S. HRG. 109–881

MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

HEARINGS

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JULY 13, 19; AUGUST 2, 2006

Printed for the use of the Committee on Armed Services

U.S. GOVERNMENT PRINTING OFFICE

35–144 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON ARMED SERVICES

JOHN WARNER, Virginia, *Chairman*

JOHN McCAIN, Arizona
JAMES M. INHOFE, Oklahoma
PAT ROBERTS, Kansas
JEFF SESSIONS, Alabama
SUSAN M. COLLINS, Maine
JOHN ENSIGN, Nevada
JAMES M. TALENT, Missouri
SAXBY CHAMBLISS, Georgia
LINDSEY O. GRAHAM, South Carolina
ELIZABETH DOLE, North Carolina
JOHN CORNYN, Texas
JOHN THUNE, South Dakota

CARL LEVIN, Michigan
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
JOSEPH I. LIEBERMAN, Connecticut
JACK REED, Rhode Island
DANIEL K. AKAKA, Hawaii
BILL NELSON, Florida
E. BENJAMIN NELSON, Nebraska
MARK DAYTON, Minnesota
EVAN BAYH, Indiana
HILLARY RODHAM CLINTON, New York

CHARLES S. ABELL, *Staff Director*
RICHARD D. DEBOBES, *Democratic Staff Director*

CONTENTS

CHRONOLOGICAL LIST OF WITNESSES

MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

JULY 13, 2006

	Page
Black, MG Scott C., USA, The Judge Advocate General of the Army	7
McPherson, RADM James E., USN, Judge Advocate General of the Navy	8
Rives, Maj. Gen. Jack L., USAF, The Judge Advocate General of the Air Force	8
Sandkulher, Brig. Gen. Kevin M., USMC, Staff Judge Advocate to the Commandant of the Marine Corps	8
Romig, MG Thomas J., USA (Ret.), Former Judge Advocate General of the Army	8
Hutson, RADM John D., USN (Ret.), Former Judge Advocate General of the Navy	9

CONTINUE TO RECEIVE TESTIMONY ON MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

JULY 19, 2006

Massimino, Elisa C., Director, Washington Office, Human Rights First	104
Bierman, Katherine Newell, Counterterrorism Counsel, U.S. Program, Human Rights Watch	122
Fidell, Eugene R., President, National Institute of Military Justice	133
Mernin, Michael, Chair, Committee on Military Affairs and Justice, The Association of the Bar of the City of New York	164
Carafano, James J., Senior Research Fellow, The Heritage Foundation	213
Katyal, Neal K., Professor of Law, Georgetown University	231
Schlueter, David A., Hardy Professor of Law and Director of Advocacy Programs, St. Mary's University	249
Silliman, Scott L., Professor of the Practice of Law and Executive Director, Center on Law, Ethics, and National Security, Duke University	260

CONTINUE TO RECEIVE TESTIMONY ON THE FUTURE OF MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

AUGUST 2, 2006

Gonzales, Hon. Alberto R., Attorney General of the United States	316
England, Hon. Gordon R., Deputy Secretary of Defense	322

MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

THURSDAY, JULY 13, 2006

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 10:02 a.m. in room SH–216, Hart Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Roberts, Sessions, Collins, Talent, Chambliss, Graham, Cornyn, Thune, Levin, Kennedy, Byrd, Lieberman, Reed, Bill Nelson, E. Benjamin Nelson, Dayton, Bayh, and Clinton.

Committee staff members present: Charles S. Abell, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: William M. Caniano, professional staff member; Regina A. Dubey, professional staff member; Ambrose R. Hock, professional staff member; Derek J. Maurer, professional staff member; David M. Morriss, counsel; and Scott W. Stucky, general counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Michael J. Kuiken, professional staff member; Peter K. Levine, minority counsel; William G.P. Monahan, minority counsel; and Michael J. Noblet, staff assistant.

Staff assistants present: Jessica L. Kingston, Benjamin L. Rubin, and Pendred K. Wilson.

Committee members' assistants present: Ann Loomis, assistant to Senator Warner; Pablo Chavez, Christopher J. Paul, and Richard H. Fontaine, Jr., assistants to Senator McCain; John A. Bonsell and Jeremy Shull, assistants to Senator Inhofe; Chris Arnold, assistant to Senator Roberts; Mackenzie M. Eaglen, assistant to Senator Collins; Clyde A. Taylor IV, assistant to Senator Chambliss; Matthew R. Rimkunas, assistant to Senator Graham; Russell J. Thomasson, assistant to Senator Cornyn; Stuart C. Mallory, assistant to Senator Thune; Mieke Y. Eoyang and Joseph Axelrad, assistants to Senator Kennedy; Christina Evans and Erik Raven, assistants to Senator Byrd; Frederick M. Downey, assistant to Senator Lieberman; Elizabeth King, assistant to Senator Reed; William K. Sutey, assistant to Senator Bill Nelson; Eric Pierce, assistant to Senator Ben Nelson; Luke Ballman, assistant to Senator Dayton; Todd Rosenblum, assistant to Senator Bayh; and Andrew Shapiro, assistant to Senator Clinton.

OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER. Subsequent to the Supreme Court decision, I was approached by a number of people who inquired as to my opinion with regard to the gravity of this situation. I said, this piece of legislation which Congress is now tasked to provide could be one of the landmark pieces of legislation, certainly in the 28 years that I've been privileged to be in the United States Senate.

