many things.

You cannot conduct this fight without doing interrogations of these folks, but you can't separate the nonactors from the actors in this. You have got to be able to talk to all of them, and you have got to do it, as Mr. Bradbury says, right now because that little gem of intelligence that guy may have about a cell phone number, about a safe house location, may lead you to a very, very significant find or very, very significant target.

And so we have from the earliest days said our goal is to get intelligence from these folks. If we can prosecute them down the road and they have committed sufficiently serious acts to warrant prosecution, we will do that. But we are going to have to do everything we can to grab intelligence from them because this is a different type of war and the intelligence gathering is absolutely critical.

Mr. SAXTON. Mr. Chairman, if I could just suggest one of the things that we might want to do as a committee before we make any decisions on how to proceed is to have a session similar to this in a closed session. I think if some of the members who maybe haven't had the opportunities that I have to view and understand, and maybe a lot of our members have, but for those who haven't had an opportunity to really sit down and look in detail at individual cases, this becomes an even more important subject to the national security of this country. And so if I may just make that suggestion.

The CHAIRMAN. Let me say to my colleague from New Jersey, I think that is a great recommendation and let's do it.

Let me, if I could, just impose on my colleagues with the last question you asked because I think it is not entirely clear to me. Is the panel saying that if this person that you pick up in combat operations, in being interrogated says, yes, I'm a bomb maker, and

I made the bomb that blew up the such and such, and you extract that information pursuant to your battlefield interrogation or shortly thereafter, that under the UCMJ that would not be admissible in a later prosecution?

Mr. DELL'ORTO. Mr. Chairman, my argument as a defense counsel would be the following: When you picked him up, you, the soldier, the specialist, the corporal, the sergeant grabbed him by the scruff of the collar and took him into captivity, you had an idea who this guy was. You knew he was a bad guy; you knew he was an unlawful combatant. You knew based upon the intelligence going in you were likely to find somebody of this character. And he told you he was a bomb maker.

Now you asked him about that; you asked him who he was. You asked him what his job was. I would argue that you as a soldier because you are subject to the code were obligated upon suspicion this guy was an unlawful combatant generally, regardless of what that might be, that you are obligated to advise him under his rights under article 31 of the Uniform Code of Military Justice.

The CHAIRMAN. Because he at that point has become the focus of suspicion of criminal activity.

Mr. DELL'ORTO. Again, if you want to carry this to the extreme, as I would as a defense counsel, I would argue any one of these guys because they are all unlawful combatants. We have yet to find on the battlefield in Afghanistan a lawful combatant. They are in theory all guilty of unlawful belligerency which would trigger the obligation to advise them of their rights, in my opinion.

The CHAIRMAN. I think Mr. Hutson may have a comment.

Admiral HUTSON. Thank you, sir.

The CHAIRMAN. Let me just ask, and I want you to go first, is it the position of any of you that that should—that should a person give an admission like that, I'm a bomb maker, upon a battlefield interrogation, if you will, that that should not be admissible in a later prosecution.

Go ahead, Mr. Hutson.

Admiral HUTSON. Thank you. If you were to superimpose UCMJ in total precisely as it is right now, that would be the unfortunate result. What I am suggesting though is that you modify it in such a way so that that would not be the result because I don't think any of us would find that to be acceptable.

The CHAIRMAN. Okay. So nobody recommends that.

The gentleman from New York, Mr. Israel.

Mr. ISRAEL. Thank you, Mr. Chairman.

Mr. Chairman, much to my mother's shame I never went to law school. I am not an attorney, which puts me at a decided disadvantage from a legal perspective, but it also gives me, I think, the advantage sometimes relying on common sense to sift through some of these complicated issues.

While I am not a lawyer, I am a student of history, and one of the things that concerns me in this debate is repeated references to the fact that we need to understand that there are enemies that we have and adversaries and threats to the security of the state and threats to our national security interests. We all understand that, and all of us on this committee are strongly supportive of an aggressive military response to those enemies, but the fact of the

matter is that every single repeal or diminishing of essential legal and human civil rights in history has always been based on the argument that there are enemies of the state.

The whole experience of national socialists was to build new courts, peoples' courts, special courts, military courts based on the argument that there are enemies of the state, there are enemies within, and we have to protect ourselves from those enemies.

I am not arguing that our legal process echoes their legal process, but we have in our own experience and in this very hearing alluded to legal decisions made in our government that protected the interests of the state against adversaries at the expense of basic rights.

Japanese Americans were interred and detained. General Grant expelled entire populations from Tennessee based on the concern of national security. Rights were impinged upon in the 1950's based on threats of Communism.

These decisions to reduce, repeal, diminish rights have never been made based in a vacuum. They have always been made based on the national security argument, which is why I think we have to be very careful in the rhetoric that we use.

One of the concerns that I have, Mr. Dell'Orto, which Mr. Snyder has already raised is the suggestion that is anyone in fact supporting Miranda rights after a Marine kicks in the door, as you said; whether anybody is suggesting that the legal process has to allow for fingerprinting and the traditional evidence gathering that we experience in our own civilian justice system.

So my question, Mr. Dell'Orto, is, who is making these proposals? Where have you heard any Member of Congress suggesting that we need to offer Miranda rights to someone after we kick in a door in Afghanistan or Iraq or elsewhere?

Mr. DELL'ORTO. Congressman, I am not suggesting that any Member of Congress has suggested that. What I am suggesting is that to the extent that some have said that the court martial process is, as currently configured, is the preferred method of dealing with the trials of unlawful combatants, that that is a model that we should follow without change I think is the problem that I suggest exists. So I am not attributing that to any individual. I will say no specific individual.

I have heard, and no member of this body that I have heard, but I have heard some say and I think it may have been—I forget which congressman earlier mentioned the argument that the defense counsel for Hamdan made at the Supreme Court, that the court martial system is the way to go, that he should be tried by a court martial. That is ludicrous.

Now here is the question. If we do agree that such things as Miranda rights, such things as very well-defined rules of evidence that require chain of custody, that require all these things that we know from our courts, from CSI Miami, from anything we read in the paper on any given day, if we think that there needs to be modification, then how do we get there.

Mr. ISRAEL. I am sorry, my time is expiring. That is the second question I wanted to raise. I have heard different panelists talk about modifications, but it seems that we are talking in opposite directions but kind of agreeing on the same thing. Mr. Bradbury

suggested that we not use the UCMJ in whole cloth, but that is not what Admiral Hutson is suggesting. In fact, his testimony said that specifically this is not to say, however, that the court martial system that is contained in the UCMJ and MCM couldn't or shouldn't be modified in some narrow and specific ways. What I am trying to figure out is, why are you both saying opposite things but agreeing on what has to be done at the end of the day?

Mr. BRADBURY. Let me say, Congressman, that that is where we are today. Because of the Supreme Court's decision in Hamdan, the military commission process is dead in the water. We cannot move forward according to the court's judgment unless the President uses the Uniform Code of Military Justice and the court martial process. That is what the court said.

So that is where we are. And the court said, because it read the statutes of the Uniform Code to require uniformity, the President has to justify any variation and the court wasn't convinced with the justification the President offered. So where we are today is we are stuck using the Uniform Code unless we can justify variations or unless this Congress sets out rules and procedures that allow us to vary from it.

There may be agreement, and it sounds like there may be on some fundamental points so we can move forward very quickly with legislation which is terrific, but as of right now, the court has said the President has to use the Uniform Code of Military Justice. That is why we are using that as the thing we need to talk about, because we need to justify those variations.

Mr. DELL'ORTO. My point is, do we take away provision after provision from the Uniform Code of Military Justice and the Manual of Courts Martial to get to that medium, wherever it is? Or do we take the existing process the President has already proposed and say either the way it is right now or with minor tweaking there you can get to that result faster and easier. And that is all I am saying.

I do have a concern though if we start from the former, that is dismantling the UCMJ or revising it, we will then be disrupting that particular process, which again has a very, very important history, a very important function with respect to our own service members, and I would hate for us to build a body of law based upon the UCMJ that then starts to cause difficulties in the application of that system with respect to our own service members.

The CHAIRMAN. Thank the gentleman. The gentleman from Michigan, Dr. Schwarz.

Dr. SCHWARZ. Just as an aside, I was raised on Fort Custer, Michigan, Mr. Dell'Orto, during World War II, where 6,000 German prisoners, mostly Afrika Korps, were housed, and had very close contact with them because my father, a lieutenant colonel in the Army Medical Corps was fluent in German and was called frequently to deal with medical problems that they might have, and then in another life, one of my jobs among many jobs in my second tour of duty in Vietnam was to take prisoners that were held by the South Vietnamese, North Vietnamese, Viet Cong, get them out of the hell hole prisons that the South Vietnamese had into American custody where they were treated exceptionally and sometimes,

if they were of no value to us, simply released, as we have done with, I believe, 250 of the detainees in Guantanamo.

That said, I can't ask a question of high nuance about the law; I am not an attorney. Very simply, to get to the lowest common denominator of this hearing this morning, my belief is that this learned panel of attorneys would say that it is the job of the Congress as the result of the Hamdan decision to pass legislation which sets up a body or bodies to deal with the non-national actor detainees that the United States might take in any conflict that we find ourselves now or the future in the Global War on Terror. Is that an appropriate and correct premise?

Admiral HUTSON. Absolutely, yes, sir.

Dr. SCHWARZ. That is what the Congress should do. That is the Congress's job. That is what the court is telling us very clearly in Hamdan.

Admiral HUTSON. I think the court is saying that this for too long has been a discussion between the executive and the judiciary, and it needs to have Congress right smack in the middle of it.

Dr. SCHWARZ. Thank you very much because that is what I get out of it as well, and I think it is very simple. That is the lowest common denominator. That is where the rubber meets the road. That is what we should do. And I have no further questions. I would just say to Mr. Bradbury, Go Blue, and to Admiral Hutson, Go Green. Michigan and Michigan State.

Thank you, Mr. Chairman. I yield back.

Mr. BRADLEY [presiding]. Mr. Larsen is next.

Mr. LARSEN. Mr. Chairman, because I think the committee would benefit from someone known as Judge rather than Rick, I would like to yield my time to Mr. Butterfield of North Carolina.

Mr. BUTTERFIELD. Thank the gentleman for yielding and thank the four of you for your testimony today. This is certainly an important case, and it is one that we need to resolve very quickly. I have taken the time to read the Hamdan decision. It is 73 pages long. I have read it multiple times. We were out last week, and I had some free time. And I took my time and read the decision and the dissenting and concurring opinions.

Even though, at first blush, the opinion may appear to be very complicated, when you filter through all of the discussion, it is really a very simple case, and so I agree with Admiral Hutson that this should be easy. The whole world is watching us.

I was in Europe last week with 200 or 300 parliamentarians from the European Union, and I can assure you, they have great interest in this case, and they are watching very closely to see if we administer justice fairly to these individuals who have been detained.

You know, the Uniform Code of Military Justice is a very comprehensive piece of rules. I think it is something that we can certainly use, probably not completely, but we can certainly use the UCMJ as a template to begin developing the rules of procedure for these types of cases.

Let me start off by asking the representative from the Department of Justice, Mr. Bradbury, what is your definition of a regularly constituted court. There is a lot of discussion in the opinion about that. What do you consider to be regularly constituted?

Mr. BRADBURY. Well, I don't know that there is a settled international interpretation of that phrase. I think, in the court's opinions, there seem to be a coalescing of view that if it is set up by statute, it is regularly constituted. So I think it was our view that the recognition and preservation of jurisdiction for military commissions that already is in the Uniform Code and that we think was implicitly in the authorization for the use of military force made them regularly constituted. The court didn't see it that way, at least not in the form the President set it up. But I think anything this body sets up by statute or recognizes by statute here will be by definition regularly constituted for purposes of common article 3.

Mr. BUTTERFIELD. The Supreme Court also talked about the judicial guarantees that are recognized as indispensable by civilized peoples. Can you give me a brief interpretation of that?

Mr. BRADBURY. Well, it was not a majority of the court that addressed that issue, it was Justice Stephens in his—the portion of his opinion that was only a plurality for four justices. In that portion of his opinion, he went off and looked at other provisions of treaty law that have not been ratified by the United States to tried to pull out of those concepts of customary international law.

But Justice Kennedy did not see a need to join that part of the opinion. So I don't think we have an opinion from the court on what that phrase means.

Mr. BUTTERFIELD. What do you think it means?

Mr. BRADBURY. I will have confidence—it really I think just refers to procedures that ensure fundamental fairness measured against standards not of the U.S. article 3 courts in criminal prosecutions or even the UCMJ which is even more protective but looking at what nations around the world view as indispensable. I think there is a minimum common denominator. I have full confidence that any set of procedures that Congress adopts or ratifies by legislation will satisfy that standard. I will also say that I firmly believe that the procedures that have been used and set forth in the military commission process that the Secretary of Defense designed also satisfies that standard.

Mr. BUTTERFIELD. There was also some discussion in the opinion about the crime of conspiracy not being triable by a commission. What does that do to our military if we cannot in the future try conspirators in the commission?

Mr. BRADBURY. Again, Congressman, that also was a portion of Justice Stephens' opinion, which was only a plurality. Justice Kennedy did not join that part, that was part 5 of Justice Stephens' opinion. That was only a plurality of four in which he concluded that conspiracy was not a charge available under the laws of war. I think Justice Thomas did a very good job in his dissenting opinion in explaining why that is not the case; that in fact conspiracy is a recognized charge that can be brought under the laws of war, and of course, in this conflict, we are going to have a very difficult time convicting many of these folks of war crimes if we cannot convict them on the basis of conspiracy because this is an international conspiracy, al Qaeda, and many of them have joined that conspiracy and actively furthered it through overt acts that they

may not have—obviously, they weren't in the plane that flew into the World Trade Center on 9/11.

Mr. BUTTERFIELD. Looks like we have run out of time. Let me just conclude by asking you this: Do you contend that commission order number 1 is sufficient to comply with the Supreme Court holding if we were to approve that?

Mr. BRADBURY. We think if Congress in its judgment approved it, the Court would respect that, and it would be sufficient to comply. I am not suggesting Congress just rubber stamp. I think when you look at it and look at all these issues we have talked about, it is open to you to come to the conclusion that each of the procedures that the President and the Secretary of Defense settled on in military commission order number 1 satisfies the standards and that you are comfortable with that, and if you were to do that, I believe backed up by statute and Congress, that would be upheld by the court.

Mr. BUTTERFIELD. Thank you.

Mr. UDALL. Mr. Chairman, I have a unanimous consent request that I be allowed to include a statement in the record of this hearing.

[The prepared statement of Mr. Udall can be found in the Appendix on page 98.]

Mr. BRADLEY. Without objection.

Mr. UDALL. Thank you, Mr. Chairman.

Mr. BRADLEY. Since we are pushing up against a vote, I am going to yield my time and recognize, I believe, next Mr. Ryan.

Mr. RYAN. Thank you, Mr. Chairman. I want to thank the panel, too. I think this has been a really helpful discussion for us, and I know the work unfortunately or fortunately is just beginning here. So we are going to certainly rely on you in the future.

I think hearing the discussion today, Mr. Chairman, that we have a great opportunity here and as the Admiral has stated, an opportunity to highlight what is best about the United States and why we are different.

One of the questions I did have to the Admiral is, as we are talking about the intelligence-gathering proposition, the other panelists have said this somehow could be impeded by some of the changes. How do we ensure that we can protect these rights that civilized societies may agree upon but at the same time gather and get the information we need?

Admiral HUTSON. I think with careful draftsmanship you will be able to draw a distinction between the purposes and also, in answer to the earlier dialogue about the battlefield kinds of statements, permit them in. In my mind, there is a big difference between what goes on in the hootch, in the battlefield, and what goes on at Guantanamo.

Where you have taken them off the battlefield, you have got some time. They are no longer an immediate threat. All you are looking for is information. You are not protecting yourself personally or protecting your fellow soldiers.

You create a regime by which—because I agree, intelligence is important. Valuable, usable intelligence is important. You create a regime by which that is derived and then you deal with the military commission aspects.

Mr. RYAN. So you are not saying, as we pull someone off the battlefield in Afghanistan or in Iraq, that immediately we are going to have—they are going to have to have counsel?

Admiral HUTSON. No.

Mr. RYAN. You are saying that weeks, possibly months later, they get back to Guantanamo—do you gentlemen disagree with that? This is kind of where I am unclear of what, Mr. Bradbury, may be your position or the Administration's position would be. If we are not saying that that person needs legal counsel immediately, isn't that plenty of time to gather any immediate information, the cell phones, the locations, the safe houses, those kinds of things. Couldn't we get that information in the first couple of weeks?

Mr. BRADBURY. I don't think we should impose that kind of arbitrary limitation on our ability to get intelligence information. It is our view that you could transfer the person back to GTMO, continue to interrogate the person. You do not need to provide counsel if you haven't charged them; for military commission purposes, if you have charged them—and you shouldn't have to charge them with a crime within some artificially short period of time such as you do under speedy trial rules.

I think, under the existing UCMJ framework, as I think every one on the panel agreed, you would have to provide them with counsel at the first point where you suspect that they may have——

Mr. RYAN. We are not just going to take UCMJ and plop it in; we are going to modify it. I guess what I am saying is, how long? that is really the question here.

Mr. BRADBURY. It would be our view, again, that if you look to, for example, the kind of timing concepts that are used in the international criminal tribunals, criminal trials in those contexts are to be brought without undue delay, or phrases like that, which allow for flexibility. But I don't think you should say within two weeks, within two months, within a fixed number of days you have to charge the person with the criminal charges and provide counsel and then cut off intelligence gathering at that point. I don't think that makes sense.

Mr. RYAN. Isn't there a point where if we have someone for five years or two years, that we have gotten all we can get out of them?

Mr. BRADBURY. Well, sure. But keep in mind that these are combatants who, under the laws of war, we have every right to hold during the ongoing hostility so we may have them for a long period of time, and we have had the folks at GTMO for a considerable period of time. And if they have ongoing intelligence value, we should be able to take advantage of that. And if we have a case to be made that they have committed serious war crimes, we should be able to charge them and move forward with those prosecutions.

We should be able to try the 60, 80 or 100 people at GTMO who we believe should be charged with war crimes and tried. We should be able to try them under whatever rules Congress now sets up even though they have been held now for some years.

Mr. BRADLEY. Mr. Ryan, I am trying to get everybody to have their five minutes.

Mr. RYAN. Will we have another round?

Mr. BRADLEY. Hopefully not. We will have many more rounds, but I hope not today. I think we need to let the witnesses go on.

Mrs. Davis.

Ms. DAVIS OF CALIFORNIA. Thank you, Chairman, and thank you all for being here. I wonder if we can go back a bit. I think the role of Congress and oversight responsibility in the time of war and oversight over the law of war is very important, and obviously, the courts looked at that, and I wonder if you could comment some. Is it fair to say that we have lost a number of years, perhaps even five in total in trying to—well, during this kind of imbalance really, I think, between the executive, the judiciary and the legislative branches. I am interested really in knowing whether you feel there was a time at which Congress could have much more appropriately stepped in or obviously the executive branch could have come to the Congress? And how you see that role?

And I wonder, Admiral Hutson, if you could elaborate a bit on what you think the court gave the Congress as a charge in balancing executive power.

Admiral HUTSON. Thank you. I think the court put it squarely in your lap. It would have perhaps been helpful in hindsight and retrospect if Congress had acted more quickly in this area or if the executive had come to Congress and said, we need help, but that didn't happen. And to quote a popular phrase these days, we are where we are.

So the only thing we can do is move forward. I think Congress needs to move forward quickly but deliberately on this because it is an important issue. But I think it is completely now, constitutionally and by the Hamdan decision, in your ball park.

Ms. DAVIS OF CALIFORNIA. Anybody else want to comment on that specifically? No.

Mr. BRADBURY. I guess I would just say, when the Administration set up the military commission process back in 2001 it certainly intended to move forward with it quickly and hoped that that would be the case. And for a variety of reasons, it hasn't been, and court intervention has been part of that, and I agree, we are where we are.

Certainly, Congress does have authority to define and punish violations, crimes against the law of nations, and we are here to work with Congress now so that we can get this process moving forward again.

Ms. DAVIS OF CALIFORNIA. Given that we might tweak the military Commission Order Number 1 of the President or move to what would be a sizeable modification I think on the Uniform Code of Military Justice, what kind of other external controls do you think would be important? Is there something else that, from an appeals point of view, that the Congress ought to be looking at, whether I think suggestions that a tribunal would be subject to the supervisory authority of the Court of Appeals for the Armed Forces; is that an appropriate direction that the Congress should be taking to consider that?

Mr. BRADBURY. Well, I guess I would say, Congresswoman, that Congress in some sense has decided this issue in the Detainee Treatment Act where Congress set up a process for judicial review on appeal of military commission judgments. Final judgments of

conviction of military convictions can be appeal to the U.S. Court of Appeals for the D.C. Circuit and ultimately if necessary by certiori to the Supreme Court. One approach would be to keep that structure of appeal and judicial review in place. I think an important part of that would be, as Mr. Olson suggested, ensuring this time around through I guess it would have to be ironclad language in your statute that all the other collateral habeas litigation does not move forward. But this is the exclusive avenue for judicial review of the military commission process.

Again, judicial review of military commission proceedings is a historic, new development. I mean, historically, there has not been that, and so—but I think the DTA sets up a process.

Ms. DAVIS OF CALIFORNIA. Do you see any impact of Hamdan on the detainee act? Should it be changed in any way as a result of the Hamdan case?

Mr. BRADBURY. Certainly, one way is I think what Mr. Olson suggested and what I just suggested; I think the court read the provisions in the Detainee Treatment Act which I think were clearly intended by Congress to cut off jurisdiction for all pending habeas litigation and other litigation challenging the detention of these enemy combatants other than the one avenue for appeal to the D.C. Circuit that Congress intended to set up, but the court read that—the court just got right around that. And I think that you need to look at that again because I think that litigation needs to be shut off, and you need to control the review through one manageable channel of review.

Ms. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman. I see my time is up.

Mr. BRADLEY. Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman. I appreciate the patience of the witnesses and also the tremendous personal sacrifice that Mr. Olson in particular has already suffered in the war on terror.

The Constitution says in article 1, section 8, that Congress shall set rules of capture on land and sea. I would like to ask the witnesses what they think that phrase means.

Admiral HUTSON. Precisely what it says.

Mr. COOPER. Others?

Mr. BRADBURY. Well, I don't think it has been actually fully developed. I think there are few sources on what it means.

Mr. COOPER. I asked what you thought it meant.

Mr. BRADBURY. I do think that it provides some authority for dealing with the captures in the war on terror. There is a view that it is limited to seizing of property and ships at sea, that kind of capture. Ultimately, I don't know if that view is sustainable, but I will say, Congressman, that never in the history of the country has Congress entered into the areas where we are now contemplating providing rules by legislation. These have been areas traditionally left up to the executive in time of war so we need to proceed extremely cautiously in these areas.

Mr. COOPER. Not everything in life has a precedent. There was, however, a very powerful precedent in Youngstown Steel. Justice Jackson is widely quoted as saying the President's wartime power

is at its zenith when he has gotten even the concurrence or consultation of Congress.

This is an ironic age that we are in because although we have a Republican White House and a Republican Congress, there has been remarkably little consultation. The Hamdan decision might not have ever occurred if there had been prior consultation. As you point out, now we will be consulting with each other.

But it is not only this case of the President's wartime powers. Senator Graham was particularly forceful on this yesterday. There are so many areas that the White House has simply not conferred with Congress, a Republican Congress, on war powers.

So can I ask what your thinking is on why the White House has refused to confer? Because doesn't the White House want its wartime powers to be at their zenith?

Mr. BRADBURY. Well, Congressman, in the Hamdan case, it was the position of the United States in that case that the provisions of the UCMJ and the authorization for the use of military force that Congress passed in the wake of 9/11 did provide positive and affirmative support for the President's military commission process. So it was the position that we in fact had the support of Congress in that case. I think the court may view that differently.

I will say that obviously I can't comment on the full range of issues that you raised by your question, but I think the President has endeavored to keep Congress informed through the traditional channels; for example, through briefings and notification to the relevant committees with respect to different activity, certainly this committee, on wartime activities.

Mr. COOPER. Mr. Bradbury, the Republican chairman of the House Intelligence Committee released a letter last week saying he had not been properly informed as the chairman of the House Intelligence Committee.

You were quoted in the newspaper yesterday as saying the President is always right. And I hope that is a misquote because I have never met an infallible human being yet.

Mr. BRADBURY. Neither have I, Congressman. I am glad you brought that up. I guess that shows I shouldn't try to be humorous when I am testifying. That was a tongue-in-cheek comment. Nobody is always right, and I certainly didn't mean to say that other than in humor.

Mr. COOPER. Let me move on since the time is so short. The sovereignty issue with Guantanamo, who is the sovereign power in Guantanamo?

Mr. Olson, you stressed that in your comments.

Mr. OLSON. The agreement between the government of Cuba and the United States makes it absolutely clear and no court so far has disturbed that conclusion that the sovereignty remains with Cuba. There are limitations on what the United States may do there to commercial and other——

Mr. COOPER. Are you saying that Cuban law controls in Guantanamo?

Mr. OLSON. No, and I should allow the government lawyers to answer that question because I am no longer representing the government, but the agreement with respect to that makes it clear that with respect to that area, like in many other agreements

throughout the world, U.S. law may appropriately govern property that is in the custody of the United States, although sovereignty remains——

Mr. COOPER. U.S. law doesn't apply, Cuban law applies. What law does apply there?

Mr. OLSON. Again, I want to defer to my colleagues representing the Administration.

Mr. COOPER. But you stressed this point very strongly in your testimony. Whose law applies?

Mr. OLSON. There is an area where the Commander-in-Chief has responsibility to determine battle place decisions, who fires a gun, where the troops will go, and so forth. And under those circumstances the Constitution quite properly allocated that responsibility to the President.

Mr. BRADLEY. Mr. Cooper, I want to give Ms. Bordallo a chance to ask her questions, too.

Thank you. Ms. Bordallo.

Ms. BORDALLO. Thank you very much, Mr. Chairman, and thank you to the panel. This certainly is a very critical concern.

I have just one question. I had a couple of questions. But in light of the Hamdan ruling of the Supreme Court and the memorandum issued by Secretary England concerning the application of article 3 of the Geneva Conventions, could you foresee a situation in the future where our Nation would not adhere to article 3? And if so, what kind of situation would that be, and why would it justify once again disregarding the Geneva Conventions? That would be for you, Mr. Bradbury.

Mr. BRADBURY. Thank you, Congresswoman. We have not disregarded the Geneva Conventions. We brought a good faith interpretation of the Geneva Conventions. And again, the court has not said that al Qaeda detainees are prisoners of war subject to all of the rules and privileges of the Geneva Conventions. The court simply construed one article of the Geneva Conventions, common article 3, and said, contrary to the President's determination, this in fact is not an international conflict because it is not between nations, and therefore common article 3 applies in our war on terror. That is, we believe, quite a dramatic concept because I don't think the drafters of Geneva in drafting that provision intended to cover or even anticipated conflicts between nations like the United States and international terrorist organizations. But be that as it may, the court said that applies.

Now that brings with it a number of standards, substantive standards, and some procedural requirements. And as I said in my testimony, most of the substantive standards are quite clear, and we can all agree that they are condemnable conduct; they are in fact the kind of crimes against humanity that al Qaeda commits. There are some very vague phrases such as humiliating and degrading treatment. These are the kinds of phrases that in past treaties and recent treaties like the Convention Against Torture and the International Convention For Civil and Political Rights have caused the United States to take reservations to those treaties, carefully defining those phrases by reference to U.S. constitutional law so we can all be sure it is based on a U.S. understanding

of the proper standards and not international understandings, which may be different from ours and may evolve.

We don't have such a reservation to common article 3 currently, and so the meaning of that phrase, those phrases, which are quite vague, will be uncertain and will be subject to interpretations by foreign and international tribunals and other governments, and they have been applied, in certain respects, in ways that are quite reasonable. In other respects, they have been applied in very broad ways, which might condemn the kinds of conditions that are in U.S. prisons for example. And we need to be very careful because now as a result of the court's opinion a violation of those standards suddenly is a war crime under title 18 of the U.S. code. So it puts at risk all of the U.S. personnel handling it.

We think Congress can act by statute to bring definition and certainty to the meaning of common article 3 and implement it for the United States. We think that is consistent with our treaty obligations, and it can make those terms certain, and we think that is very important as we move forward.

Ms. BORDALLO. If these changes are made then the situation perhaps would not occur again, is this what you are saying?

Mr. BRADBURY. We think we can address that, that the Congress can address those risks through legislation.

Ms. BORDALLO. Thank you, Mr. Chairman, for the opportunity to ask my question.

Mr. BRADBURY. Thank you. We have gotten to the end of our witnesses and seeing we are down below ten minutes in the vote, I am going to yield to the Chairman for just a moment.

The CHAIRMAN. I want to thank you the gentleman from New Hampshire for running this hearing so effectively here while I was gone.

Gentlemen, I would like to thank you for being with us, but also ask you if you want to make any recommendations as to the substance of the structure or anything elsewhere you think we would be—that you have some advice for us, without objection, we will leave the record open. And please make any further recommendations you would like to make to us on how we construct this new body of law. I think we are going to be acting, and whether we get this in time to package it with the conference report working with the Senate or it comes in later, I think we definitely are acting. So it is going to be there. This has been I think very, very instructive. You have been most valuable in talking to us today. Thank you very much. As you can see, we had full attendance, lots of people with lots of great questions, and your testimony was very, very good. Really appreciate it. Thank you.

Admiral HUTSON. Thank you, Mr. Chairman.

Mr. BRADLEY. Thank you, all of the witnesses, and I get the responsibility of adjourning the hearing.

[Whereupon, at 12:44 p.m., the committee was adjourned.]

A P P E N D I X

JULY 12, 2006

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 12, 2006

OPENING STATEMENT FOR THE HONORABLE IKE SKELTON
FULL COMMITTEE HEARING ON STANDARDS FOR MILITARY COMMISSIONS
12 JULY 2006

Thank you, Mr. Chairman. I join you in welcoming the witnesses.

I want to start with a note of personal history as my family has a connection to the military commissions of World War II. My father's mentor, Colonel Carl Ristine, represented one of the two German saboteurs in 1942 who received a life sentence rather than the death penalty. The use of military commissions has played an important role historically, but it has evolved significantly, since Colonel

Ristine made his mark. The Court acknowledged that in its recent *Hamdan* decision.

I've believed since I learned of those commissions in my youth and I believe today that we must be tough in dealing with those who would do this nation harm. The primary responsibility of this committee is to ensure that the men and women who serve this country have all they need to achieve their missions. In the same way that we are committed to ensuring that our forces have the best equipment when they go into battle, **we will do everything to make sure that enemies taken off the battlefield are not given another opportunity to kill American soldiers and Marines.**

We take this as our charge. But we must do so in a way that conforms strictly to the rule of law, with our core values as Americans. This is what our troops fight for.

The Supreme Court spoke loudly and clearly when it ruled in *Hamdan v Rumsfeld*. We can and we must craft a system for aggressively dealing with accused terrorists and war criminals that holds them to account. But we must do so in a way that meets the standards laid out in the Supreme Court decision. Mr. Chairman, I'm just a Missouri country lawyer, but let me tell you what I think I heard in their decision.

The Court told the President that he has a couple options before him. He can use a "regularly constituted court" like a courts-martial or the federal court system, or even an international court. If not, and he wants to proceed with military commissions that diverge from the rules and procedures of courts-martials, we in Congress must explicitly authorize them. The Court decided that the President's current commission design violates both the Uniform Code of Military Justice codified in 1950 and revised by Congress several times since then and the four Geneva Conventions we signed in 1949. As to the latter, the Court found that the current Commissions did not afford the "accused" minimal due process protections. These are not the due process rights that would be

afforded POWs, but the least of the protections Geneva affords even those who commit grave breeches of its tenets in Common Article 3.

The Court has given Congress a clear charge to craft a system to deal with these central issues. We can and we must get this right. To do so, I believe we must look carefully at tried-and-true existing systems of law like the Uniform Code of Military Justice that may provide a basis for a solution. Then we must consider the modifications that need to be made to make commissions most effective as a tool in the war on terror.

Any solution we create must build on our current system, but it must survive for the future. This is a long war in which we are engaged. Any commissions must be able to try those caught on far-flung battlefields or those who would harm us in our own backyards. This is a global struggle; one in which we need our allies to continue to take part. We will be all the stronger if the principles enshrined in this solution reflect the Court's decision and gain the support of our allies around the world.

Mr. Chairman, it is possible to legislate a system that will keep terrorists off the battlefield and meet the Court's standard. This hearing is a good first step, but we will

need more hearings like it. We'll need to hear from more experts on military law, current and former General Counsels and JAGs, and commanders to get this right without putting our own forces in jeopardy. And we will need to work together in a bipartisan, open process to figure out the best solution. This will take time and careful consideration. But it is well-worth it for our troops and for the outcome of the war on terror. I look forward to undertaking this effort and to hearing from our witnesses. Thank you, Mr. Chairman.

Department of Justice

STATEMENT

OF

STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE SUPREME COURT'S DECISION
IN *HAMDAN V. RUMSFELD*

PRESENTED ON

JULY 12, 2006

STATEMENT OF
STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE
HOUSE ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
THE SUPREME COURT'S DECISION
IN *HAMDAN v. RUMSFELD*

JULY 11, 2006

Thank you, Mr. Chairman, Ranking Member Skelton, and Members of the Committee. I appreciate the opportunity to appear here today to discuss the Supreme Court's decision in *Hamdan v. Rumsfeld.*

Hamdan is a decision without historical analogue. Since the Revolutionary War, the United States has used military commissions in time of armed conflict to bring to justice unlawful combatants for violations of the laws of war. Indeed, *Hamdan* recognized that the Supreme Court itself has sanctioned the use of military commissions on multiple occasions in the past. Yet the Court in *Hamdan* held that the military commissions that the President established were inconsistent with the Uniform Code of Military Justice and the Geneva Conventions.

The Court's reasoning in *Hamdan* may be surprising and disappointing to many of us, but it is not my intent to reargue the case this morning. The Administration will, of course, as the President has said, abide by the decision of the Court.

It is important to point out that the Court did not call into question the authority of the United States to detain enemy combatants in the War on Terror, and that the Court's

decision does not require us to close the detention facilities at Guantanamo Bay or release any terrorist held by the United States. Moreover, the Court implicitly recognized several fundamental Government positions: The Court confirmed our view that the atrocities committed by al Qaeda on September 11 have triggered our right to use military force in self-defense and that we are involved in an armed conflict with al Qaeda to which the laws of war apply.

And the Supreme Court made clear that its decision rested only on an interpretation of current statutory and treaty-based law. The Court did not address the President's constitutional authority and did not reach any constitutional question. Indeed, the Court did not accept the petitioner's arguments that the Constitution precludes the use of military commissions.

Therefore, the *Hamdan* decision now gives Congress and the Administration a clear opportunity to work together to address the matters raised by the case, including the appropriate procedures governing military commissions. As Justice Breyer stated in his separate opinion, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."

In its decision, the Court also addressed the application of the Geneva Conventions to al Qaeda fighters in our War on Terror. On this point, it is important to emphasize that the Court did *not* decide that the Geneva Conventions as a whole apply to our conflict with al Qaeda or that members of al Qaeda are entitled to the privileges of prisoner of war status. The Court *did* hold, rather, that the basic standards contained in common Article 3 of the Geneva Conventions apply to the conflict with al Qaeda.