Given that we started a little late this morning—we had to do that to accommodate some of our colleagues on the Judiciary Committee—I will not, in an opening statement, try to go back over the history of how the administration, and, indeed, this country, have tried to deal with this very complex and, really, unprecedented situation regarding detainees. Most, if not all, have no real state allegiance, and were not in a state-sponsored type of conflict.

I will just assume that everyone before us here on this panel, and, indeed, my colleagues, are well aware of that. Therefore, I also will not try and get into any dissertation about the Supreme Court decision. We've all studied that. I'll simply say that we, in my judgment, as a Congress, in this legislation, must meet the tenets and objectives of that opinion; otherwise, such legislation that we will devise and enact into law might well be struck down by subsequent Federal Court review, and that would not be in the interests of this Nation. The eyes of the world are on this Nation as to how we intend to handle this type of situation, and handle it in a way that a measure of legal rights and human rights are given to detainees.

I say "a measure," because I'm not prepared, this morning, to say what would be the parameters in that situation. Like several other members of this committee, I've been in consultation with the administration, and it was made very clear to me by the National Security Advisor, Mr. Hadley, and Ms. Miers, Counsel to the President, that they were working the issue, that there were some honest difference of opinion as to approach within the administration—that's quite understandable; it's the way it should be—but that they would reconcile those positions and advise Congress shortly after the President returns from the G8 conference.

Given that there have been two hearings at which witnesses have appeared and have stated rather finite parameters, I do not believe that we, Congress, have received the last word, by any means, as to where and how the administration would like to see this legislation proceed.

With that in mind, I'd just caution my colleagues—let us be most respectful of the fact that we will work in partnership with the administration, but the burden rests on Congress to enact this law. It's my understanding—and I'll yield momentarily to my colleague, Senator McCain, who, likewise, has been in consultation with the administration, to give his perspectives—but we have to keep in mind the end game. The end game, ladies and gentlemen, are the men and women of the Armed Forces on the far-flung fronts of this world, wherever they may be, and, indeed, an associated number of civilians, who, likewise, are taking extraordinary risks. We're a Nation at war, and we need to preserve our country's ability to protect our intelligence sources from discovery by the enemy, and our

men and women have to rely on sound intelligence to carry out their missions.

We cannot, also, overestimate the importance of how we, Congress, working with the administration, deal with this. As I said, the eyes of the world are upon us, and we must set the standards. This is new ground. It may well be, in the months and years to come, that the international community will suddenly begin to realize fully, as we are now, the complexity of this new type of terrorist nonstate-sponsored combat, go back and hold a international conference to see what we can do to revise certain portions of the various treaties and documents which have guided nations these past years, given the change of circumstances.

Now, the Senate leadership, in consultation with me and other committee chairmen, recommend that our committee proceed with its work, the Judiciary Committee is doing its work, the Intelligence Committee may well do its work. Eventually, it's my judgment that the leadership will put together the views of the three committees and have a leadership bill to propose to the Senate. It's my hope also that that bill be, to the extent possible, a bipartisan document, because it is, in my judgment, absolutely imperative that this law be enacted before Congress completes this Congress, whenever that may be.

At this time, Senator Levin, do you have a few comments?

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. Thank you, Mr. Chairman.

On June 29, the Supreme Court held that Congress has a vital role to play in determining the appropriate procedures to be applied when our Nation decides to try a detainee for a crime, such as a violation of the laws of war. I welcome today's hearing as an important step in that process and a step that can reinforce our Nation's credibility around the world by demonstrating our commitment to being a nation of laws, even with regard to enemies who have not, themselves, abided by the laws of war.

If we are going to win the war on terrorism, we need more than military strength; we need to rally decent people everywhere in the world to root out terrorists and to share information about their horrific plans. We will have more success convincing potential friends and allies to actively join us in this cause if we show them not just our military strength, but also our values as a Nation.

For almost 5 years now, the Bush administration has insisted on running the war on terrorism on its own, with little or no role for Congress. Over and over again, the administration has insisted that the executive branch has plenary authority to address critical issues such as processes for defining enemy combatant status, standards for the treatment and interrogation of detainees, procedures for trying detainees for crimes, and rules for the collection of electronic intelligence inside the United States. Last summer, Senator Lindsey Graham chaired a hearing in our Personnel Subcommittee in which the administration was repeatedly urged to work with us to develop legislation governing the criminal trial of detainees by military commissions. Senator Graham made it clear that we needed to write such legislation, not because we oppose the war on terrorism, but to help us win the war by establishing a firm

legal basis for the trial of the small percentage of detainees that we try for crimes, thereby showing the world that we remain a nation of laws, even when we are attacked by the lawless.

The Department of Defense (DOD) Deputy General Counsel made it clear at that hearing that the administration didn't particularly welcome Congress's help. He testified that "legislation is not necessary. The President has powers under the Constitution. I don't think we need additional authorities."