Of course, the terrorists who fight for al Qaeda have nothing but contempt for the laws of war. They have killed thousands of innocent civilians in New York, Washington, and Pennsylvania—and thousands more in London, Madrid, Kenya, Tanzania, Yemen, Jordan, Indonesia, Iraq, and Afghanistan. They advocate unrestrained violence and chaos. As a matter of course, they kidnap relief aid workers, behead contractors, journalists, and U.S. military personnel, and bomb shrines, wedding parties, restaurants, and night clubs. They openly mock the rule of law, the Geneva Conventions, and the standards of civilized people everywhere, and they will attack us again if given the chance.

The Supreme Court's conclusion that common Article 3 applies to members of al Qaeda is a significant development that must be considered as we continue the healthy discussion between the political Branches about the standards and procedures that ought to govern the treatment of terrorist detainees.

Courts-Martial and Military Commissions

In moving forward after *Hamdan*, the basic question we must answer together is how best to pursue the prosecution of al Qaeda and other terrorists engaged in armed conflict with the United States.

The *Hamdan* majority held that Congress had greatly restricted the President's authority to establish procedures for military commissions. The Court read the Uniform Code of Military Justice, or "UCMJ," to require presumptively that captured enemy combatants, including unlawful combatants such as al Qaeda terrorists, are entitled to the very same military court-martial procedures that are provided for the members of our Armed Forces.

In trying al Qaeda terrorists for their war crimes, we firmly believe that it is neither appropriate as a matter of national policy, practical as a matter of military reality, nor feasible in protecting sensitive intelligence sources and methods, to require that military commissions follow all of the procedures of a court-martial.

For example, when members of the U.S. Armed Forces are suspected of crimes, the UCMJ, in Article 31(b), provides that they must be informed of their *Miranda* rights, including the right to counsel, prior to any questioning. The right of access to a lawyer in the military justice system is even more protective than in civilian courts, since it applies as soon as the service member is suspected of an offense. Granting terrorists prophylactic *Miranda* warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes. The very notion of our military personnel regularly reading captured enemy combatants *Miranda* warnings on the battlefield is nonsensical.

The rules that apply to courts-martial under the UCMJ also impose strict requirements on the admission of evidence in court-martial proceedings that are wholly unworkable for military commission trials of unlawful combatants in the War on Terror. Court-martial rules require that the chain of custody for evidence be preserved, and that all documents admitted be painstakingly authenticated. But it is extremely difficult during an armed conflict to gather evidence in a way that meets strict criminal procedure requirements, whether collected on the battlefield, during military intelligence operations, or during interrogations of detainees.

Furthermore, court-martial rules prohibit the use of hearsay in ways very similar to the civilian rules of evidence. Yet reliable hearsay statements from the battlefield and

from fellow terrorists are often the only probative evidence readily available. In these situations, use of court-martial procedures may mean that the most relevant and probative evidence will be inadmissible. Securing properly sworn and authenticated evidence would also require members of the Armed Forces to leave the front lines to attend legal proceedings, in effect, requiring them to fight al Qaeda members twice, once on the battlefield and then again through legal proceedings.

Article 46 of the UCMJ, and the procedures prescribed under it, require that prosecutors share classified information with the accused if the information will be introduced as evidence at trial. We cannot put at risk our Nation's most sensitive secrets in the War on Terror by exposing them to terrorist detainees. The disclosure of classified information about intelligence sources and methods would compromise national security and could endanger the lives of Americans at home and around the world. That is a risk that can be avoided, while still ensuring that military commission trials are fundamentally fair.

The insistence upon the protections of the UMCJ may not always be easy in the military justice system, but it is often impossible on the battlefields of the present conflict. Our forces are dedicated to fighting this armed conflict; unsurprisingly, they cannot be expected to focus on the law enforcement tasks of gathering evidence and conducting criminal investigations. Such duties would, at best, distract from the military's central mission—fighting and winning the war. Congress has never embraced the notion that dangerous foreign terrorists are entitled to the same procedural protections as American citizens who risk their lives for the Nation.

All of the issues with military commissions identified by the Supreme Court can be addressed and resolved through legislation. The Administration stands ready to work with Congress to do just that. We would like to see Congress act quickly to establish a solid statutory basis for the military commission process, so that trials of captured al Qaeda terrorists can move forward again.

The United States may continue to detain the terrorists we have captured. But as of right now, we cannot effectively punish those who have committed war crimes. That is unacceptable.

The Court's Jurisdiction Under the DTA

In addition to developing appropriate procedures for military commissions, we will need to consider carefully how any new legislation should clarify the scope of judicial review. In this connection, I want to comment briefly on the Court's threshold conclusion in *Hamdan* that it was proper for the Court to exercise jurisdiction over the case.

The role of the Supreme Court in the separation of powers depends crucially upon the principle that the jurisdiction of federal courts extends only to cases that properly arise under the laws enacted by Congress. Last December, in the Detainee Treatment Act of 2005, Congress expressly established procedures for the review of military commission decisions. The DTA provided that judicial review of military commission proceedings would be strictly limited to post-trial review of the final judgments of military commissions; the DTA expressly deprived the federal courts of jurisdiction to hear pre-trial habeas petitions, such as Hamdan's.

It has long been a canon of interpretation, firmly established by what the dissenting Justices called "[a]n ancient and unbroken line of authority," that statutes removing jurisdiction from the courts have immediate effect in all pending cases. Congress was entitled to legislate against the background of that traditional canon when it enacted the DTA. *Hamdan* makes clear, however, that if Congress seeks to limit the Court's jurisdiction in future cases, it may be well advised to enact statutory provisions that are ironclad and leave absolutely no wiggle room with respect to Congress's intent.

Common Article 3 of the Geneva Conventions

Finally, we will need to address the Court's ruling that common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda.

The United States has never before applied common Article 3 in the context of an armed conflict with international terrorists. When the Geneva Conventions were concluded in 1949, of course, the drafters of the Conventions certainly did not anticipate, and did not agree to cover, armed conflicts with international terrorist organizations such as al Qaeda.

In directing that our Armed Forces would treat all detainees humanely regardless of their legal status, the President specifically determined in February 2002 that common Article 3 does not apply to the conflict with al Qaeda on the ground that the War on Terror is decidedly an "international" conflict. It involves the projection of U.S. force to different states to combat a transnational terrorist movement with global reach and a proven record of targeting the United States in multiple countries. The President's conclusion on this point was plainly reasonable. Indeed, it reflects what is a fundamental

truth about the Geneva Conventions—that they were not designed as a framework for addressing the kind of conflict we are in with al Qaeda.

We are now faced with the task of implementing the Court's decision on common Article 3. Last year, Congress engaged in a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists. Congress codified that standard in the McCain Amendment, part of the Detainee Treatment Act, which prohibits "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the established meaning of our Constitution, for all detainees held by the United States, regardless of nationality or geographic location. Congress rightly assumed that the enactment of the DTA settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror.

That assumption may no longer be true. By its interpretation of common Article 3 in *Hamdan*, the Supreme Court has imposed another baseline standard—common Article 3—that we must now interpret and implement.

On the one hand, when reasonably read and properly applied, common Article 3 will prohibit the most serious and grave offenses. Most of the provisions of common Article 3 prohibit actions that are universally condemned, such as "violence to life," "murder," "mutilation," "torture," and the "taking of hostages." These are a catalog of the most fundamental violations of international humanitarian law. In fact, they neatly sum up the standard tactics and methods of warfare utilized by our enemy, al Qaeda and its allies, who regularly perpetrate gruesome beheadings, torture, and indiscriminate slaughter through suicide bombings. Consistent with that view, some in the international

community, including the International Committee of the Red Cross, have stated that the actions prohibited by common Article 3 involve conduct of a serious nature.

On the other hand, although common Article 3 should be understood to apply only to serious misconduct, it is undeniable that some of the terms in common Article 3 are inherently vague. Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application. It is also unclear what precisely is meant by "judicial guarantees which are recognized as indispensable by civilized peoples."

Furthermore, the Supreme Court has said that in interpreting a treaty provision such as common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty are due "considerable weight." Accordingly, the meaning of common Article 3—the baseline standard that now applies to the conduct of U.S. personnel in the War on Terror—would be informed by the evolving interpretations of tribunals and governments outside the United States. Many of these interpretations to date have been consistent with the reading that we would give to common Article 3. Nevertheless, the application of common Article 3 will create a degree of uncertainty for those who fight to defend us from terrorist attack.

We believe that the standards governing the treatment of detainees by the United States in the War on Terror should be certain, and that those standards should be defined by U.S. law, in a manner that will fully satisfy our international obligations.

The meaning and application of the vague terms in common Article 3 are not merely academic questions. The War Crimes Act, 18 U.S.C. § 2441, makes any violation of common Article 3 a felony offense.

The difficult issues raised by the Court's pronouncement on common Article 3 are ones that the political Branches need to consider carefully as they chart a way forward after *Hamdan*. We think this, too, is an area that Congress should address.

* * *

Notwithstanding the problematic aspects of the Court's opinion I have described, the decision in *Hamdan* gives the political Branches an opportunity to work as one to reestablish the legitimate authority of the United States to rely on military commissions to bring the terrorists to justice. It is also an opportunity to come together to reaffirm our values as a Nation and our faith in the rule of law.

We in the Administration look forward to working with Congress to protect the American people and to ensure that unlawful terrorist combatants can be brought to justice, consistent with the Supreme Court's guidance. I look forward to discussing these issues with the Committee this morning.

Thank you, Mr. Chairman.

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STATEMENT OF DANIEL J. DELL'ORTO
PRINCIPAL DEPUTY GENERAL COUNSEL
OFFICE OF GENERAL COUNSEL
U.S. DEPARTMENT OF DEFENSE

BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ARMED SERVICES

HEARING ON THE SUPREME COURT'S DECISION IN *HAMDAN v. RUMSFELD*

Thank you, Mr. Chairman, Ranking Member Leahy, and Members of the Committee. On behalf of the Department of Defense, please allow me to express my gratitude for the opportunity to appear before you today, and for the prompt and careful consideration by the Committee of necessary measures in response to the Supreme Court's decision in *Hamdan v. Rumsfeld.*

I join whole-heartedly in Mr. Bradbury's statement and add just a few words of my own. The United States military has convened criminal tribunals other than courts-martial since the days of the very first Commander-in-Chief, George Washington. From the Revolutionary, Mexican-American and Civil Wars on through World War II and the present, our nation and its military have considered these tribunals an indispensable tool for the dispensation of justice in the chaotic and irregular circumstances of armed conflict. The military commission system reviewed by the Court in *Hamdan* fits squarely within this long tradition.

Tradition, however, is not the only justification for employing criminal adjudication processes other than courts-martial in times of armed conflict. Alternative processes are necessary to avoid the absurd result of adopting protections for terrorists that American citizens do not receive in civilian courts.

The court-martial system is not well known or understood outside the military. One common misperception is that courts-martial must necessarily render a lesser form of justice because they fall outside the judicial branch. But the opposite is actually true. To protect in court those who protect us in battle, and to avoid even the appearance of unlawful command influence, courts-martial are more solicitous of the rights of the accused than our civilian courts.

For every court-martial rule that is arguably less protective of the accused than its civilian analogue, there are several that are indisputably more protective. For example, legal counsel is provided without cost not just for the indigent, but for all. The rights to counsel and against self-incrimination are afforded earlier in the military justice system than in civilian practice. Instead of indictment by grand jury, which convenes in secret without the defendant and defense counsel, the military justice system requires for a general court-martial a thorough and impartial investigation open to the public and the media, at which the accused and defense counsel may conduct pre-trial discovery and call and cross-examine witnesses. The court-martial process allows open and full discovery of the government's information by the accused, a process more open and automatic than discovery in civilian criminal prosecutions. The speedy trial rules are stricter in the military justice system than in the civilian system. The statute of limitations that applies to most military offenses is shorter than the federal statute for terrorism offenses. And the rules for exclusion of evidence are more generous toward the accused than their civilian counterparts.

While tradition and common sense therefore provide strong support for alternative adjudication processes for terrorists and other unlawful enemy combatants, military

necessity is perhaps the strongest reason of all. It is simply not feasible in time of war to gather evidence in a manner that meets strict criminal procedural requirements. Service personnel are generally not trained to execute military combat and intelligence missions while simultaneously adhering to law enforcement standards and constraints. Asking our fighting men and women to take on additional duties traditionally performed by police officers, detectives, evidence custodians and prosecutors would not only distract from their mission, but endanger their lives as well.

Intelligence gathering would also suffer terribly. It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial. Similarly, full application of court-martial rules would force the government either to drop prosecutions or to disclose intelligence information to our enemies in such a way as to compromise ongoing or future military operations, the identity of intelligence sources, and the lives of many. Military necessity demands a better way.

As Mr. Bradbury stated, the *Hamdan* decision provides Congress and the President an opportunity to address these critical matters together. We look forward to working with you.

Thank you, Mr. Chairman.

# # #

Theodore B. Olson

House Committee on Armed Services

Standards for Military Commissions

July 12, 2006

Testimony of Theodore B. Olson

Good morning, Chairman Hunter, ranking Member Skelton, and Members of the Committee.

Thank you for the opportunity to appear before the Committee to testify about a subject that is of grave importance to both our national security and the integrity of our republican form of government. The Supreme Court's decision in *Hamdan v. Rumsfeld* has far-reaching implications for the President's ability to defend our national security and perform his duties as Commander-in-Chief, and raises fundamental separation-of-powers issues that go to the core of our constitutional structure. No issue deserves more thoughtful consideration from our elected representatives than ensuring that the American people are defended—in a manner consistent with our political traditions and values—from a savage terrorist enemy that deliberately targets civilians in an effort to destroy our way of life.

From 2001 to 2004, I served as the Solicitor General of the United States.[1]

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[1] Although I am a former government official and current member of the President's Privacy and Civil Liberties Oversight Board, I am appearing in my

[Footnote continued on next page]

In that capacity, I had the privilege and the responsibility to supervise the representation of the United States in several cases involving our Nation's defense against terrorism. These include *Rasul v. Bush*, 542 U.S. 466 (2004), a precursor to the *Hamdan* case in which the Supreme Court held that federal courts have jurisdiction to entertain habeas corpus petitions filed on behalf of terrorist combatants detained in Guantanamo Bay and elsewhere in the world outside United States sovereign territory, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the President's authority to capture and detain an American citizen who took up arms against the United States overseas as an "enemy combatant." In connection with this responsibility, and as a consequence of my service as Assistant Attorney General for the Office of Legal Counsel from 1981 through 1984, I have had the opportunity to consider at great length the relationship between our three branches of government in time of war. As Solicitor General, I also had the responsibility to represent the government in terrorism-related cases in the lower courts, which required my office and its exceptionally talented staff to make careful judgments about the respective wartime responsibilities of the legislative, executive, and judicial branches.

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personal capacity, and the views that I express are solely my own and do not represent the views of the Administration or any other person or entity.

In *Hamdan*, a majority of the Supreme Court endorsed three significant holdings: first, that, notwithstanding the Detainee Treatment Act, which Congress enacted to foreclose attempts by Guantanamo Bay detainees to seek habeas corpus relief in federal courts, those courts nonetheless retain jurisdiction over habeas petitions filed before the Act went into effect; second, that the President's military commission structure is inconsistent with the Uniform Code of Military Justice; and third, that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda.

It is altogether necessary and appropriate for Congress to consider a legislative response to the Supreme Court's decision in *Hamdan*. Indeed, all eight Justices who participated in the case—Chief Justice Roberts was recused—recognized that Congressional action could cure any perceived inadequacies in the military commissions established by the President.

Justice Breyer's concurring opinion (which was joined by Justices Kennedy, Souter, and Ginsburg) explicitly invited the President to reach out to Congress, observing that "nothing prevents the President from returning to Congress to seek the authority he believes is necessary." *Hamdan*, 548 U.S. at _ (slip op. at 1) (Breyer, J., concurring).

Justice Kennedy's concurring opinion (which was joined by Justices Souter, Ginsburg, and Breyer) similarly observed that "[i]f Congress, after due

consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." *Id.* at _ (slip op. at 2) (Kennedy, J., concurring).

Indeed, in his *Hamdan* concurrence, Justice Kennedy invoked Justice Jackson's well-known concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which articulated a three-part framework for analyzing the relationship between executive and legislative authority. The President's authority is at its maximum, Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635 (Jackson, J., concurring). "When the President acts in absence of either a Congressional grant or denial of authority," Justice Jackson continued, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. And "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb." *Id.*

Relying upon the *Youngstown* paradigm, Justice Kennedy concluded in his *Hamdan* concurring opinion, incorrectly in my view, that the military commissions established by the President presented "a conflict between Presidential and congressional action," and that the case therefore fell within Justice Jackson's third category, where the President's authority is at its lowest point. *Hamdan*, 548 U.S.

at _ (slip op. at 4) (Kennedy, J., concurring). If Congress responds to *Hamdan* by explicitly conferring on the President broad authority to establish military commissions, the Court's analysis makes clear that the President would be acting at the height of his authority—he would be exercising both the inherent constitutional powers of the Commander-in-Chief and the statutory powers granted to him by Congress.[2]

In response to the Justices' invitation to implement a legislative solution, it is my opinion that Congress should restore the status quo that existed prior to the *Rasul* decision and clarify that the federal courts do not possess jurisdiction over pending or future habeas petitions filed by Guantanamo Bay detainees or other noncitizen enemy combatants detained outside the territory of the United States. Congress should also, I submit, expressly authorize the use of military commissions to try terrorists and others accused of war crimes.

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[2] *Hamdan* did not address the President's inherent power to establish military commissions absent Congressional authorization in cases of "controlling necessity." *See Hamdan*, 548 U.S. at _ (slip op. at 23) ("Whether . . . the President may constitutionally convene military commissions without the sanction of Congress in cases of controlling necessity is a question this Court has not answered definitively, and need not answer today."). According to the Court, the issue before it was limited to whether the President may "disregard limitations that Congress has, in the proper exercise of its own powers, placed on his powers." *Id.*

I

CONGRESS SHOULD ACT TO CONFIRM THAT THE FEDERAL HABEAS STATUTE DOES NOT GRANT JURISDICTION OVER PETITIONS FILED BY ENEMY COMBATANT ALIENS HELD OUTSIDE THE SOVEREIGN TERRITORY OF THE UNITED STATES.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court overturned a precedent, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that had stood for fifty years, and held, for the first time, that the federal habeas statute, 28 U.S.C. § 2241, grants United States courts jurisdiction to entertain habeas petitions filed by aliens detained beyond the sovereign territory of the United States (in that case, Guantanamo Bay, Cuba). In the *Hamdan* decision, the Court held that legislation enacted in response to *Rasul* depriving the federal courts of jurisdiction in such cases does not apply to habeas petitions pending when that legislation was enacted. Unless Congress acts, the Court's interpretation of section 2241 will have far-reaching and adverse consequences for the conduct of this Nation's defense against terrorist attacks on Americans and American facilities here and abroad.

Since the emergence of the writ of habeas corpus several centuries ago in English common-law courts, the writ has *never* been available to enemy aliens held outside of a country's sovereign territory. The text of section 2241—which authorizes federal courts to grant the writ "within their respective jurisdictions"—provides no indication that Congress intended to depart from this long-standing historical principle. By requiring the President to justify his military decisions in

federal courts, *Rasul* imposed a substantial and unprecedented burden on the President's ability to react with vigor and dispatch to homeland security threats.

Congress responded to the *Rasul* decision by enacting the Detainee Treatment Act of 2005 ("DTA"), which amended section 2241 to provide explicitly that "*no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.*" Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741 (emphasis added). Notwithstanding this clearly stated statutory language withdrawing the jurisdiction created by the *Rasul* decision for the federal courts to entertain habeas petitions filed by Guantanamo Bay detainees and a companion provision plainly making this statutory measure effective on enactment, the *Hamdan* Court held that the DTA *does not* apply to petitions pending at the time the measure was signed into law. 548 U.S. at _ (slip op. at 7-20). That holding not only enabled the Court to reach the merits of Hamdan's claim challenging the validity of the military commission system, but also requires the lower federal courts to adjudicate the hundreds of other habeas petitions filed by Guantanamo Bay detainees that were pending at the time of the DTA's enactment. *Id.* at _ (slip op. at 15) (Scalia, J., dissenting). As Justice Scalia observed in his dissenting opinion in *Hamdan*, the "Court's interpretation [of the DTA] transforms a provision abolishing jurisdiction over *all*

Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come." *Id.*

Until the Supreme Court's decision in *Rasul*, no court had ever suggested that aliens captured during hostilities and held outside of the United States' sovereign territory could challenge their captivity through a petition for a writ of habeas corpus filed in a U.S. court. This was true at the time of the Founding and continued to be true throughout the military confrontations of the Twentieth Century.[3] Indeed, none of the two million prisoners of war held by the United States at the conclusion of World War II was deemed authorized to file a habeas petition in a U.S. court challenging the terms or conditions of his confinement. One can only imagine the chaos that would have been introduced into the effort to win World War II if each of these detainees, or lawyers on their behalf, had been permitted to file petitions in U.S. courts immediately upon their capture in Europe, Africa or in the Islands of the Pacific Ocean. Indeed, in the wake of *Rasul*, a habeas petition was even apparently filed on behalf of Saddam Hussein before he was handed over to Iraqi authorities. As the Supreme Court plainly recognized in

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[3] As Justice Jackson observed in his opinion for the Court in *Eisentrager*, he was unaware of any "instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction." 339 U.S. at 768.

concluding that it lacked jurisdiction to hear a habeas petition filed by German prisoners held by American authorities in occupied Germany, "[e]xecutive power over enemy aliens, *undelayed and unhampered by litigation*, has been deemed, throughout history, *essential to war-time security*." *Eisentrager*, 339 U.S. at 774 (emphases added). *Rasul*'s conclusion that federal courts may hear habeas petitions filed by Guantanamo Bay detainees thus overturned several centuries of precedent concerning the jurisdictional reach of the writ of habeas corpus and introduced incalculable complications in the President's ability to conduct an effective defense against unprincipled and savage terrorists.

Furthermore, the availability of habeas relief to Guantanamo Bay detainees does violence to the separation-of-powers principles embodied in our constitutional structure. The Founders were keenly aware of the need for swift, decisive action to safeguard national security. They designated the President as the sole Commander-in-Chief of the Armed Forces precisely because, as Alexander Hamilton explained, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist No. 70*, at 471 (Alexander Hamilton) (J. Cooke ed., 1961). Because courts have limited familiarity with battlefield conditions; must move slowly, deliberately, and collectively; lack access to military intelligence; and may possess an incomplete understanding of relevant

foreign policy considerations, they are—by their very institutional design—ill-suited to micro-manage on a real-time basis the decisions that the Executive must make daily, indeed hourly, in his capacity as Commander-in-Chief. As Justice Jackson observed in another context, "It would be intolerable that the courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

The *Rasul* decision also imposes a tremendous burden on our military personnel in the field. To begin with, as the Supreme Court has explained, authorizing courts—at the behest of enemy aliens—to second guess the decisions of military leaders will "diminish the prestige of our commanders, not only with enemies but with wavering neutrals." *Eisentrager*, 339 U.S. at 779. Indeed, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* The *Rasul* decision raises an

endless stream of practical problems: Will commanders be summoned from the field to give evidence and to explain the circumstances regarding the capture of combatants? Will detainees have access to counsel? Do they have the right to appointed counsel? *Miranda* warnings? The right to speedy trials? Will the government be required to disclose sensitive intelligence information to demonstrate that its detention of enemy combatants is justified?[4] These questions are just a few examples, but they serve to demonstrate how disruptive the extension of habeas relief to enemy combatants could become to the military's ability to focus its resources and undivided attention on defending our people from terrorists.[5]

Congress should act to restore the pre-*Rasul* status quo. The Constitution places the decision to detain an enemy alien squarely within the exclusive domain

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[4] The *Hamdan* decision seems to answer this question in the affirmative. 548 U.S. at _ (slip op. at 71-72) (plurality op. of Stevens, J.) ("That the Government has a compelling interest in denying access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him." (citation omitted)).

[5] *See* Theodore B. Olson, *Tex Lezar Memorial Lecture*, 9 TEX. REV. L. & POL. 1, 12 (2004) (providing further discussion of *Rasul*'s potentially disruptive impact on anti-terrorism operations).

of the President, as Commander-in-Chief of the Armed Forces.[6] Congress should restore, as it attempted to do when it enacted the DTA just six months ago, the constitutional balance between the executive and judicial branches by amending the DTA to clarify that federal courts lack jurisdiction over habeas corpus petitions filed by detainees held outside of the sovereign territory of the United States, no matter when those petitions were filed.

II

CONGRESS SHOULD CONFIRM THAT THE PRESIDENT HAS BROAD AND FLEXIBLE AUTHORITY TO TRY ENEMY COMBATANTS BEFORE MILITARY COMMISSIONS.

The second principal holding of *Hamdan* is that the military commissions established by the President are invalid because their structure and procedure do not comport in all material respects with the Uniform Code of Military Justice ("UCMJ"). In reaching this conclusion, the Court rejected the government's position that the Constitution, the UCMJ itself, and the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), authorized the military commissions established by the President.

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[6] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-Chief . . . [chooses] to accord to [aliens] the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted . . . .").

The *Hamdan* Court's invalidation of the President's military commissions cannot be reconciled with the Court's earlier holding in *Madsen v. Kinsella*, 343 U.S. 341 (1952), that, "as Commander-in-Chief of the Army and Navy of the United States, [the President] may, in time of war, *establish and prescribe the jurisdiction and procedure of military commissions*, and of tribunals in the nature of such commissions." *Id.* at 348 (emphasis added). Indeed, as the Court explained in upholding the President's authority to convene a military commission to try a Japanese war criminal after World War II, "[a]n important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita*, 327 U.S. 1, 11 (1946). The *Hamdan* decision is also inconsistent with the Court's conclusion in *Ex Parte Quirin*, 317 U.S. 1 (1942) (per curiam), that, in the UCMJ, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." *Id.* at 28.

The Court's rejection of the government's position that the AUMF authorized the President's military commissions raises equally serious questions. The AUMF authorized the President to exercise his full war powers in connection with the defense of the Nation from terrorist attacks. As a plurality of the Court

recognized in *Hamdi*, those war powers include the authority necessary for "the capture, detention, *and trial* of unlawful combatants." 542 U.S. at 518 (plurality op. of O'Connor, J.) (emphasis added). A rational and reasonable reading of the AUMF is that it endorsed the President's exercise of all his war powers, including the establishment of the military commissions at issue in *Hamdan*. But while the *Hamdan* Court recognized that the President's war powers "include the authority to convene military commissions," 548 U.S. at _ (slip op. at 29), it nonetheless concluded that the AUMF did not authorize any use of military commissions beyond those already authorized by the UCMJ.

The *Hamdan* decision represents an extremely cramped and unworkable interpretation of the expansive authorization that Congress gave the President in the AUMF. The Court's approach seriously diminishes the significance of the AUMF as a Congressional endorsement of Presidential war powers, and it apparently does so on the theory that the AUMF does not specifically mention and enumerate each and every aspect of the President's wartime authorities and responsibilities. Congress, however, gave the AUMF an expansive scope precisely to ensure that the authorization it afforded the President was as broad as necessary to permit the President to respond to unprecedented and savage attacks and threats of future attacks. As Justice Thomas stated in his dissenting opinion in *Hamdan*, "the fact that Congress has provided the President with broad authority does not

imply—and the judicial branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated." 548 U.S. at _ (slip op. at 3) (Thomas, J., dissenting). Yet that is precisely what the *Hamdan* Court has done.[7]

The Court's unrealistically narrow interpretation of the AUMF makes clear that any Congressional response to *Hamdan* must expressly endorse and ratify the President's authority to oversee the trial and punishment of enemy combatants. Congress should ensure that the President has broad discretion to try enemy combatants in proceedings that he determines are appropriate, including through utilization of the vehicle of military commissions.

Congress also should make clear that the President has expansive and flexible authority to prescribe the rules and procedures governing military

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[7] Moreover, there is no support for the conclusion of a plurality of the *Hamdan* Court that the offense of conspiracy to commit acts of terrorism is not subject to trial before a military commission. *Hamdan*, 548 U.S. at _ (slip op. at 49). As Justice Thomas explained, under well-established principles of the common law of war, "Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission." *Id.* at _ (slip op. at 16) (Thomas, J., dissenting); *see also* 11 Op. Atty. Gen. 297, 312 (1865) (explaining that joining a band of "guerillas, or any other unauthorized marauders is a high offense against the laws of war"). Indeed, numerous defendants were convicted at Nuremberg for membership in criminal Nazi organizations, including the SS and Gestapo. *Hamdan*, 548 U.S. at _ (slip op. at 19) (Thomas, J., dissenting). A conspiracy charge is an especially important prosecutorial tool in trials of high-level terrorist leaders, who typically orchestrate a terrorist organization's deadly activities without themselves participating in the attacks.

commission proceedings. Congress should not attempt to establish in an inflexible, rigid, and detailed manner each and every detail of the structure and procedure of these commissions. These determinations should be made by the Executive, which requires the flexibility to develop, modify, and innovate procedures and rules as circumstances and exigencies in the defense from terrorism require. Experience has unfortunately shown us that terrorists are quick to adapt to our defenses, unprincipled in their determination to use to their advantage any weaknesses in our systems, and resourceful in their ability to exploit any fixed procedures. An effort by Congress to legislate a comprehensive set of rules and procedures, however well conceived and well intended, risks locking the President into one set of procedures that, in time, may be outdated, inappropriate, or unworkable for any number of reasons that are simply unknown and unknowable today. Change would be difficult and slow because the President likely would be required to return to Congress to secure necessary amendments and modifications, and the legislative process would need time to run its course. Therefore, to the extent that Congress determines that it *is* appropriate to define specific procedures for military commission proceedings, Congress should authorize the President to deviate from those procedures in his discretion, when necessary and appropriate.

The Founders vested the President with primary responsibility to protect the Nation's security and to conduct foreign affairs because the executive branch has

structural advantages the other two branches do not have—including the "decisiveness, activity, secrecy, and dispatch that flow from the . . . unity" of the executive branch. *Hamdan*, 548 U.S. at _ (slip op. at 2) (Thomas, J., dissenting) (internal quotation marks omitted). "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). The structural advantages possessed by the executive branch place the President in the best position to specify the rules and procedures governing the trial of enemy combatants.[8] Congress should affirm this in its legislative response to *Hamdan*. At a minimum, Congress should explicitly authorize the military commission procedures established pursuant to the President's Military Order of November 13, 2001. 66 Fed. Reg. 57,833.

Nothing in my testimony is intended, or should be construed, in any way to minimize the prerogatives and responsibilities of Congress or the courts in our tripartite system of government. Both the legislative and judicial branches have been endowed by our Founders with authority and special capabilities in our balanced system. All three branches have important roles to play in defending this

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[8] *See Yamashita*, 327 U.S. at 13 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government . . . .").

Nation from terrorism and in guaranteeing individual rights, freedom, and liberty. But each branch must be sensitive in discharging its respective role, to allow the remaining branches most effectively to function as our Constitution intended.

III

CONGRESS ALSO SHOULD CONFIRM THAT THE GENEVA CONVENTIONS OF 1949 DO NOT APPLY TO OUR NATION'S DEFENSE AGAINST TERRORISM AND ITS CONFLICT WITH AL QAEDA AND OTHER TERRORIST ORGANIZATIONS.

The third significant holding in *Hamdan* is that Common Article 3 of the Geneva Conventions applies to our defense against terrorists such as al Qaeda, whose principal tactics are inflicting injury and destruction on vulnerable civilians and civilian targets.

The Court's conclusion that Common Article 3 applies to stateless terrorist groups committing sustained international attacks is directly contrary to the official position of the executive branch. The President has formally adopted the Justice Department's conclusion that the Geneva Conventions do not apply to our Nation's defense against stateless terrorists, such as al Qaeda and comparable organizations. It has long been the rule that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitono Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982). As Justice Thomas explained, courts should defer to "the Executive's interpretation" of treaty provisions. *Hamdan*, 548 U.S. at _ (slip op. at 44)

(Thomas, J., dissenting). The Court's interpretation of Common Article 3 fails to accord any deference to the views of the executive branch on this question, or, for that matter, any aspect of the Executive's judgment and actions in the defense against terrorism.

There are powerful arguments that the Geneva Conventions generally, and Common Article 3 specifically, do not apply to the Nation's defense against terrorists. Article 2 of the Geneva Conventions renders the full protections of the Conventions applicable only to an armed conflict between two or more "High Contracting Parties," and al Qaeda and its counterparts are plainly not "High Contracting Parties."

Similarly, Common Article 3 by its terms appears to apply only to a purely "internal" armed conflict—such as a civil war—on the territory of a signatory state, and *not* to an international conflict such as the defense against international terrorism. As Judge Randolph explained in the D.C. Circuit decision that *Hamdan* reversed, "The Convention appears to contemplate only two types of armed conflicts"—international armed conflict between signatories, and "a civil war." *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005). The conflict with international, stateless terrorists does not fall into either category.

Sound policy considerations also support the conclusion that the protections of the Geneva Conventions do not extend to stateless terrorist groups. One of the

key purposes underlying the Conventions is to encourage combatants to conduct themselves in a manner that provides some protection for civilians. Under the Conventions, "irregular forces achieve combatant . . . status when they (1) are commanded by a person responsible for subordinates; (2) wear a fixed, distinctive insignia recognizable from a distance; (3) carry weapons openly; and (4) conduct their operations in accordance with the laws and customs of war." *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, Jan. 22, 1987*, 2 AM. U. J. INT'L L. & POL'Y 415, 465, 467 (1987). Terrorists, of course, do not comply with any of these requirements, and they deliberately target civilians with violence. Extending the protections of the Geneva Conventions to terrorist groups endangers civilian populations by removing the incentives these groups have to observe the laws of war.

Indeed, it is precisely for this reason—the increased danger to civilian populations—that the United States has declined to ratify treaties that would extend the protections of international humanitarian law to terrorist groups. Most notably, the United States has not ratified Additional Protocol I to the Geneva Conventions, which covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Protocol Additional to the Geneva

Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. The United States has not ratified Protocol I on the ground that it would "grant[] terrorist groups protection as combatants" and "elevate[] the status of self-described 'national liberation' groups that make a practice of terrorism," undermining efforts "to encourage fighters to avoid placing civilians in unconscionable jeopardy." *Remarks of Judge Abraham D. Sofaer*, 2 AM. U. J. INT'L L. & POL'Y at 465, 467. The *Hamdan* Court's conclusion that Common Article 3 applies to stateless terrorists is difficult to reconcile with the executive branch's long-standing position with respect to Protocol I.

Moreover, the Geneva Conventions are not now—and have never been regarded as—judicially enforceable. To the contrary, the Geneva Conventions set out comprehensive and exclusive state-to-state enforcement procedures that are to be carried out by the political branches of the signatory states. By interpreting the UCMJ to encompass the *substantive* protections of Common Article 3, but not the *exclusive enforcement procedures* common to all four Geneva Conventions, the Court, as Justice Thomas explained, "selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient." *Hamdan*, 548 U.S. at _ (slip op. at 41).

The Court's determination that Common Article 3 applies to the war with al Qaeda and other international, stateless terrorist organizations is potentially very

far-reaching. It opens the door to the possibility that senior officials of the American government could be haled into distant courts for violating the Conventions' requirements. Congress can and should remedy this problem by confirming the President's determination that the Geneva Conventions do not apply to the conflict with stateless terrorist organizations—a determination that is more faithful to the text and purpose of the Conventions than the conclusion reached by the *Hamdan* Court.

* * *

I would like to thank the Committee for the opportunity to testify today and look forward to answering any questions the Committee may have.

U.S. House of Representatives
Committee on the Armed Services
Testimony of John D. Hutson
President and Dean, Franklin Pierce Law Center
RADM, JAGC, USN (ret.)