Two weeks ago, in *Hamdan* v. *Rumsfeld* case, the Supreme Court forcefully rejected that administration position. The authority to establish military commissions to try detainees for violations of the law of war, the Court ruled "can derive only from the powers granted jointly to the President and Congress in time of war." The military commission established by the administration to try *Hamdan* "lacks the power to proceed," the Court ruled, because it was not consistent with the authority granted by Congress, which requires its procedures to be consistent with the rules governing courts-martial and the requirements of international law, including Common Article 3 of the Geneva Conventions. The Supreme Court found that the military commissions established by the administration to handle criminal trials departed from those rules and requirements in a number of ways: by authorizing the exclusion of a detainee from his own trial; by permitting the admission of a broad range of unreliable evidence; by permitting legal decisions to be made by nonlawyers; and by establishing unique review procedures that do not include safeguards important to the fairness of criminal proceedings and the independence of the court.

We begin our deliberative process where we should begin it, with the testimony of distinguished military officers who lead, and have led, our able Corps of Judge Advocates. These are the witnesses who are most familiar with the rules for courts-martial and the history and practice of military commissions. They also understand the practical importance of our adherence to American values and the rule of law in the treatment of others. If we mistreat, torture, or humiliate persons whom we detain on the battlefield, or if we proceed to try detainees without fair procedures, we increase the risk that our troops will be subject to similar mistreatment, torture, or humiliation at the hands of others.

Our Founding Fathers established the standard for our Nation in this area, as they did in so many other areas. The British mistreated, starved, and summarily executed many American prisoners during our war for independence, but, as described by historian David Fischer in his book, "Washington's Crossing," General Washington "ordered that captives would be treated as human beings with the same rights of humanity for which Americans were striving," and "those moral choices in the War of Independence enlarged the meaning of the American Revolution."

I hope that this Congress will reaffirm once again the path of American values and enlightened self-interest that was set at our Nation's birth as we address the issues now before us involving the practices and procedures to be used with those detainees whom we decide to try for crimes.

Mr. Chairman, I thank you for proceeding as you are in this manner, thoughtfully, as always. I join you in welcoming the dis-

tinguished panel of witnesses. I ask that my full statement be inserted in the record.

[The prepared statement of Senator Levin follows:]

PREPARED STATEMENT BY SENATOR CARL LEVIN

On June 29, the Supreme Court held that Congress has a vital role to play in determining the appropriate procedures to be applied when our Nation decides to try a detainee for a crime, such as a violation of the laws of war. I welcome today's hearing as an important step in that process, and a step that can reinforce our credibility around the world by demonstrating our commitment to being a nation of laws, even with regard to enemies who have not themselves abided by the laws of war.

If we are going to win the war on terrorism, we need more than just military strength: we need to rally decent people everywhere in the world to root out terrorists and to share information about their horrific plans. And I firmly believe that we will have more success convincing potential friends and allies to actively join us in this cause if we show them not just our military strength, but also our values as a Nation.

For almost 5 years now, the Bush administration has insisted on running the war on terrorism on its own, with little or no role for Congress. Over and over again, the administration has insisted that the executive branch has plenary authority to address critical issues such as processes for defining enemy combatant status, standards for the treatment and interrogation of detainees, procedures for trying detainees for crimes, and rules for the collection of electronic intelligence inside the United States. Unfortunately, reports in the media about U.S. practices for the treatment, interrogation, and trial of detainees at Guantanamo and elsewhere have severely undermined support for U.S. efforts around the world.

Last summer, Senator Lindsey Graham chaired a hearing in our Personnel Subcommittee at which the administration was repeatedly urged to work with us to develop legislation governing the criminal trial of detainees by military commissions. Senator Graham made it clear that we needed to write such legislation not because we oppose the war on terrorism, but to help us win the war by establishing a firm legal basis for the trial of the small percentage of detainees that we try for crimes, thereby showing the world that we remain a nation of laws even when we are attacked by the lawless.

The DOD Deputy General Counsel made it clear at that hearing that the administration didn't particularly welcome Congress' help. He testified: "[Legislation is not necessary. . . . [T]he President has powers under the Constitution. . . . I don't think we need additional authorities."

Two weeks ago, in *Hamdan* v. *Rumsfeld,* the Supreme Court forcefully rejected that administration position. The authority to establish military commissions to try detainees for violations of the law of war, the Court ruled, "can derive only from the powers granted jointly to the President and Congress in time of war." The military commission established by the administration to try *Hamdan* "lacks the power to proceed," the Court ruled, because it was not consistent with the authority granted by Congress, which requires its procedures to be consistent with the rules governing courts martial and the requirements of International Law, including Common Article 3 of the Geneva Conventions. The Supreme Court found that the military commissions established by the President to handle criminal trials departed from those rules and requirements by:

- authorizing the exclusion of a detainee from his own trial;
- permitting the admission of a broad range of unreliable evidence;
- permitting legal decisions to be made by non-lawyers; and
- establishing unique review procedures that do not include safeguards important to the fairness of the proceedings and the independence of the court.

According to the Supreme Court, departure from the existing rules governing courts martial is permitted only when it is necessary—because compliance is not "practicable"—not merely because it is convenient.

It is now up to us to decide how the ground rules for these commissions will be fashioned. As Justice Breyer explained in his concurring opinion:

> "The court's conclusion ultimately rests upon a single ground: Congress has not issued the executive a 'blank check.' . . . ,
>
> "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Na-

tion's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our court today simply does the same."