Mr. Chairman, thank you for the opportunity to testify on this particularly important issue. With respect, I believe there are very few issues facing Congress today which are more vital to the United States than the question of how we resolve the fate of those detainees whom we hold in Guantanamo. Indeed, if done properly this is an opportunity for the United States to deal from a position of strength, not weakness, and to demonstrate to the rest of the world the ideals which our young men and women are fighting so bravely to protect.

I was an early supporter of the concept of military commissions and their use in the war on terror. I believed then, and still believe now, that they are historically grounded and the proper forum to prosecute alleged terrorists. However, as the Supreme Court recently told us in rather unequivocal words, they were neither properly authorized nor implemented. That was a significant embarrassment for our nation which has justifiably prided itself for generations on our unwavering support for the rule of law and human rights. The Supreme Court thrust upon Congress the opportunity to right the wrong.

If done thoughtfully and wisely, this will enable us to regain the high ground. There are many options available to this body, most of them fraught with peril. A few commentators may advocate for military commissions which are novel and break new ground. Many will take out a blank sheet of paper and a pen and start writing to create a new form of commission. I believe that these approaches would be a mistake because the risk of omitting a necessary provision or including an objectionable one is too great.

Many people will urge you to simply authorize essentially the same commissions the President created with only minor changes. I believe this is the worst option of all because the Court has already found them to be lacking in significant, but correctable, ways. The Court gave the Congress and the Administration a road map to follow. We must avoid more court challenges or another failure in this important work.

On the bookshelf of virtually every U.S. military judge advocate, stationed anyplace on the globe, sits a thick burgundy soft cover book. That book is the envy of every other armed force in the world. Congress enacted the core it in 1951 and amended it in 1969. It has withstood close scrutiny by the Supreme Court of the United States, the same court that found such serious fault with the military commissions as currently designed. The book I refer to, of course, contains the Uniform Code of Military Justice and the Manual for Courts-Martial.

The UCMJ and the MCM easily comport with the requirements of the Hamdan decision and also with Common Article 3 of the Geneva Conventions. As required by Common

Article 3, they provide "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." I know that some have suggested that you enact legislation which avoids or modifies our obligations under Common Article 3, but I ask: which part of that Article just quoted do we want the United States to say doesn't apply to us? We should embrace Common Article 3 and sing it's praises from the roof tops. To avoid it or try to draft our way out of it is unbecoming the United States. Now that the Supreme Court has spoken, the unmistakable impression around the world would be that this was a blatant attempt to cover ourselves. Moreover, doing so would endanger our troops now and in the future as well as government civilians and contractors in the field. If we engage in such "line item veto" in the middle of a war, other countries may follow our lead to our great disadvantage and regret. We would be unable to object.

That is not to say, however, that the court-martial system as contained in the UCMJ and MCM couldn't or shouldn't be modified in some narrow and specific ways. For example and fundamentally, jurisdiction would have to be conferred by Congress in order to create military commissions. The Military Rules of Evidence may need to be modified in some narrow and well defined ways to accommodate the vagaries of the environment of the war of terror. The rules regarding hearsay and chain of custody may be examples of this. But none of these are difficult or dramatic. And if done sparingly, none would undermine the validity of the basic construct. Clearly, evidence derived as the result of any form of coercion should not be admissible under any circumstances. The touchstones are our present "regularly constituted" court-martial system and "judicial guarantees which are recognized as indispensable by all civilized peoples."

I have attached to my testimony a proposed draft of such amendments to the UCMJ as might be appropriate. This proposal was drafted by military law experts including the founder and directors, including myself, of the National Institute of Military Justice. This is certainly a worthy model. There may be others.

In closing, the United States Congress has been given a golden opportunity to get military commissions on course in a way that will pass judicial review as well as the scrutiny of domestic and international critics. It is imperative to the good reputation of the United States and, I believe, to the successful prosecution of the Global War on Terror that Congress meet this challenge. The benefits are great and, if done properly, the sweat equity is small.

Thank you.

House Armed Services Committee Hearing on Standards for Military Commissions
Statement by Honorable Mark Udall
July 12, 2006

Mr. Chairman, I'm glad we're holding this hearing although I think it's overdue.

I have long been concerned about the President's executive order authorizing use of military commissions to try non-citizens in some cases related to terrorism. I took very seriously the views of legal experts who warned that the Administration-created commissions lacked essential judicial guarantees, such as the right to attend all trial proceedings and challenge any prosecution evidence.

Those experts made what I thought was a compelling case that a court system that allows secret meetings and operating without juries and that doesn't even require that verdicts be unanimous is a clear and dramatic departure from our fundamental legal traditions.

That's why – beginning three years ago – I have cosponsored legislation to specifically authorize the President to detain as an enemy combatant a U.S. person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda, while also permitting the detainee access to counsel and guaranteeing timely access to judicial review to challenge the basis for detention. Currently, I am a cosponsor of a similar bill that would affirm executive branch authority to detain certain foreign nationals as unlawful combatants, spell out their procedural rights, and authorize special "tribunals" to try them.

Last week, the Supreme Court in *Hamdan v. Rumsfeld* agreed that the military commission set up by the Administration to try enemy combatants lacked the authority to try the detainee in part because the procedures adopted to try him violate basic tents of military and international law, including that a defendant must be permitted to see and hear evidence against him.

Although the Court did not rule that the president is prohibited from holding military commissions, it did determine that the current system isn't a "regulary constituted court" and doesn't provide judicial guarantees.

So it seems to me that there is no longer any doubt that the time has come for Congress to act – not simply to authorize the system the Administration has put forward, but to put in place one that withstands the scrutiny of the courts, the American people, and our allies in the war on terror while also keeping Americans safe.

I believe that any legislative solution must balance military necessity with basic due process, and I have pushed for such a solution for over three years. It is now time for this Committee and for Congress to act.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 12, 2006

NATIONAL INSTITUTE OF MILITARY JUSTICE

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

July 5, 2006

Text

Sec. 821. Art. 21. ~~Jurisdiction of courts-martial not exclusive~~ Military commissions and provost courts

In time of war or national emergency declared by Congress, the President may establish military commissions and provost courts consistent with international law, including the law of war. The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions~~,~~ and provost courts~~, or other military tribunals~~ of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions~~;~~ or provost courts~~, or other military tribunals~~.

Sec. 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and provost courts, ~~and other military tribunals,~~ and procedures for courts of inquiry,

may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) To the extent that the President considers it impracticable for the regulations for military commissions and provost courts to apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, the procedures in military commissions and provost courts shall, subject to any applicable rule of international law and with the exception of section 832 of this title (article 32), apply the principles of law and pretrial, trial, and post-trial procedures, including modes of proof, prescribed for general courts-martial.

(~~b~~c) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Sec. 866. Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial, military commission, and provost court cases, the court may

sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial, military commission, or provost court—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate poli-

cies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

(i) The President shall determine which Court of Criminal Appeals will have jurisdiction over a military commission or provost court case.

Comment

The first purpose of the amendment is to state directly, for the first time, the President's power to establish military commissions. At present, military commissions are referred to in several articles of the Uniform Code of Military Justice ("UCMJ"), but the statute in effect simply acknowledges their existence rather than affirmatively authorizing them. This is a function of legislative fortuities dating back to 1916, and is long overdue for correction. The amendment is not intended to disturb rulings such as *Ex parte Milligan*, 71 U.S. 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), that limit the use of military commissions and provost courts.

The second purpose of the amendment is to tie military commission procedures to court-martial procedures to the extent the President determines that use of district court procedures is unworkable. At present, Article 36 of the UCMJ simply addresses conformity with district court procedures, but leaves entirely open—except for the uniformity clause in Article 36(b)—the follow-on question of what the rules may provide if and to the extent the President has determined that district court procedures are unworkable. This second stage of the conformity issue is currently addressed only in ¶ 2(b)(2) of the *Manual for Courts-Martial*, which speaks in what can be read as precatory terms, providing that military commissions "shall be guided by" court-martial rules, and then only if there are no contrary regulations

and "applicable rules of international law." The amendment goes beyond ¶ 2(b)(2) by broadly requiring the use of general court-martial procedures. General courts-martial are the highest level of trial court in the military justice system. Reference to their procedures is consistent with Article 18, which confers on general courts-martial jurisdiction over persons who are subject to the law of war. On the other hand, the amendment explicitly exempts military commissions and provost courts from the requirement for an investigation under Article 32, inasmuch as such investigations result in only a recommendation, which the convening authority is free to accept or reject.

The amendment would make court-martial procedure the second-step default standard for military commissions, much as district court procedure is the first-step default standard for courts-martial and military commissions. The effect would be to afford the President the same measure of deference as applies to court-martial-rule departures from the district court norm. *Hamdan v. Rumsfeld* did not articulate precisely what that level of deference is. The plurality "assume[d] that complete deference is owed to [an Article 36(a)] determination" (slip op. at 60), while Justice Kennedy (slip op. at 5)—the fifth vote—is less clear on this score. He observed that the textual differences between the practicability clauses of Article 36(a) and (b) suggest, "at the least," that determinations under the latter are entitled to "a lower degree of deference." Whatever the proper degree of deference, the

amendment is not intended to authorize the President to establish rules that are inconsistent with treaty obligations.

The amendment would liberate the President from the constraints imposed by the uniformity clause in the present Article 36(b), as analyzed by the *Hamdan* majority, while at the same time imposing on him a corresponding duty to justify discrepancies between court-martial and military commission procedure. The amendment does not take a position on the proper standard of deference for such determinations. Obviously, to the extent the President may elect to exercise the power to depart from the court-martial norm, those departures would be subject to scrutiny for violations of international law. This is consistent with the current text of the *Manual for Courts-Martial*, which itself is an Executive Order issued by the President.

Until 1990, Article 36(b) required that changes in the *Manual for Courts-Martial* be reported to Congress. "The power to repudiate a *Manual* provision has never been exercised, and indeed, it appears that the responsible committees of Congress have never played a significant role with respect to oversight of the President's power under" Article 36(b). Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216 n.12 (1997). The reporting requirement was repealed as a paperwork reduction measure.

The amendment restores the requirement and is intended to apply to rules for military commissions and provost courts as well as those for courts-martial.

The amendment draws directly on the current *Manual for Courts-Martial*, and deletes obsolete references to "other military tribunals."

The third purpose of the amendment is to provide for appellate review of military commissions. The UCMJ provides for three stages of appellate review: by a service Court of Criminal Appeals, by the United States Court of Appeals for the Armed Forces, and by the Supreme Court of the United States. Because decisions of the Courts of Criminal Appeals are subject to review by the other courts just mentioned, only the grant of appellate jurisdiction to the Courts of Criminal Appeals in Article 66 of the UCMJ needs to be adjusted. This amendment would render superfluous the Review Panel created by the Department of Defense's Military Commission Order, and require a conforming amendment to repeal the Detainee Treatment Act's grant of limited military commission appellate jurisdiction to the United States Court of Appeals for the District of Columbia Circuit.

The amendment requires the President to designate which of the Courts of Criminal Appeals will have jurisdiction over a military commission case.

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The Day

Guantanamo Bay: New Kind Of Law For New Kind Of War

By **Glenn Sulmasy**

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Last week, in Rumsfeld vs. Hamdan, the Supreme Court decided that the military commissions for the jihadist detainees in Guantanamo Bay are not lawfully constructed. I disagree. However the realities of maintaining international support and ensuring domestic consensus on fighting the global war demands we look for alternatives for detaining and trying jihadists. Regardless of how the Court decided in Hamdan, the commissions have failed.

The Court has forced the opponents of military commissions to offer legitimate solutions. The best solution available is the creation of a National Security Court system.

The global war on terror has created ambiguities in both the laws of armed conflict and how best to fight this new war. The asymmetric threat of international terror, the lack of a clear national enemy, the problems with the military commissions in Guantanamo Bay, allegations of torture and the recent constitutional issues surrounding wiretap efforts of the National Security Agency all highlight the lack of an appropriate body of law to govern this new conflict. Nowhere is this ambiguity more evident than in the United States' handling of detainees.

The "enemies" in this war are men and women who fight not for a nation but for ideology, do not wear standard military uniforms and, as doctrine, flout the laws of war. These new "warriors" have created extreme difficulties since they are not conventional prisoners of war (regardless what the recent ruling has asserted) and thus (with all due respect to Justice John Paul Stevens) the Geneva Conventions simply *do not* apply to them. Adjudicating their status and crimes has become increasingly chaotic. It initially appeared that the military tribunals (currently referred to as military commissions by the Bush Administration) would provide the appropriate venue for handling the prosecution of the detainees. But now, over four years later, there has not been a completed prosecution. More than 500 detainees remain in Guantanamo Bay and supposedly another 450 are are being held in Afghanistan.

As this problem grows, the U.S. needs a a new approach. Our own federal courts system, the standard courts-martial system and other traditional methods, won't work. A healthy, bipartisan debate on "what" to do next is critical. This is a new war, one that mixes law enforcement and warfare, and does not fit neatly in either category.

A national security court apparatus needs to be legislated. As Congress begins to debate (as ordered by the Supreme Court) how to handle jihadists' violations of the laws of war, policymakers must achieve both the reality *and appearance* of justice.

Clearly, many issues need to be hammered out regarding the composition of the court.

The court would be a hybrid of the military commissions and our own federal trial system.

The jihadist would be afforded limited rights, including right to counsel and be detained and tried on military bases within the United States. The law would allow the death penalty. The hearings would be closed with the exception of observers from Human Rights Organizations (for example, Amnesty International, the International Red Cross and the U.N. Human Rights Watch.) The U.S. Department of Justice would provide prosecutors and administer over the program.

International concern over Guantanamo is detracting from our ability to provide guidance, counsel and policy in this and other arenas. A blue-ribbon commission, created by the president with bipartisan support from Congress, should immediately be formed to address questions as to proper detention, adjudication, intelligence gathering, terrorist surveillance and other legal issues associated with the threat of international terror.

The National Security Court, a natural outgrowth of the military commissions, affords an opportunity for U.S. policy makers to respond forcefully and effectively to calls for a way out of the Guantanamo issue.

The Hamdan decision has pushed us in this direction. The military commissions are no longer a viable option.

Rather than offering no solutions and merely attacking the existing structure, policy makers need to emerge with fresh ways to look at the proper detention and adjudication of the jihadists.

It is time to regain the initiative, and reaffirm our leadership in the humane prosecution of those who would undermine the ideals of democracy.

Glenn Sulmasy is an associate professor of law at the U.S. Coast Guard Academy and an expert in national-security law. The views expressed here are his own. ■

QUESTIONS AND ANSWERS SUBMITTED FOR THE RECORD

JULY 12, 2006

QUESTIONS SUBMITTED BY MS. SANCHEZ

Ms. SANCHEZ. I have a few questions about how we should approach the task of codifying our system for military commissions.

Since the UCMJ delegates substantial rule-making power to the President, what aspects of commission procedures should we codify and what should be left to Presidential executive orders in the Manual for Courts-Martial? For example, if we decide to allow for exclusion of the accused in certain circumstances during presentation of classified evidence, should we codify the rule or leave it to executive rule-making?

Second, in crafting a statute for commissions should we begin with the general court-martial model and deviate only where common sense dictates? Or should we outline an entirely distinct type of tribunal and specify minimum procedural safeguards, leaving the details to the president?

Finally, if we enact a military-commissions statute, would it make sense to have a separate Manual for Military Commissions as the vehicle for Presidential rule-making? Would you expect that the implementing regulations would need to be that extensive?

Mr. BRADBURY. We believe that Congress struck the appropriate balance in the Military Commissions Act of 2006 ("MCA"), which enacts the Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice (the "UCMJ"), but adapted for use in the special context of military commission trials of alien unlawful enemy combatants. Dozens of articles of the UCMJ have relevance for military commissions and were appropriately relied on as the starting point for the MCA. At the same time, Congress recognized that the military commissions process for alien unlawful enemy combatants should be separate from the court-martial process that is used to try our own service members. The MCA thus reflects the relevant differences between the procedures appropriate for trying the men and women of our Armed Forces and those appropriate for trying unlawful alien enemy combatants.

The MCA, like the UCMJ, provides that the procedures established in the MCA will be supplemented by additional rules and procedures. Similar to Article 36 of the UCMJ, section 949a provides that the Secretary of Defense, in consultation with the Attorney General, shall prescribe rules of law and evidence appropriate for military commissions, following those in courts-martial, where the Secretary of Defense considers such procedures practicable or consistent with military necessity. *See* 10 U.S.C. § 949a(a). Consistent with that directive, the Department of Defense recently promulgated a new Manual for Military Commissions, which follows the Manual for Courts-Martial in many respects.

Ms. SANCHEZ. One of the persistent criticisms of Military Commission Order Number 1 has been the lack of a meaningful appeals process for military-commission cases. What would you consider to be the most appropriate appeals process for military-commission cases: use of existing Article I courts, the ad hoc approach of limited review under the DTA, or some other alternative? Why?

Mr. BRADBURY. In the MCA, Congress has created a formal appeals process that parallels the appellate process under the UCMJ. Specifically, the MCA establishes a Court of Military Commission Review within the Department of Defense to hear appeals on questions of law. *See* 10 U.S.C. § 950f(a). Convicted detainees have the right to further appeal their convictions to the U.S. Court of Appeals for the D.C. Circuit. *Id*. § 950g(a). The Supreme Court may review decisions of the D.C. Circuit through petitions for certiorari. *Id*. § 950g(d). We believe the MCA provides robust appellate review of decisions by military commissions.

Ms. SANCHEZ. Common sense suggests that when war crimes trials are conducted in the course of an on-going war, we should reserve some discretion to deny the accused access in unusual cases, yet we want to ensure that the rules narrowly limit the circumstances of such denials and ensure that there are safeguards to mitigate the prejudice to the accused, such as unclassified summaries of the evidence, etc.

With that in mind, I first would ask the panel to offer their opinion on whether, in theory, it is possible to have a fundamentally fair trial where an accused is excluded for portions of the trial? What about trials in absentia, where an accused vol-

untarily flees after arraignment—while that is different, doesn't the law assume that resulting verdicts can be fundamentally just, despite the absence of the accused?