We begin our deliberative process where we should begin it—with the testimony of the distinguished military officers who lead, and have led, our able Corps of Judge Advocates. These are the witnesses who are most familiar with the rules for courts martial and the history and practice of military commissions. They also understand the practical importance of our adherence to American values and the rule of law in the treatment of others: if we mistreat, torture, or humiliate persons whom we detain on the battlefield, or if we proceed to try detainees without fair procedures, we increase the risk that our own troops will be subject to similar mistreatment, torture, or humiliation at the hands of others.

Our Founding Fathers established the standard for our Nation in this area as they did in so many other areas. The British mistreated, starved, and summarily executed many American prisoners during our war for independence. But, as described by David Hackett Fischer in his book Washington's Crossing, General Washington "ordered that . . . captives would be treated as human beings with the same rights of humanity for which Americans were striving," and those "moral choices in the War of Independence enlarged the meaning of the American Revolution."

I hope that this Congress will reaffirm once again the path of American values and enlightened self-interest that was set at our Nation's birth as we address the issues now before us involving the practices and procedures to be used with those detainees whom we decide to try for crimes.

Mr. Chairman, I thank you for proceeding as you are in this matter, thoughtfully as always, and I join you in welcoming our distinguished panel of witnesses.

Chairman WARNER. Thank you very much, Senator Levin.

I'll introduce the panel, but I'd like now to ask Senator McCain to add his perspective.

Senator MCCAIN. Thank you, Mr. Chairman.

Very briefly, first of all, I would like to congratulate you on convening this panel of witnesses. These are not political appointees, they're not transient lawyers, they're individuals who have served this Nation during their entire careers and understand the implications of the Uniform Code of Military Justice (UCMJ), how it would apply to detainees; and their testimony should be significant in guiding us as to how we should address this very difficult challenge we face as a result of the United States Supreme Court decision.

Again, I want to emphasize my respect for the members of this panel for their involvement; and sometimes, on occasion, members of this panel have had to stand up in disagreement with the civilians in the DOD, which is their duty under certain occasions.

Mr. Chairman, I just want to repeat, Senator Graham and I met with the President's National Security Advisor, Mr. Hadley, and present in the room were DOD and the Department of Justice (DOJ) representatives. We did agree, at that time, according to Mr. Hadley, that the basis of proceeding on applicable legislation would be the UCMJ. No one understands better than those individuals that there certainly will have to be changes made from the standard rubric of the UCMJ, but that's what the United States Supreme Court has told us to do. At that time, I was under the impression that that was the administration's position. I hope that it hadn't changed.

Mr. Chairman, I just want to point out—you've made reference to it—America's image in the world is suffering because of Guantanamo Bay or perceived treatment of detainees. We need to fix that, and now is our opportunity to do it.

Perhaps most importantly, and I know our witnesses will emphasize this, we will have more wars, and there will be Americans who

will be taken captive. If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners. I know that our witnesses will emphasize that today.

I hope that as we deliberate as to how we approach—and we need to have a dialogue, and not openly disagree until we have at least exhausted the dialogue amongst ourselves—is that we do have an obligation to future generations of men and women who are serving in the military and make sure that we're not doing something that would allow them to be mistreated under some excuse because of actions we have taken in implementing this decision.

I thank you, Mr. Chairman. I thank the witnesses.

Chairman WARNER. Thank you very much, Senator McCain.

Indeed, my consultations with Mr. Hadley are comparable to those that you received, and I'm somewhat perplexed at some of the testimony that was offered both to the Senate Judiciary Committee and the House Armed Services Committee yesterday. But, in due course, we'll work that out.

I remain on the timetables outlined to me, that the administration will be forthcoming in a formal manner subsequent to the G8 conference and their return.

I purposely, in consultation with my colleagues, have decided that we would have this distinguished panel before us today. I have some modest career in the legal business, many years ago, and I just see, in each of you, what I aspired to achieve when I was a very young man in the law business. I remember when the senior partner of my firm walked down the hall, we flattened our back against the wall like you were aboard ship, "yes, sir." Each of you, through your skills, has achieved an eminence and a recognition by becoming the Judge Advocates of your distinguished group of younger lawyers and associates throughout your respective commands. That is a remarkable achievement. I can think of no better than the current incumbents, and some of the past, to help us set the course and speed for this committee.

The only distinction between you and the senior partners of major law firms across America today is that you make about one-tenth of their salaries.

Having said that, General Black, would you like to start?

STATEMENT OF MG SCOTT C. BLACK, USA, THE JUDGE ADVOCATE GENERAL OF THE ARMY

General BLACK. Yes, sir. Thank you, Mr. Chairman, Ranking Member Levin, and members of the committee. I'd like to thank you for the opportunity to appear here today and for the committee's timely and thoughtful consideration of *Hamdan* v. *Rumsfeld.*

I'd also like to express my heartfelt thanks to the members and staff of this committee for your continuing hard work on behalf of the Army's soldiers, civilians, and family members. We really do appreciate what you do, day-in and day-out.

With that, I look forward to your questions, sir.

Chairman WARNER. Thank you.

Admiral McPherson.

STATEMENT OF RADM JAMES E. MCPHERSON, USN, JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral MCPHERSON. Thank you, Mr. Chairman and Senator Levin. I echo General Black's articulate welcome this morning. We sincerely appreciate the opportunity to come before you today and talk with you about, as you put it, one of the most important pieces of legislation that this body has ever taken up. We come here with that sense; and, at the same time, we come with the sense that Senator McCain spoke of, that we need to think in terms of the long view.