Second, since the Supreme Court ruled that Common Article 3 of the Geneva Conventions apply to our conflict with al Qaeda generally and the military commissions specifically, could we exclude the accused from selected portions of his trial consistent with Common Article 3's requirement for a tribunal "affording all the judicial guarantees which are recognized as indispensable by civilized people"?

Finally, military-commission prosecutors I have spoken with about this say that exclusion of the accused would be an unusual and extraordinary measure. What is the best way to preserve some rule for extraordinary exclusion, while protecting the rights of the accused? What procedural and substantive standards would you recommend? Is there any existing model?

Mr. BRADBURY. The MCA strikes an appropriate balance between the rights of the accused and interests of our national security. The new law grants the accused the right to be present for all trial proceedings. *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). Moreover, the accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured alien unlawful enemy combatants without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f). Accordingly, we believe that the MCA is consistent with Common Article 3's requirement of a tribunal "affording all the judicial guarantees which are recognized as indispensable by civilized peoples," while also safeguarding our intelligence operations and personnel.

Ms. SANCHEZ. The single rule of evidence in Military Commission Order No. 1 is that "evidence shall be admitted if the evidence has probative value to a reasonable person." This standard is very similar to the rule of admissibility used by the International Criminal Tribunal for the Former Yugoslavia, which states: "A chamber may admit any relevant evidence which it deems to have probative value." The International Criminal tribunal for Rwanda uses a nearly identical standard as well. In view of the similarity of these standards, there seems to be an international consensus that war crimes trials require a broader and more relaxed approach to admissibility of evidence.

What additional rules regarding the admissibility or exclusion of evidence are essential to ensure reliable verdicts in military-commission cases? Do you believe that this standard—"probative value to a reasonable person" is sufficient to exclude evidence derived from coercive interrogations? How would you fashion a rule of exclusion that prohibits admission of statements obtained through coercive interrogations?

Mr. BRADBURY. We agree that the evidentiary rules used in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") demonstrate the appropriateness of applying broad rules of admissibility in war crimes trials. Because military commissions must try crimes based on evidence collected everywhere from the battlefields of Afghanistan to foreign terrorist safe houses, we believe that Congress struck a sensible balance in enacting a Code of Military Commissions that provides for the introduction of all probative evidence, including hearsay evidence where such evidence is reliable. Of course, some evidence may be unreliable under the circumstances surrounding a particular case. We believe, however, that the reliability of a particular piece of evidence is best left to the considered judgment of the presiding military judge in the first instance.

The Administration believes that it is neither possible nor prudent to draw a "bright-line" rule of exclusion for statements obtained via "coercion." The United States does not engage in torture, an act that is prohibited by United States law and our international obligations. Consistent with these obligations, the MCA provides that statements obtained by torture shall not be admitted in a military commission proceeding. *See* 10 U.S.C. § 948r(b). The MCA further provides that statements obtained in violation of the Detainee Treatment Act of 2005, which was enacted on December 30, 2005, shall not be admitted before a military commission. *See id.* § 948r(d)(3). As for other statements arguably obtained through "coercion," the MCA leaves the question of admissibility to the sound discretion and expertise of the military judge. Allegations of "coercion" are easy to make and often difficult to rebut, particularly in the context of an ongoing armed conflict. Accordingly, instead of attempting to fashion a universally applicable rule of exclusion for "coerced" statements, Congress has appropriately entrusted military judges with the authority to make context-specific determinations about whether a particular allegation of "coercion" is sufficiently well founded to vitiate the reliability of a given statement and whether the interests of justice favor the admission of the statement.

Ms. SANCHEZ. What additional rules regarding admissibility or exclusion of evidence are essential to ensure reliable verdicts in military commission cases? And if it is commonly accepted that coerced admissions are not reliable and therefore lack probative value, do you believe that this standard, probative value to a reasonable person, is sufficient to exclude evidence derived from coerced confessions? And how would you fashion a rule of exclusion that prohibits admission of statements obtained through coercive confessions?

Mr. DELL'ORTO. The Military Commissions Act of 2006 lays out statutory framework for military commissions cases including evidentiary rules.

On January 18, 2007, the Department of Defense submitted to Congress a Manual for Military Commissions consistent with the guidance provided in the Military Commissions Act, which includes specific rules of evidence.

Ms. SANCHEZ. Those familiar with the history of American military justice are aware of the great evolution of military justice in the last half-century. Beginning with the enactment of the UCMJ in 1950 and continuing thereafter through changes to the Code itself and the Manual for Courts-Martial, modern American courts-martial have become very similar to, and in many ways superior to, civilian criminal courts. Yet there has been no similar evolution in the legal basis for military commissions, which have also been a long standing feature of American military justice. I believe we are now taking the first major steps in the evolution of military commissions, which I believe are an important part of our legal arsenal in the war on international terrorism. I have a few questions about how we should approach the task of codification.

• Since the UCMJ delegates substantial rule-making power to the President, what aspects of commission procedures should we codify and what should be left to Presidential executive orders in the Manual for Courts-Martial? We need to find the appropriate mix of statute and implementing regulations. For example, if we decide to allow for exclusion of the accused in certain circumstances during presentation of classified evidence, should we codify the rule or leave it to executive rule-making?

Mr. DELL'ORTO. Congress has passed and the President has signed into law the Military Commissions Act of 2006 ("MCA"). The Department of Defense believes that this legislation provides the appropriate approach, including the appropriate level of statutory codification.

Ms. SANCHEZ. Second, in crafting a statute for commissions should we begin with the general court-martial model and deviate only where common sense dictates? Or should we outline an entirely distinct type of tribunal and specify minimum procedural safeguards, leaving the details to the president?

Mr. DELL'ORTO. Please see the previous answer.

Ms. SANCHEZ. Finally, if we enact a military commissions statute, would it make sense to have a separate Manual for Military Commissions as the vehicle for Presidential rule-making? Would you expect that the implementing regulations would need to be that extensive?

Mr. DELL'ORTO. On January 18, 2007, the Department submitted to Congress a Manual for Military Commissions consistent with the guidance provided in the Military Commissions Act of 2006.

Ms. SANCHEZ. One of the persistent criticisms of Military Commission Order Number 1 has been the lack of a meaningful appeals process for military commissions cases. The Detainee Treatment Act provides for review by a special panel of the DC Circuit Court of Appeals of cases that result in a sentence in excess of 10 years confinement. However, because military commissions are a species of military tribunals under the UCMJ, it would seem to make sense to give the Article I military appeals courts, with their expertise in military law, supervision of this aspect of military justice as well.

• What would you consider to be the most appropriate appeals process for military commissions cases: use of existing Article I courts, the ad hoc approach of limited review under the DTA, or some other alternative? Why?

Mr. DELL'ORTO. The Military Commissions Act of 2006 affords accused the opportunity to appeal military commissions decisions to the Court of Military Commission Review, the Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States. We believe that the Military Commissions Act of 2006 lays out the appropriate appeals process.

Ms. SANCHEZ. The Supreme Court was critical of the military commission rule that permits exclusion of the accused from proceedings and denies him access to classified evidence. I believe that this rule was offered as one of the original justifications for military commissions in our current context. There has been much useful discussion here regarding the best way to protect classified information in the military commissions process. On the one hand, there are those who advocate using

the usual rules in the Classified Information Procedure Act (CIPA) and Military Rule of Evidence 505, which apply in a regular court-martial. On the other hand, there are those who take the view that the commission should have the discretion to simply exclude the accused whenever classified evidence is presented, believing that the presence of his appointed defense counsel will mitigate any prejudice to the accused. I'd like to find a middle ground—common sense suggests that when war crimes trials are conducted in the course of an on-going war, we should reserve some discretion to deny the accused access in unusual cases, yet we want to ensure that the rules narrowly limit the circumstances of such denials and ensure that there are safeguards to mitigate the prejudice to the accused, such as unclassified summaries of the evidence, etc.

- With that in mind, I first would ask the panel to offer their opinion on whether, in theory, it is possible to have a fundamentally fair trial where an accused is excluded for portions of the trial? What about trials in absentia, where an accused voluntarily flees after arraignment—while that is different, doesn't the law assume that resulting verdicts can be fundamentally just, despite the absence of the accused?

Mr. DELL'ORTO. Yes, in principle by setting clear, defined limitations on when an accused can be excluded we may ensure a "full and fair trial". That said, the MCA does not permit the accused to be tried *in absentia* or through the introduction of classified evidence withheld from the accused. The new law grants the accused the right to be present for all trial proceedings (unless he engages in disruptive conduct warranting his exclusion). *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). The accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A).

Ms. SANCHEZ. Second, since the Supreme Court ruled that Common Article 3 of the Geneva Conventions apply to our conflict with al Qaeda generally and the military commissions specifically, could we exclude the accused from selected portions of his trial consistent with Common Article 3's requirement for a tribunal "affording all the judicial guarantees which are recognized as indispensable by civilized peoples"?

Mr. DELL'ORTO. Yes, by setting clear, defined limitations on when an accused can be excluded we can ensure a "full and fair trial". As explained in the previous answer, the MCA provides that the accused shall be present for all proceedings of a military commission (with certain narrow exceptions). *See* 10 U.S.C. § 949d(b). The MCA further makes clear that, in the view of the United States, a military commission established under the MCA is "a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." *Id.* § 948b(f).

Ms. SANCHEZ. Finally, military commissions prosecutors I have spoken with about this say that exclusion of the accused would be an unusual and extraordinary measure. What is the best way to preserve some rule for extraordinary exclusion, while protecting the rights of the accused? What procedural and substantive standards would you recommend? Is there any existing model?

Mr. DELL'ORTO. The Military Commissions Act of 2006 includes provisions to protect classified information from disclosure if disclosure would be detrimental to the national security. The legislation requires that the accused will be present for all proceedings of a military commission (with certain narrow exceptions). *See* 10 U.S.C. § 949d(b). The procedural and substantive standards included in the Military Commissions Act of 2006 appear to strike the proper balance between the need to protect classified information and the accused's right to a full and fair trial.

Ms. SANCHEZ. I would like to zero in on the rules of evidence again. All of you, including Admiral Hutson, accept the view that different rules of evidence are required for war crimes cases. The usual reasons cited for this necessary deviation from the regular rules of evidence in courts-martial and Federal courts are related to the manner and circumstances in which war crimes evidence is gathered—by soldiers and intelligence agents, rather than police detectives trained in the collection and preservation of evidence for criminal trials. Consequently, the evidence in war crimes trials will likely include hearsay, evidence without a clear chain of custody, and interrogation products obtained without Miranda warnings and other safeguards against coercion. The single rule of evidence in Military Commission Order No. 1 is that "evidence shall be admitted if the evidence has probative value to a reasonable person." This standard is very similar to the rule of admissibility used by the International Criminal Tribunal for the Former Yugoslavia, which states: "A chamber may admit any relevant evidence which it deems to have probative value." The International Criminal tribunal for Rwanda uses a nearly identical standard as well. In view of the similarity of these standards, there seems to be an international

consensus that war crimes trials require a broader and more relaxed approach to admissibility of evidence.

• What additional rules regarding the admissibility or exclusion of evidence are essential to ensure reliable verdicts in military commissions cases?

Mr. DELL'ORTO. The Military Commissions Act of 2006 lays out a statutory framework for military commissions cases including evidentiary rules.

On January 18, 2007, the Department submitted to Congress a Manual for Military Commissions consistent with the guidance provided in the Military Commissions Act which includes specific rules of evidence.

Ms. SANCHEZ. It is commonly accepted that coerced admissions are not reliable and, therefore, lack probative value. So, do you believe that this standard—"probative value to a reasonable person"—is sufficient to exclude evidence derived from coercive interrogations? How would you fashion a rule of exclusion that prohibits admission of statements obtained through coercive interrogations?

Mr. DELL'ORTO. Coercion is a difficult legal concept to define and any interrogations by government officials are coercive to some degree. I do not agree that coerced admissions are per se unreliable and lack probative value. The MCA excludes statements obtained by torture, as that term is defined under United States law, and it further excludes statements obtained in violation of the Detainee Treatment Act ("DTA"), which was enacted on December 30, 2005. *See* 10 U.S.C. § 948r(d). As for other statements obtained by measures that did not violate any United States statute, the MCA leaves the question of admissibility to the sound discretion and expertise of the military judge. Rather than trying to define "coercion," Congress has appropriately entrusted military judges with the authority to make context-specific determinations about whether a particular statement appears to be reliable and whether the interests of justice would be served by admission of the statement. *See id.* § 948r(c). I believe that the MCA fashions the appropriate rule regarding the admissibility of allegedly coerced statements.

QUESTIONS SUBMITTED BY MS. TAUSCHER

Ms. TAUSCHER. Would you agree that the Congress, in drafting the UCMJ, made a reasoned and considered decision, informed in part by concerns about the procedures adopted and applied in the *Yamashita* case, that military commissions should adhere as closely as practicable to the rules of the UCMJ?

Have any military commissions been established since the UCMJ was adopted that not track the rules of the UCMJ, aside from those currently proposed by the administration?

Which agencies and officials of the U.S. government did the White House consult in advising the President on the issuance of his military order of November 13, 2001, establishing the present military commissions? Were senior officials from the Pentagon, including the uniformed military leadership and senior Judge Advocates General, the State Department and the National Security Council consulted? If not, why were those officials in the government with primary responsibility for national security and knowledge of U.S. military law and traditions excluded from the process?

Mr. BRADBURY. We believe that Congress made a reasoned decision to enact the Uniform Code of Military Justice (the "UCMJ") to codify the rules for courts-martial. As reflected in the position of the United States in the *Hamdan* litigation, we do not believe that the uniformity requirement of Article 36 was intended to require concordance between military commission procedures and court-martial procedures, but rather was designed to ensure uniformity among the court-martial rules promulgated by the various services. That said, a majority of the Supreme Court held to the contrary in *Hamdan*. The Military Commissions Act of 2006 (the "MCA") addresses the statutory limitations identified in *Hamdan* by establishing a new chapter of title 10 to govern trials of alien unlawful enemy combatants by military commission. The MCA tracks the UCMJ, but is adapted for use in the special context of military commission trials of alien unlawful enemy combatants and reflects the relevant differences between the procedures appropriate for trying the men and women of our Armed Forces and prisoners of war and those appropriate for trying alien unlawful enemy combatants.

The President's November 13, 2001, order reflected advice received from policy and legal experts throughout the Administration. In proposing new military commissions legislation, the Administration engaged in extensive deliberations with all of the bodies that you have mentioned, including military lawyers, and in discussions with interested Members of Congress. Beyond that, it is not appropriate to discuss confidential and privileged advice provided by the Department of Justice or

others in the Administration for the benefit of policymakers within the Executive Branch.

With respect to the specifics of any military commissions that may have been convened after the codification of the UCMJ, we would refer you to the Department of Defense, which is in a better position to provide a response.

Ms. TAUSCHER. You stated that intelligence and military operations might be compromised by application of the UCMJ, or a system of justice modeled after the UCMJ. Specifically, you warned that members of our armed forces would have to read Miranda rights to combatants captured on the battlefield, and that intelligence officers would not be able to carry out interrogations without first giving Miranda warnings and providing access to counsel. Isn't it true that, under the UCMJ, Miranda warnings and access to counsel are not required at the moment of capture or when interrogations are conducted for intelligence gathering purposes? Isn't it true that the UCMJ only requires Miranda warnings and access to counsel once someone has become a suspect for purposes of criminal prosecution?

If so, why did you not mention this distinction in your testimony?

Mr. BRADBURY. The MCA makes clear that Article 31 of the UCMJ shall not apply, directly or indirectly, to the trial of alien unlawful enemy combatants by military commission. *See* 10 U.S.C. § 948b(c) & (d)(1)(B). To answer your specific question, as I explained in my testimony, Article 31 of the UCMJ requires members of our Armed Services to provide *Miranda*-type warnings before questioning to any individual suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law enforcement investigation. That right is broader than the right afforded to criminal defendants in the civilian system and should not be applied to the questioning of captured terrorists. The Court of Military Appeals held in the *Lonetree* case that intelligence agents who were not members of our Armed Forces did not have to provide Article 31 warnings when conducting an interrogation wholly divorced from a military law enforcement investigation. *See United States* v. *Lonetree*, 35 M.J. 396, 405 (C.M.A. 1992). But Article 31 may well apply to many situations in which members of our Armed Forces interrogate or interact with detainees suspected of having violated the law of war. Our military personnel should not be required to guess as to whether the situation they confront is sufficiently investigatory, nor should they be forced to choose between conducting effective interrogations and risking having confessions later deemed inadmissible. Congress appropriately determined in the MCA that Article 31 (a), (b), and (d) should not apply to military commission prosecutions.

Ms. TAUSCHER. Isn't it true that the UCMJ has rules that protect against the disclosure of classified evidence?

Don't those rules allow the government to substitute summaries of evidence or statements of facts that the classified evidence would prove to avoid the disclosure of classified evidence?

Mr. BRADBURY. The MCA strikes an appropriate balance between the rights of the accused and our national security interests. The new law grants the accused the right to be present for all trial proceedings. *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). Moreover, the accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured alien unlawful enemy combatants without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f).

As you note, Military Rule of Evidence 505, which tracks the Classified Information Protection Act, provides procedures that allow the Government to seek judicial approval for the substitution of classified evidence with redacted or summarized evidence. Although some of those procedures parallel those in the MCA, they are not identical, reflecting the fact that military commission procedures are designed for the trials of unlawful enemy combatants—not the members of our Armed Forces—and that in contrast to courts-martial, military commission prosecutions are far more likely to concern evidence that either is classified or was derived from classified sources or methods.

Ms. TAUSCHER. Isn't it true that the UCMJ includes exceptions to the prohibition on hearsay that include both an "excited utterance" exception and "present sense impressions" exception?

Wouldn't both those exceptions apply to statements made on the battlefield, and wouldn't those statements be admissible even under the current hearsay rules of the UCMJ? If not, please explain.