We need to think in terms of the long view and to always put our own sailors, soldiers, marines, and airmen in the place of "an accused" when we're drafting these rules to ensure that these rules are acceptable when we have someone, in a future war, who faces similar rules.

Thank you, sir.

Chairman WARNER. General Rives.

STATEMENT OF MAJ. GEN. JACK L. RIVES, USAF, THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

General RIVES. Mr. Chairman, Senator Levin, members of the committee, it is an honor to be here today. We don't have formal written statements, but we do look forward to answering any questions, sharing our experiences, and being able to discuss any of the matters you would like us to discuss so you can better understand all of the issues you're facing here.

Chairman WARNER. The committee purposefully said you didn't have to put down formal statements.

General RIVES. Yes, sir.

Chairman WARNER. So, we understand that.

General Sandkulher.

STATEMENT OF BRIG. GEN. KEVIN M. SANDKULHER, USMC, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

General SANDKULHER. Mr. Chairman, Senator Levin, it's an honor to be here. We have been here before on important matters, and it's a pleasure to be back again to address additional important matters. We look forward to handling your questions and having a discourse on the issues.

Thank you.

Chairman WARNER. General Romig.

STATEMENT OF MG THOMAS J. ROMIG, USA (RET.), FORMER JUDGE ADVOCATE GENERAL OF THE ARMY

General ROMIG. Thank you, Chairman Warner, Senator Levin, and other members.

I'm very pleased to appear before you today as a private citizen. I would like to say, at the outset, that this is a very important topic that Congress and this committee are addressing now, since it has far-reaching and historic impact for our military and our country.

In this endeavor, I would urge Congress to take its time to deliberately and methodically explore all the options available before crafting the appropriate legislation. I would strongly caution

against a rush to judgment. If ever there was a time for bipartisan effort, it is now.

I urge you to take the long view, because the steps you take today will undoubtedly have a dramatic impact on our Nation's ability to effectively wage war for decades to come.

As you go through this deliberative process, I would strongly urge you to retain the military commissions as an important tool for the military to prosecute violations of the law of war.

Having said that, I believe any legislation on military commissions needs to reflect the practice of military law as it has evolved over the last 60 years since military commissions were last convened and as the uniformed lawyers advocated in 2001 and early 2002.

To this end, I believe the starting point for updating military commissions is to look at the structure, the processes, and the procedures that are in the Manual for Courts-Martial and the UCMJ.

I want to be very clear about this, I am not advocating adopting the court-martial process as whole cloth; rather, a review needs to be done that would look at those processes and procedures that do not make sense for prosecuting law-of-war offenses committed on the battlefield. There are a number of courts-martial processes and procedures that would not work, and should not be applied to military commissions.

In this process of developing military commission procedures, I believe the drafters—and I'm sure they will—need to look at the provisions of the law of war and the Geneva Conventions, especially if this effort is not limited to detainees at Guantanamo, but is also to apply to all law-of-war violators on the battlefield.

Thank you. I'm prepared to answer your questions.

Chairman WARNER. Thank you very much.

Admiral Hutson.

STATEMENT OF RADM JOHN D. HUTSON, USN (RET.), FORMER JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral HUTSON. Mr. Chairman, Senator Levin, Senator McCain, and members of the committee, thank you for inviting us. It's nice to be heard on this subject.

In some respects, to echo what Senator McCain said, Plato said that, "Only the dead have seen the last of war." I think that it's true, and we have to bear in mind that war is, in some respects, but a prelude to the peace, and we have to wage the war in such a way that we can endure the peace when it comes. It's for that reason that there is little more important right now than to get this straight with military commissions.

Military commissions have to be effective. I want to have prosecutions of terrorists. I want that process to work. But in order for it to work, the hearings are going to have to be full and fair, and they're going to have to be consistent with the mandates of Common Article 3 by ensuring that the judicial guarantees that are considered to be indispensable by all civilized people are observed.

There sits, on the bookshelf of every U.S. judge advocate station anyplace in the world, a burgundy softcover book, and that book is the envy of every military on the face of the Earth. That book contains the Manual for Courts-Martial and the UCMJ. That, I be-

lieve, has to be the starting point for this discussion. To concur with General Romig, it is the starting point. There will be modifications that will be necessary to make. Those modifications should be very narrow, very specific, well-articulated, and based on absolute necessity.

I testified yesterday at the House Armed Services Committee and was overwhelmed with rhetoric about marines busting down doors and having to stop in their tracks in order to give Article 31 rights. That example, and others like it, came up time and time and time again. Nobody, certainly not me, was advocating for that position. We have to make exceptions. In the rules of evidence, chain of custody, Article 31, Article 32, what the media loves to call, but is so much better—its civilian equivalent of a grand jury, those kinds of things, by smart, wise, dedicated drafters can be accommodated very easily, I believe. In the end, we will end up with a process that will actually work. We will actually get some prosecutions, and the Supreme Court won't be beating us down in the effort. We can be proud of what it is we have accomplished. The rest of the world will watch it and say, "They got it straight. They got back on track. They came to realize what it is they stood for, for all those years." Because what makes this country great is not our military strength, great as it is, or our economy, or our natural resources or island nature of our geography. What makes us strong is who we are and what we've stood for for generations. We must not lose that because if we lose that, we will have lost the war, and it will all be for naught.

Thank you. I look forward to your questions.

Chairman WARNER. Thank you very much.

Colleagues, given that we have a very large turnout this morning, I'd suggest that we adhere to the 6-minute rule in our question period.

I want to assure the witnesses that, speaking for myself, but I've been consulting with my ranking member, this committee will not rush. This committee will offer the opportunity to people with diverse opinions to come in and express them. We're going to have a wide range of inquiries. I hope to have at least one or two hearings before the July period is over. During the summer months we may have briefings in lieu of hearings, given that so many members will not be in the locale of Washington, and then resume in September, with the hope of providing the leadership with the thoughts of this committee, and recommendations, either in the form of a bill or otherwise, as directed by the leadership, early on in September.

I'd like to start off, we'll just go left to right. Again, the question is—we come back to this—to the extent we can follow the UCMJ. That's the basic premise that I've been operating on. So, I'd let you, General Black, how would you go about straightening out this situation, hopefully utilizing, to the extent possible, the existing UCMJ?

General BLACK. Yes, sir. At the outset, I will tell you that commissions are the right answer, in some form. Indeed, what we have put together in the deliberative process, thus far, is a good start, but that much of what we have in the UCMJ, and, indeed, what we also can borrow from other sources, such as the international

criminal tribunals and elsewhere, can create what I believe would be a perfect blend of rights and responsibilities that would make us literally the envy of the—not only the people of our country, but the people of the world, in terms of the judicial process.

I believe that what we're looking for here is not a document that starts from the UCMJ, or that is firmly founded there, or on the commissions, as they exist today, or on the international criminal tribunals, but a blend thereof. I think that a talented group of bright people can achieve that goal in a relatively short period of time, sir.

Chairman WARNER. It's the intent of the Chair to hopefully ask each of you, at some subsequent period, to put down, in writing, your own views. I hope that you're not rigidly bound by perspectives that eventually the administration comes up with, and that you can provide your best professional advice to the United States Congress.

We'll accept that as a preliminary, and I'll now turn to the Admiral for the same question. Perhaps you could touch a little more on the complexity of discovery, the ability to provide witnesses, given that apprehensions take place on the battlefield and those associated with our uniformed people making that apprehension. Would they have to be subpoenaed back over here in the course of trials? These are some of the important issues that we have to ascertain. How do we protect classified information?

Admiral MCPHERSON. Thank you, Senator. You raise very difficult questions. That's what we're paid for, is to answer those difficult questions.

We don't believe that Common Article 3, which is the departure point for the Supreme Court—requires we provide the same panoply or extension of rights that our citizens Article III courts or that our servicemembers enjoy under the UCMJ. While the UCMJ can be a good starting point, there must be many points of departure from there, for the exigencies of the battlefield that you spoke of. What we should avoid is trying to put a law enforcement overlay on these commissions. These individuals, these unlawful combatants, came to us on the battlefield. They didn't come to us through execution of a search warrant in some city of the United States. There is a basic difference between those two.

One of the areas you spoke of was discovery. I would urge a distinction be made between discovery and evidence presented against the accused. Common Article 3 requires that the individual have access to, and the opportunity to review, the evidence presented against them. It does not require that they have the same discovery rights either under Article III of the Constitution or under the UCMJ. Indeed, under the UCMJ there are greater discovery rights than civilians have in civilian courts. We have open-file discovery under the UCMJ. The prosecutor is required to give their file, in its entirety, to an accused. That's not required under Common Article 3. What's required is that the accused in that commission have an opportunity to review the evidence that's going to be presented against them. I think that's a key distinction that we have to keep in mind and that we ought to make.

At the same time, you raised the classified information issue, as well. We have processes, under the UCMJ, under our rules for

court-martial, that deal with access to classified information and how that classified information can be placed in a public forum. We think not those same rules, but rules similar to that, could be crafted for commissions. Whether they be an ex parte review by the presiding officer who creates an unclassified summary of the evidence, whatever it may be, we think that bright people can come up with the rules that will satisfy Common Article 3 in those proceedings.

Chairman WARNER. Thank you, Admiral.

General, same question. Perhaps you might comment, or subsequent witnesses comment, on the manner in which Common Article 3 was put together. It seems to me that it leaves a measure of latitude within which we can work.

General RIVES. Yes, Mr. Chairman, thank you very much.

I agree with my colleagues that the UCMJ does provide a great starting point. The UCMJ took effect on Law Day in 1951. It replaced the systems that the United States had lived with for well over a century. It provides a great system of criminal justice, one that's second to none in the entire world. It provides all of the protections that we expect for American citizens, and it's only right that we provide those protections to those who voluntarily serve their Nation in uniform. It's a tremendous system that provides great protections, and it's geared toward the American system of justice that's designed toward protecting the rights of the innocent, even if it means that some guilty people go free. We have very careful safeguards for evidence and the type of evidence that can be admissible in a court-martial.

It's important to realize that, while we're totally supportive of the UCMJ as providing a structure, there are various tribunals called for under the UCMJ. Provisions throughout the UCMJ recognize the procedural and substantive rules for courts-martial. Article 135, in particular, addresses courts of inquiry.