Mr. BRADBURY. The Military Rules of Evidence, tracking the rules in civilian courts, do contain hearsay exceptions for "present sense impressions" and "excited utterances." *See* Mil. R. Evid. 803(1), (2). And those hearsay exceptions may apply to some statements made on the battlefield under certain circumstances. However,

those two exceptions may well not apply in many instances, such as if the declarant provides a statement after leaving the battlefield and the immediacy of the situation surrounding it. *See, e.g., United States* v. *Green*, 50 M.J. 835, 840 (A. Ct. Crim. App. 1999) (holding that present-sense-impression exception does not apply to rape victim's statements made after she was questioned by her roommates); *United States* v. *Jones*, 30 M.J. 127, 129–30 (C.M.A. 1990) (holding that excited-utterance exception does not apply to statements made 12 hours after the event).

Given the importance of gathering reliable evidence from alien unlawful enemy combatants both on and off the field of battle, the Administration believes that the hearsay rules under the Military Rules of Evidence are ill suited to military commissions. Many witnesses in military commission trials are likely to be foreign nationals who are not amenable to process. Other witnesses may be unavailable because of military necessity, incarceration, injury or death. The MCA adopts a broad rule of admissibility for hearsay, in a manner that is consistent with international tribunals. *See* 10 U.S.C. § 949a(b)(2)(E)(i). For example, the international criminal tribunals for the former Yugoslavia and Rwanda permit the admission of any relevant evidence that the tribunal deems to have probative value, including hearsay evidence, as long as it is not substantially outweighed by the need for a fair trial.

Ms. TAUSCHER. Is it not the policy of our military, as expressed in the current DOD Directive on its Law of War Program, to comply with the law of war (including Common Article 3) "during all armed conflicts, however such conflicts are characterized, and in all other military operations?"

Would you agree that the United States has applied the minimum standards of Common Article 3 in all of the wars it has fought since the ratification of the Geneva Conventions, including against irregular forces like the Viet Cong and warlords in Somalia?

Please specify any and all examples of situations where these requirements of humane treatment were a detriment to our military's ability to fulfill its mission?

Please specify examples of any and all interrogation techniques that you believe U.S. service members or contractors should be allowed to employ, but are prohibited by the humane treatment requirements of Common Article 3?

If the meaning of humane treatment under Common Article 3 is Vague and not fully understood by military commanders, why was Deputy Secretary England able to state with confidence that current DOD practices and policies fully comply with its standard?

You warned that the definition of the Common Article 3 is subject to constant reinterpretation by international bodies. Isn't it true that interpretations and rulings issued by foreign tribunals are not ever binding on the U.S.? And that therefore the U.S. is not, and would not, ever be obliged to adopt an international tribunal's definition of the Terms of Common Article 3?

Does the Supreme Court's ruling that Common Article 3 applies to the treatment of all al Qaeda detainees in U.S. custody also apply to the treatment of al Qaeda detainees in the custody of other U.S. government agencies, including the CIA? If not, why not? If so, what steps are being taken to communicate this requirement to such agencies?

Has any country in the world that is a party to the Geneva Conventions ever passed a law or promulgated a policy that denies the application of Common Article 3 to any detainee captured as part of an armed conflict?

Mr. BRADBURY. It has been and will continue to be the policy of the United States to comply with the law of war, including Common Article 3. With respect to Deputy Secretary England's statement, I would refer you to the Department of Defense, which is in a better position to provide a response.

As you know, the Supreme Court held in *Hamdan* that Common Article 3 applies to the conduct of the United States during the armed conflict against al Qaeda. That decision extends to all detainees in the custody of the United States. It would not be appropriate for me to comment on specific privileged legal advice that the Department of Justice has provided on this subject. That said, the difficulty in providing clear guidance as to the meaning of Common Article 3 demonstrates why it was vitally important for Congress to enact the MCA.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "torture," and the "taking of hostages," other terms are undeniably vague. Most notably, Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment." Terms such as "outrages," "personal dignity" and "degrading treatment" are susceptible to uncertain and unpredictable interpretations. For example, some might consider it "humiliating and degrading treatment" merely to hear harsh words during an interrogation, or to be questioned by an interrogator of the opposite sex.

The unpredictability of Common Article 3's meaning is exacerbated by the well established principles—repeatedly affirmed by the United States Supreme Court—that interpretations adopted by international tribunals deserve "respectful consideration," and that interpretations adopted by other state parties to the treaty are due "considerable weight." To be sure, international interpretations of Common Article 3 are not binding on the United States. In light of *Hamdan*, however, there was a substantial risk that the meaning of Common Article 3's ambiguous provisions would have been informed by the evolving interpretations of tribunals and governments outside the United States. As the President has noted, the uncertainty as to the meaning of Common Article 3 would have placed into doubt the ability of the CIA to interrogate senior al Qaeda officials and to gather from them information that has directly contributed to our success in foiling many terrorist plots over the past five years.

The President believed that it was vitally important that the standards governing the treatment of detainees by the United States in the War on Terror should be clear and consistent with our international obligations. The MCA does this by clarifying the meaning of Common Article 3 for all U.S. personnel. The statute clearly defines the grave breaches of Common Article 3 that would expose individuals to criminal sanctions. *See* MCA § 6(b) (amending 18 U.S.C. § 2441(d)). It makes clear that the Constitution's protections for our own citizens—as defined in statute by the Detainee Treatment Act—similarly reflect our Nation's international obligations. *See id*. § 6(c). And the statute reaffirms the President's inherent constitutional authority to interpret our Nation's treaty obligations and delegates to him the power to promulgate authoritative interpretive orders. *See id*. § (6)(a)(3)(C). The MCA thereby promotes United States compliance with its treaty obligations by providing clarity to U.S. personnel and other states parties to the Geneva Conventions of our understanding of United States obligations under the treaty.

Ms. TAUSCHER. Get back to the committee and me specifically as to your suggestions on how we deal with this issue [referring to the issue of MRE 505 and classified information being used in proceedings].

Mr. DELL'ORTO. The Military Commissions Act of 2006 lays out statutory framework for military commissions cases including rules regarding the use of classified information.

On January 18, 2007, the Department of Defense submitted to Congress a Manual for Military Commissions, consistent with the guidance provided in the Military Commissions Act, which includes specific rules of evidence regarding the use of classified information.

Ms. TAUSCHER. Would you agree that the Congress, in drafting the UCMJ, made a reasoned and considered decision, informed in part by concerns about the procedures adopted and applied in the Yamashita case, that military commissions should adhere as closely as practicable to the rules of the UCMJ?

Mr. DELL'ORTO. In many respects, the Military Commissions Act of 2006 closely tracks the UCMJ. I agree that Congress has made a reasoned and considered decision in drafting the UCMJ as well as the Military Commissions Act of 2006.

Ms. TAUSCHER. Have any military commissions been established since the UCMJ was adopted that not track the rules of the UCMJ, aside from those currently proposed by the administration?

Mr. DELL'ORTO. The UCMJ was implemented by Executive Order on February 8, 1951. I do not believe that there have been any military commissions conducted under the UCMJ until the initiation of the current military commissions associated with the current ongoing conflict.

Ms. TAUSCHER. Which agencies and officials of the U.S. government did the White House consult in advising the President on the issuance of his military order of November 13, 2001, establishing the present military commissions? Were senior officials from the Pentagon, including the uniformed military leadership and senior Judge Advocates General, the State Department and the National Security Council consulted? If not, why were those officials in the government with primary responsibility for national security and knowledge of U.S. military law and traditions excluded from the process?

Mr. DELL'ORTO. I cannot address what consultations the White House did or did not have.

Ms. TAUSCHER. You stated that intelligence and military operations might be compromised by application of the UCMJ, or a system of justice modeled after the UCMJ. Specifically, you warned that members of our armed forces would have to read Miranda rights to combatants captured on the battlefield, and that intelligence officers would not be able to carry out interrogations without first giving Miranda warnings and providing access to counsel.

Isn't it true that, under the UCMJ, Miranda warnings and access to counsel are not required at the moment of capture or when interrogations are conducted for intelligence gathering purposes? Isn't it true that the UCMJ only requires Miranda warnings and access to counsel once someone has become a suspect for purposes of criminal prosecution?

If so, why did you not mention this distinction in your testimony?

Mr. DELL'ORTO. The MCA makes clear that Article 31 of the UCMJ shall not apply, directly or indirectly, to the trial of unlawful enemy combatants by military commission. *See* 10 U.S.C. § 948b(c) & (d)(1)(B). To answer your specific question, Article 31 of the UCMJ requires members of our Armed Services to provide *Miranda*-type warnings before questioning any individual who is subject to the UCMJ and suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law-enforcement investigation. These rights are broader than the rights afforded to criminal defendants in the civilian system. Indeed, unlike civilian *Miranda* rights warnings, military Article 31, UCMJ, rights warnings are required regardless of whether the suspect is in law enforcement custody. In addition, when the suspect is placed in custody and is to be questioned by law enforcement or other persons subject to the UCMJ, the suspect is entitled to be advised that he or she may consult with counsel and have such counsel present during the interrogation or questioning. When counsel is requested, counsel must be present before any subsequent custodial interrogation may proceed. The failure to provide a required rights warning, regardless of whether the statement is obtained for law enforcement or intelligence purposes, generally precludes the use of those statements as evidence, and may preclude the use of any additional evidence or information derived from those unwarned statements.

The Court of Military Appeals held in the *Lonetree* case that intelligence agents who were not members of our Armed Forces did not have to provide Article 31 warnings when conducting an interrogation wholly divorced from a military law-enforcement investigation. *See United States* v. *Lonetree*, 35 M.J. 396, 405 (C.M.A. 1992). But Article 31 may well apply to many situations in which members of our Armed Forces interrogate or interact with detainees suspected of having violated the law of war. Our troops should not be required to guess as to whether the situation they confront is sufficiently investigatory, nor should they be forced to choose between conducting effective interrogations and risking having confessions later deemed inadmissible. Congress appropriately determined in the MCA that Article 31 should not apply to military commission prosecutions.

Ms. TAUSCHER. You state that application of court-martial rules will require the government to disclose classified evidence if it chooses to go forward with prosecutions.

Isn't it true that the UCMJ has rules that protect against the disclosure of classified evidence? Don't those rules allow the government to substitute summaries of evidence or statements of facts that the classified evidence would prove precisely to avoid the problem you identified—the disclosure of classified evidence?

Mr. DELL'ORTO. The Manual for Courts-Martial has a Military Rule of Evidence (MRE) that addresses the disclosure of classified information during a court-martial prosecution. MRE 505 allows the government to offer alternatives to the full disclosure of classified information to the accused. The military judge then determines whether the alternatives are acceptable for use by the accused at trial or whether the use of the classified information itself is necessary to afford the accused a fair trial. If the military judge determines that alternatives to full disclosure of the classified information are insufficient and the government continues to object to disclosing the classified information, the military judge must issue an order sanctioning the government as the interests of justice require. Such an order may include: striking all or part of the testimony of a witness, declaring a mistrial, or dismissing the charges, with or without prejudice. Thus, under the UCMJ, the government may be forced to choose between releasing classified information to an accused in order to continue the prosecution or protecting the classified information but foregoing the prosecution.

In the MCA, Congress recognized that MRE 505—which was designed for the trials of members of our Armed Forces—needed to be tailored for trials of unlawful enemy combatants. The new law grants the accused the right to be present for all trial proceedings. *See* 10 U.S.C. § 949a(b)(1)(B); *id.* § 949d(e). Moreover, the accused will have access to all the evidence admitted before the trier of fact. *See id.* § 949a(b)(1)(A). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f). I believe the MCA strikes an appropriate balance between the rights of the accused and interests of our national security.

Ms. TAUSCHER. You state that the UCMJ would deprive prosecutors of some of the best—and in some cases only—evidence against the detainees: hearsay statements made on the battlefield.

Isn't it true that the UCMJ includes exceptions to the prohibition on hearsay that include both an "excited utterance" exception and "present sense impressions" exception? Wouldn't both those exceptions apply to statements made on the battlefield, and wouldn't those statements be admissible even under the current hearsay rules of the UCMJ? If not, please explain.

Mr. DELL'ORTO. Military commissions, like international war crimes tribunals, will have a strong need to consider reliable hearsay evidence. Hearsay statements comprise some of the best evidence against those we expect to try by military commission, and it would be impracticable or even impossible to successfully try some of those accused without the use of hearsay evidence. The Military Rules of Evidence generally prohibit hearsay evidence and carve out certain established exceptions where hearsay evidence has generally been recognized as more reliable. While some of the hearsay evidence used in military commissions cases will fall into the recognized hearsay exceptions, given the unusual nature of these cases, some valuable hearsay evidence will not. In particular, the "excited utterance" exception or the "present sense impression" exception—which permit the admission of hearsay statements about present or recent observations—are not likely to be broad enough to permit the admission of highly relevant reports concerning past events that reliable, but unavailable, foreign witnesses may have made to United States personnel. Thus, the Military Commissions Act of 2006 provides that hearsay evidence shall be admitted if it would be admissible in a court-martial proceeding, or if the judge otherwise finds the evidence probative and reliable. *See* 10 U.S.C. § 949a(b)(2)(E).

Ms. TAUSCHER. Is it not the policy of our military, as expressed in the current DOD Directive on its Law of War Program, to comply with the law of war (including Common Article 3) "during all armed conflicts however such conflicts are characterized, and in all other military operations?"

Mr. DELL'ORTO. Yes, that is the policy.

Ms. TAUSCHER. Would you agree that the United States has applied the minimum standards of Common Article 3 in all of the wars it has fought since the ratification of the Geneva Conventions, including against irregular forces like the Viet Cong and warlords in Somalia? Isn't it true that in all of those conflicts we considered ourselves bound to apply the basic standards of humane treatment and fair justice embodied in Common Article 3—even against enemies that engaged in brutal war crimes—in recognition that our actions set an example for others and for the treatment of our own troops when they are captured?

Mr. DELL'ORTO. U.S. Armed Forces personnel captured in the course of an armed conflict have the status of prisoners of war under the Third Geneva Convention. The full scope of that convention's provisions and protections would apply in those circumstances, not the more limited protections of Common Article 3. In every armed conflict, the United States has demanded always that captured U.S. personnel be afforded all the rights and privileges of their lawful status. It has not always been the case, however, that other State parties to the Geneva Conventions have afforded our personnel such protections. Recall the experience of U.S. POWs held by the North Vietnamese.

The United States provided captured Viet Cong and North Vietnamese forces with prisoner of war protections out of our interest in protecting captured U.S. military personnel and civilians, following the murder of three U.S. military personnel in Viet Cong hands. Captured U.S. personnel did not benefit from this policy decision, however, and they suffered confinement under brutal conditions, torture, malnourishment, and other hardships up to and including murder at the hands of their captors.

An historical and fundamental premise of the law of war is that private citizens may not engage in combatant acts. No law of war treaty requires that a State provide prisoner of war status or protections to civilians who unlawfully take up arms against that State. Doing so would place innocent civilians in greater jeopardy, and would reward terrorists for their violations of the law of war.

Reciprocity in practices among States who are parties to the same treaty is an important consideration. However, the attack of civilian objects and the death of almost 3,000 innocent civilians on September 11, 2001; the illegal attacks on other civilian objects, such as the United Nations and International Committee of the Red Cross facilities in Iraq; and the subsequent kidnapping, torture and murder of innocent U.S. and foreign civilians, such as the May 11, 2004, beheading of Nicholas Berg, provide no expectation of even limited application of the law of war by al Qaeda, which is not a State party to the Geneva Conventions.

Ms. TAUSCHER. Please specify any and all examples of situations where these requirements of humane treatment were a detriment to our military's ability to fulfill its mission?

Mr. DELL'ORTO. I do not believe that treating detainees humanely is a detriment to fulfilling U.S. military mission requirements.

Ms. TAUSCHER. Please specify examples of any and all interrogation techniques that you believe U.S. service members or contractors should be allowed to employ, but are prohibited by the humane treatment requirements of Common Article 3?

Mr. DELL'ORTO. The Detainee Treatment Act of 2005 contains the following provision:

> No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or interrogation approach or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

The Deputy Secretary issued a directive to the Department on December 30, 2005, informing the field of this legal requirement under the Detainee Treatment Act. The interrogation approaches and techniques contained in Field Manual 34–52, Intelligence Interrogations, comply with the law and are well within the humane treatment requirements of Common Article 3.

Ms. TAUSCHER. If the meaning of humane treatment under Common Article 3 is vague and not fully understood by military commanders, why was Deputy Secretary England able to state with confidence that current DOD practices and policies fully comply with its standard?

Mr. DELL'ORTO. The policies promulgated by the Department of Defense are well above the standards of Common Article 3.

Ms. TAUSCHER. Isn't it true that interpretations and rulings issued by foreign tribunals are not ever binding on the U.S.? And that therefore the U.S. is not, and would not, ever be obliged to adopt an international tribunal's definition of the terms of Common Article 3?

Mr. DELL'ORTO. Many of the provisions of Common Article 3 prohibit actions that are universally understood and condemned, such as "murder," "mutilation," "torture," and the "taking of hostages." It is undeniable, however, that some of the terms in Common Article 3 are inherently vague, as this Committee already discussed in its recent hearing on the subject.

For example, Common Article 3 prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application. If left undefined by statute, the application of Common Article 3 could create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3 constitutes a federal crime under the War Crimes Act.

Furthermore, the Supreme Court has said that in interpreting a treaty provision such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty are due "considerable weight." Accordingly, the meaning of Common Article 3—the baseline standard that now applies to the conduct of U.S. personnel in the War on Terror—would be informed by the evolving interpretations of tribunals and governments outside the United States.

Ms. TAUSCHER. Does the Supreme Court's ruling that Common Article 3 applies to the treatment of all al Qaeda detainees in U.S. custody also apply to the treatment of al Qaeda detainees in the custody of other U.S. government agencies, including the CIA? If not, why not? If so, what steps are being taken to communicate this requirement to such agencies?