My own proposal is that we come up with military commission rules, and maybe a manual for military commissions, under the UCMJ. Perhaps we have an Article 135(a) for military commissions that will detail the basic outlines that Congress wants us to include as substantive requirements, and then permit an executive order to have the details, just as we have the Manual for Courts-Martial with the details.

You asked about Common Article 3, and my starting point with that is, Common Article 3 provides standards for basic decency. Most recently, the Detainee Treatment Act (DTA) of 2005 recognizes and reaffirms; provides a baseline that the United States military has always trained to and has always insisted on adherence to. You do get into some tricky issues if we permit the readings that other people give to some of the provisions of Common Article 3.

Chairman WARNER. I'm going to have to ask that you yield. I want to get a brief response from the others. We'll come back and give you full opportunity.

General? Your basic summary.

General SANDKULHER. My basic summary would be that it's a balancing. We have a military commissions procedure that was established that attempted to provide the fundamental rights. We have the UCMJ, which we know is the gold standard, that achieves

the protection of fundamental rights. My view is that we are looking for a leveling between the two. In my perspective, if we start from the UCMJ, that's a method. If we build up from the military commissions as they exist today, that's another perspective that I think could be workable. Both require detailed examination. We talked about some of the items. Admiral Hutson mentioned Article 31 rights. Article 31 exists in the UCMJ. We have to address how we handle that with regard to military commissions.

Chairman WARNER. Good. Thank you.

General Romig?

General ROMIG. Thank you, sir.

As I said, I think that the court-martial process needs to be the baseline for the structure, and then looking at each one of the procedures and processes to see if they make sense for the unique environment of the battlefield.

Traditionally, military commissions always started with the existing processes they had at that time for court-martial. I see that that is what we ought to be doing here, taking what we have, and adapting it to the unique environment. I think that can be done.

Chairman WARNER. Good.

Admiral HUTSON. I think it's interesting, Mr. Chairman, none of us are all that far apart.

Chairman WARNER. No, I observed that.

Admiral HUTSON. I think there's some basis for that.

Chairman WARNER. There certainly is no consensus here to just rubberstamp what's in place and just go on about our business.

Admiral HUTSON. That's absolutely right.

The UCMJ, as great as it is, didn't come down from Mount Sinai on a stone tablet. We can modify it. That will be okay to do that. The heavens won't open.

Common Article 3 says, in pertinent part, "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." I submit that there is no part of that, that the United States of America should try to get around. That should be the touchstone that we're always looking at. Does this comply with that?

With regard to the UCMJ and the rules of evidence, for example, I think that evidence that comes in to be considered has to have an apparent authenticity and an apparent validity. For lawyers, that's a reasonably measurable standard.

No matter how apparently valid or authentic, no coerced evidence is admissible.

Chairman WARNER. Right. Thank you.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

I think, as Admiral Hutson said, there is not much difference between you. You all basically either believe that the UCMJ should be the starting point, and then exceptions should be crafted based on necessity, or some of you believe that it ought to be a blend with two or three starting points, the UCMJ being one of them, the current rules of the commissions being a second starting point, and perhaps international tribunal procedures being a third starting point.

Is it fair to say that none of you believe we should simply ratify the current commission and their procedures? Is that a fair statement?

General Black?

General BLACK. Yes, sir.

Admiral MCPHERSON. Yes, sir. I think doing that would not fulfill Common Article 3.

Senator LEVIN. All right.

General Rives?

General RIVES. Yes, Senator. Clearly, we need to change.

General SANDKULHER. Yes, sir.

Senator LEVIN. General Romig?

General ROMIG. Yes, sir, absolutely.

Admiral HUTSON. Yes, sir.

Senator LEVIN. Okay. So, it seems to me that is a critical starting point, is that none of you believe, as apparently some in the administration believe, that we should just simply ratify the current commission procedures and their operations.

Now the question is, in what areas, as the chairman says, should we then revise, in effect, based on necessity, the procedures that exist either in UCMJ, the courts-martial manual, or in those other sources? Would you agree that those revisions should be based on practicality and necessity, and not convenience, as the way the Supreme Court said it?

Admiral Hutson?

Admiral HUTSON. Absolutely. Yes, sir.

Senator LEVIN. General?

General ROMIG. Yes, sir.

Senator LEVIN. Would you agree, General?

General SANDKULHER. Yes, sir.

General RIVES. Yes, sir.

Senator LEVIN. Admiral?

Admiral MCPHERSON. Yes, sir.

Senator LEVIN. General?

General BLACK. Yes, sir.

Senator LEVIN. Okay. I also want to pick up something that the chairman said, that we would be asking you to cooperate with us and the other panels in looking at those areas where exceptions need to be made based on necessity of war and the differences between a criminal trial before a commission and a court-martial. We would need you all to work with us. My request, particularly to the four of you still in uniform, would be that you would give us your personal and professional opinion.

General BLACK. Yes, sir.

Admiral MCPHERSON. Yes, sir.

General RIVES. Absolutely.

Senator LEVIN. I'll ask the two of you, but that's not necessary, you not being in a uniform anymore.

General ROMIG. Certainly.

Chairman WARNER. If I could interrupt, that's the standard practice of this committee with regard to certain categories of flag and general officers when they come before us, and also high-ranking civilians. We're asking of you no more than we seek of the current incumbents.

Thank you, Senator.

Senator LEVIN. It is part of the oath that you take when you appear in front of this committee and we very much appreciate that.