Mr. DELL'ORTO. I can only speak for the Department of Defense and note the steps taken to ensure that the Supreme Court's ruling in *Hamdan* has been communicated throughout the Department of Defense. The Deputy Secretary issued a memorandum on July 7, 2006 informing the Department of Defense that the Supreme Court determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda. A copy of this memorandum has already been provided to Congress.

Ms. TAUSCHER. Has any country in the world that is a party to the Geneva Conventions ever passed a law or promulgated a policy that denies the application of Common Article 3 to any detainee captured as part of an armed conflict?

Mr. DELL'ORTO. I do not know.

QUESTIONS SUBMITTED BY MS. DAVIS OF CALIFORNIA

Ms. DAVIS. Why have only ten of the terrorist combatants in Guantanamo been charged? What does the government plan to do with the rest of the people currently held at GTMO?

Mr. BRADBURY. As the Supreme Court recognized in the *Hamdi* decision, the United States has the authority to detain enemy combatants for the duration of hostilities. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 519–21 (2004). The decision whether to charge an enemy combatant with a crime depends, however, on whether there is specific evidence that the individual committed a war crime. In light of the passage of the Military Commissions Act of 2006, and the resulting removal of any legal uncertainty over whether the military commissions are authorized by statute, we expect a greater number of detainees will be charged and tried by military commission.

With respect to those detainees who are not charged, the United States has the authority to detain those individuals for the duration of hostilities, consistent with their status as enemy combatants under international law. Nevertheless,the President has made clear that the United States has no interest in detaining these individuals beyond the point where such detention is necessary. Accordingly, the United States has voluntarily taken measures to review the need to continue to hold enemy combatants on an annual basis through the Administrative Review Board ("ARB") process. The ARBs assess whether the enemy combatant poses a threat to the United States or its allies in the ongoing War on Terror and whether there are other factors bearing on the need for continued detention (*e.g.*, intelligence value). When appropriate, the United States has undertaken extraordinary measures to repatriate enemy combatants to their home countries. We emphasize, however, that these transfers are not without risk. On anumber of occasions, enemy combatants released by the United States have returned to the field of battle to once again take up arms against American forces. Accordingly, for the safety of United States citizens, it is important that the United States be careful and ensure that enemy combatants are released only when they truly no longer pose a threat to the United States and its allies.

Ms. DAVIS. The military commission rules the President approved prior to the *Hamdan* decision contained a number of different features distinguishing the commissions from ordinary courts martial or other conventional judicial proceedings. Are there specific policy rationales for each of those distinctions? Please explain.

Mr. BRADBURY. In his military commissions order, the President determined that the trial of captured terrorists by court-martial procedures would not be practicable, and he therefore directed the Department of Defense to convene military commissions that would reflect the military realities of the War on Terror, but that would still provide detainees with full and fair trials. At that time, the President did not make the specific procedure-by-procedure determination as to every departure from the court-martial system that the Supreme Court later held in *Hamdan* was required by Article 36 of the Uniform Code of Military Justice (the "UCMJ").

Congress has now passed, and the President has signed into law, the MCA. The MCA relies upon the UCMJ as a starting point and then departs in specific respects where the court-martial procedures would be impracticable or inappropriate. For example, because many terrorists were captured on the battlefield, strict hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present significant obstacles to the trials of such enemy combatants. Therefore, the MCA recognizes that the hearsay rules applicable in courts-martial shall not apply here. *See* 10 U.S.C. § 949a(b)(2)(E). In other circumstances, the UCMJ provides protections that exceed those given to criminal defendants in civilian courts, and that would be inappropriate to provide to alien unlawful enemy combatants in the military commissions. Congress therefore provided, for example, that Article 31(a), (b), and (d) (concerning the pretrial right to counsel) and Article 32 (concerning the pretrial investigation) of the UCMJ shall not apply to military commissions. *See id.* § 948b(d). More generally, the MCA provides that the rules issued by the Secretary of Defense shall track those of courts-martial only insofar as he "considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). Thus, while the MCA tracks the UCMJ in many respects, Congress correctly determined that these and other court-martial provisions should not be employed in military commissions.

Ms. DAVIS. Why doesn't the Administration try to implement the *Hamdan* decision by complying with Common Article 3 and modifying the military commissions to better incorporate due process provisions mentioned by the Court, rather than requesting Congressional action without the benefit of experience?

Mr. BRADBURY. Congress recognized in the MCA that the procedures enacted therein fully satisfy the standards of Common Article 3. *See* 10 U.S.C. § 948b(f). We agree and believe that the legislation appropriately addresses the concerns raised by the Supreme Court. Common Article 3 prohibits the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3 provides no further details as to the "judicial guarantees which are recognized as indispensable by civilized peoples," but the MCA, which takes the UCMJ as a starting point, provides extensive procedural protections for the accused that fully satisfy the international standard.

The Supreme Court held in *Hamdan* that the then-existing military commission procedures conflicted with Articles 21 and 36 of the UCMJ. The Court did not hold that any particular commission procedure violated due process or international law. Nonetheless, several of the Justices, in separate opinions, did express concerns about some commission procedures, and the new military commission legislation addresses those concerns. For instance, to ensure the impartiality of the tribunal, the MCA provides that a military judge presides over the commission proceeding with the traditional authority of a judge to issue final rulings at trial on law and evidence. *See* 10 U.S.C. § 949l(b). In addition, the MCA provides that the minimum number of members of the commission is increased to five in non-capital cases, and twelve in capital cases, so as to track the procedures now in place under the UCMJ. *See id.* § 948m(a); *id.* § 949m(c).

Ms. DAVIS. If you believe Congress can establish non-law-of-war violations that are subject to trial by military commission (for example, conspiracy or inchoate offenses related to terrorism), do you believe such new offenses could be applied retroactively? If so, under what theory of law?

Mr. BRADBURY. The Administration believes that conspiracy is an offense under the law of war and is therefore properly triable by military commission. As Justice Thomas demonstrated in his opinion in *Hamdan*, that view is supported by historical practice and by authoritative commentators on the law of war. In enacting the MCA, Congress has appropriately exercised its authority under Article I, Section 8, to "define and punish . . . Offenses against the Law of Nations," by specifically authorizing military commissions to try unlawful alien enemy combatants for conspiring to violate the law of war. In so doing, Congress specifically recognized that conspiracy was an offense "that ha[d] been traditionally triable by military commission." 10 U.S.C. § 950p(a). This determination should make clear that conspiracy remains properly triable by military commission. We also note that conspiracies to commit the offenses defined as "war crimes" are already prosecutable in federal court. *See* 18 U.S.C. § 2441(c)(1); *id.* § 371. Title 18 likewise prohibits providing material support to terrorism. *See id.* § 2339A; 2339B. Because conspiring to commit a war crime or providing material support to terrorism is not a "new offense," the prosecution for such a crime would not raise retroactivity concerns.

Ms. DAVIS. What are the specific definitions the Secretary uses for the following terms:

a. Enemy combatant?
b. Unlawful enemy combatant?
c. War crime?
d. Terrorist?
e. Coercion?
f. Cruel?
g. Humiliating?
h. Degrading?
i. Indignities?
j. Inhuman?

Mr. BRADBURY. The MCA defines many of the terms that you have listed for purposes of military commissions. "Lawful enemy combatant" and "unlawful enemy combatant" are defined under 10 U.S.C. § 948a. The statute does not specifically define "enemy combatant," but every combatant will either be a lawful or an unlawful combatant.

The "war crimes" that violate Common Article 3 as a matter of United States criminal law are defined in 18 U.S.C. § 2441, as amended by section 6 of the MCA. In addition, 10 U.S.C. § 950v(b) defines the offenses traditionally triable by military commission that would generally be understood to constitute war crimes.

The MCA defines the offense of "terrorism" at 10 U.S.C. § 950v(b)(24).

"Cruel, inhuman and degrading treatment" is defined in section 6(c) of the MCA. In addition, the War Crimes Act, as amended by the MCA, defines an offense of cruel or inhuman treatment. *See* 18 U.S.C. § 2441(d)(1)(B).

To the extent your question seeks the particular definitions of other terms employed by the Secretary of Defense, we would refer you directly to the Department of Defense, which is in a better position to respond.

Ms. DAVIS. Generally, the United States filled GTMO in late 2001 and early 2002, and hundreds of people who have been designated as enemy combatants have been sitting there for nearly four years in solitary confinement. While hundreds sit there, the administration has only filed charging documents for ten of them.

Mr. DELL'ORTO. We have no one at Guantanamo who is held in solitary confinement.

Ms. DAVIS. Why have only ten been charged?

Mr. DELL'ORTO. Charging of some of the detainees before military commission commenced in the summer of 2004 and continued into 2005. A number of restraining orders were issued in habeas corpus actions pending before United States District Courts preventing military commissions from proceeding. A decision was made to delay additional charges until such time as the restraining orders in pending cases were lifted and the law concerning military commissions was settled. In June 2006, the United States Supreme Court held in *Hamdan* that the prior structure of military commissions lacked statutory authorization. Now that Congress has passed the Military Commissions Act of 2006, the President has signed it into law, and the Manual for Military Commissions has been promulgated, charges have been preferred against three individuals. We expect additional individuals will be charged in the future.

Ms. DAVIS. Are they no longer of intelligence value?

Mr. DELL'ORTO. The United States has no desire to hold detainees any longer than necessary, but transfers are not without risk. We make a determination about the transfer of a detainee based on the best information and evidence available at the time, both classified and unclassified. They are of varying degrees of intelligence value. Remember, some of these individuals are highly skilled in concealing the truth. Al Qaeda's training manual, a.k.a. the Manchester Manual, stresses the importance of deception tactics, techniques, and procedures. Once the individual is transferred, that person becomes the responsibility of his home country and is subject to that country's laws. About 15 detainees who have been released are reported to have returned to the fight.

The Administrative Review Board (ARB) assesses 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. The recommendation of the ARB panel is provided to the Designated Civilian Official (DCO), who then makes a determination as to whether a particular enemy combatant should continue to be detained, be transferred, or released.

Ms. DAVIS. What does the government plan to do with the rest of these people?

Mr. DELL'ORTO. See answer above.

Ms. DAVIS. Are we planning to detain them indefinitely (given the Rasul decision and the indefinite nature of war on a tactic, "terrorism")? For the rest of their natural lives? Until another government agrees to take them? Almost all major conflicts have a definite end. When in is the end of this "conflict?" How will we know when it's over since we likely won't be signing a peace treaty? Please explain.

Mr. DELL'ORTO. See answer above.

Additionally, the war on terror is different from a conventional war because the United States is at war against al Qaeda, an international terrorist organization. Al Qaeda is not a State party to the Geneva Conventions and does not conduct its operations in accordance with the customs and laws of war.

The law in regard to this matter is the law of war. It is difficult to know during a war, when the war will be won. We certainly hope that hostilities will not continue for decades, but the law permits detaining enemy combatants until the cessation of hostilities.

Ms. DAVIS. The military commission rules the President approved—and that the *Hamdan* court found unlawful—contained a number of different features distinguishing the commission from ordinary courts martial or other conventional judicial proceedings. Are there specific policy rationales for each of those distinctions? If yes, what rationales correspond to the specific features of the commissions, and how were they arrived at? If no, then why is any particular feature of the original rules indispensable?

Mr. DELL'ORTO. The original military commission rules were formulated to comport with the modern military commission precedent, dating back to the World War II era as reviewed by the Supreme Court in *Ex parte Quirin,* 317 U.S. 1 (1942).

Ms. DAVIS. Why doesn't the Administration wait to see if it can implement the *Hamdan* decision without all the adverse consequences it was warning about? It could proceed by complying with Common Article 3 and modifying the military commissions to better incorporate due process provisions mentioned by the Court. It could then report back in a year or two about actual experiences rather than requesting congressional changes without the benefit of experience.

Mr. DELL'ORTO. We at the Department of Defense believe that in *Hamdan*, the Supreme Court indicated that Congress and the Executive Branch should work together to address the appropriate procedures governing commissions. We believe that the recently enacted Military Commissions Act of 2006, the product of such a joint effort, preserves flexibility in the procedures for military commissions while ensuring that those accused receive a full and fair trial.

Ms. DAVIS. If you believe Congress can establish non-law of war violations that are subject to trial by military commission (for example, conspiracy or inchoate offenses related to terrorism), do you believe such new offenses could be applied retroactively? If so, under what theory of law?

Mr. DELL'ORTO. The Military Commissions Act of 2006 deals with the question of retroactivity of new offenses. I believe that it has the appropriate solution.

Ms. DAVIS. What are the specific definitions the Secretary uses for the following terms:

a. Enemy combatant?
b. Unlawful enemy combatant?
c. War crime?
d. Terrorist?
e. Coercion?
f. Cruel?
g. Humiliating?
h. Degrading?
i. Indignities?
j. Inhuman?

Mr. DELL'ORTO.

Enemy combatant

From the Military Commissions Act of 2006 and for the purposes of trial by military commission:

"(2) LAWFUL ENEMY COMBATANT.—The term 'lawful enemy combatant' means a person who is—

"(A) a member of the regular forces of a State party engaged in hostilities against the United States;

"(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

"(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Unlawful enemy combatant

From the Military Commissions Act of 2006 and for the purposes of trial by military commission:

"(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—

"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

War crime

Under Section 2441 of title 18, United States Code, (c) Definition. As used in this section the term "war crime" means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

The Military Commissions Act of 2006 amends the previous definition as follows:

(1) IN GENERAL.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3):

"(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or"; and

(B) by adding at the end the following new subsection:

"(d) COMMON ARTICLE 3 VIOLATIONS.—

"(1) PROHIBITED CONDUCT.—In subsection (c)(3), the term 'grave breach of common Article 3' means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

"(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

"(B) CRUEL OR INHUMAN TREATMENT.—The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

"(C) PERFORMING BIOLOGICAL EXPERIMENTS.—The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

"(D) MURDER.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

"(E) MUTILATION OR MAIMING.—The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

"(F) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

"(G) RAPE.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

"(H) SEXUAL ASSAULT OR ABUSE.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

"(I) TAKING HOSTAGES. The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such

person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

"(2) DEFINITIONS.—In the case of an offense under subsection (a) by reason of subsection (c)(3)—

"(A) the term 'severe mental pain or suffering' shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

"(B) the term 'serious bodily injury' shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

"(C) the term 'sexual contact' shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

"(D) the term 'serious physical pain or suffering' shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves—

"(i) a substantial risk of death;

"(ii) extreme physical pain;

"(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

"(iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

"(E) the term 'serious mental pain or suffering' shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term 'severe mental pain or suffering' (as defined in section 2340(2) of this title), except that—

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"(i) the term 'serious' shall replace the term 'severe' where it appears; and

"(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and non-transitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

"(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.

"(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

"(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.".

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273).

Terrorist

From the Military Commissions Act of 2006:

TERRORISM.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

"(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

"(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

"(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18.

Coercion

From FM 2–22.3, Human Intelligence Collector Operations (page 5–22):

Although no single comprehensive source defines impermissible coercion, certain acts are clearly prohibited. Certain prohibited physical coercion may be obvious, such as physically abusing the subject of an interview or interrogation. Other forms of impermissible coercion may be more subtle, and may include threats to turn the individual over to others to be abused; subjecting the individual to impermissible humiliating or degrading treatment; implying harm to the individual or his property. Other prohibited actions include implying a deprivation of applicable protections guaranteed by law because of a failure to cooperate; threatening to separate parents from their children; or forcing a protected person to guide US forces in a dangerous area.

Cruel

Under section 1003(d) of the Detainee Treatment Act and section 6(c)(2) of the Military Commissions Act of 2006, the term "cruel, inhuman, or degrading treatment or punishment" means:

the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

The Military Commissions Act of 2006 further provides:

"(12) CRUEL OR INHUMAN TREATMENT.—

"(A) OFFENSE.—Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

"(B) DEFINITIONS.—In this paragraph:

"(i) The term 'serious physical pain or suffering' means bodily injury that involves—

"(I) a substantial risk of death;

"(II) extreme physical pain;

"(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

"(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.

"(ii) The term 'severe mental pain or suffering' has the meaning given that term in section 2340(2) of title 18.

"(iii) The term 'serious mental pain or suffering' has the meaning given the term 'severe mental pain or suffering' in section 2340(2) of title 18, except that—

"(I) the term 'serious' shall replace the term 'severe' where it appears; and

"(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and non-transitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

Humiliating

The Supreme Court determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda. Common Article 3 prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment. There is no definition of humiliating in Common Article 3 or the Geneva Conventions of 1949.

Degrading

Under the Detainee Treatment Act, Section 1003(d) and the Military Commissions Act of 2006, the term "cruel, inhuman, or degrading treatment or punishment" means:

the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Indignities

There is no definition of the term "indignity" in Department of Defense policies or regulations. As stated above, the Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda. Common Article 3 prohibits outrages upon personal dignity. There is no definition of the term "outrages upon personal dignity" in Common Article 3 or the Geneva Conventions of 1949.

Inhuman:

Under the Detainee Treatment Act, Section 1003(d) and the Military Commissions Act of 2006, the term "cruel, inhuman, or degrading treatment or punishment" means:

the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

The Military Commissions Act of 2006 further provides:

"(12) CRUEL OR INHUMAN TREATMENT.—
"(A) OFFENSE.—Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.
"(B) DEFINITIONS.—In this paragraph:
"(i) The term 'serious physical pain or suffering' means bodily injury that involves—
"(I) a substantial risk of death;
"(II) extreme physical pain;
"(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
"(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.
"(ii) The term 'severe mental pain or suffering' has the meaning given that term in section 2340(2) of title 18.
"(iii) The term 'serious mental pain or suffering' has the meaning given the term 'severe mental pain or suffering' in section 2340(2) of title 18, except that—
"(I) the to 'serious' shall replace the term 'severe' where it appears; and
"(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term 'serious and non-transitory mental harm (which need not be prolonged)' shall replace the term 'prolonged mental harm' where it appears.

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