In addition to having access to evidence, as one of you said, that is going to be used, and be able to confront the evidence that will be used, would you agree that there may be exculpatory evidence that someone who's being tried for a crime—and I emphasize this, because there's some confusion out there—we're talking about criminal trials, we're not talking about detention; we're talking about criminal trials here—would you agree that except for based on necessity or national security exigencies—someone who's tried for a crime should have access to exculpatory evidence?

Admiral?

Admiral HUTSON. Absolutely. Yes, sir.

General ROMIG. Absolutely.

Senator LEVIN. General?

General SANDKULHER. Yes, sir.

General RIVES. Yes.

Admiral MCPHERSON. Yes, sir.

Senator LEVIN. Okay.

General BLACK. Yes, sir.

Senator LEVIN. That, then, raises the question of the discovery. At least to the extent that access to exculpatory evidence is important, it's an important answer for all of us.

In terms of the structure of the military commission process—and this is something Justice Kennedy expressed great concern about in his concurring opinion—is the composition of military commissions and the process for appealing decisions of military commissions through the DOD and up to the President—according to Justice Kennedy, the structural differences between the existing military commissions and courts-martial—one, the concentration of functions, including legal decisionmaking, in a single executive official; two, the less rigorous standards for composition of the tribunal; three, the creation of special review procedures in place of institutions created and regulated by Congress—all, in his opinion, removed safeguards that are important to the fairness of the proceedings and the independence of the court. He went on to say that there's no evident practical need to explain the departures.

Then, Justice Stevens, speaking for the Court, specifically endorsed that portion of the concurring opinion of Justice Kennedy.

Do you, personally, agree with Justice Kennedy and Justice Stevens that deviations from court-martial processes in the structure of military commissions, and the process for appealing commission decisions, could undermine the fairness and independence of the process? For instance, is there any practical need to permit the selection of a person other than a judge to be the presiding officer of a military commission?

Admiral Hutson?

Admiral HUTSON. I concur with that completely, and that's one of the reasons I would use the UCMJ as the starting point, partly because that is a regularly constituted court. It also has passed close scrutiny, time and again, by the Supreme Court of the United States. Deviations from that, particularly with regard to the body that's constituted, the court itself, and the appeal process, are un-

necessary and undermine the likelihood of it being endorsed either by the international community or, more importantly, by the United States Supreme Court.

Senator LEVIN. Okay.

General?

General ROMIG. Yes, sir, I do. This is one of the issues that we advocated early on, that we need to have a military judge that rules on the law, you need to have a panel that rules on the facts, and you need to have independence of the military judge. We've come a large way that way in the military orders that were published both in 2002 and then in 2005, but we're still not there. The better idea is, let's start with the structure we have in the court-martial process, and then go from there.

Senator LEVIN. Have a judge——

General ROMIG. Absolutely.

Senator LEVIN. Okay.

General? Quickly. My time's up. If I could get answers from each of you.

General SANDKULHER. Sir, in practical effect we are using military judges now, those that were convened already, but it's——

Senator LEVIN. But that is important, in your judgment?

General SANDKULHER. It's important to have a military judge present, yes, sir.

Senator LEVIN. And presiding?

General SANDKULHER. Yes, sir.

General RIVES. I would call the presiding official "judge" instead of "presiding official." I believe that all of the judges ought to be certified, in accordance with Article 26 of the UCMJ, as general court-martial judges.

Senator LEVIN. Thank you.

Admiral?

Admiral MCPHERSON. I agree that the military judge should be the presiding official. But I disagree with utilizing the UCMJ for appellate purposes. I think the scheme that was worked out under the DTA of the DC Circuit Court is the right answer.

Senator LEVIN. Which we adopted here, overwhelmingly. Yes, sir.

General?

General BLACK. I believe we should have certified judges and independent judicial review, sir.

Senator LEVIN. Thank you.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Levin.

Senator McCain.

Senator MCCAIN. I want to thank the witnesses. I think that, so far, we have established that the witnesses believe that the UCMJ is a good framework from which to begin, but taking into full consideration—as one of the witnesses said, this is not someone who has been arrested for shoplifting; this is an enemy terrorist, or alleged enemy terrorist, and certain provisions of the UCMJ would not apply. Is there anyone who disagrees with that assessment of your testimony so far? [No response.]

On the issue of Common Article 3, the DOJ representative said, yesterday, that Common Article 3 "prohibition of outrages upon personal dignity"—in particular, "humiliating and degrading treat-

ment"—is a phrase susceptible of uncertain and unpredictable application. He went on to say that the Supreme Court has held that interpreting treaty provisions such as Common Article 3, the meaning given by international tribunals and other state parties to the treaty, must be accorded consideration; therefore, this would create uncertainty.

Isn't it true, General Black, that all international law—that courts are take in consideration the views held by other parties, but the views held by other parties are not binding—interpretations given by foreigners are not binding on the United States interpretation?

General BLACK. Yes, sir, that's correct.

Senator MCCAIN. Do you agree with that? General Black, do you believe that Deputy Secretary England did the right thing by, in light of the Supreme Court decision, issuing a directive to DOD to adhere to Common Article 3? In so doing, does that impair our ability to wage the war on terrorism?

General BLACK. I do agree with the reinforcement of the message that Common Article 3 is a baseline standard. I would say that, at least in the United States Army, and I'm confident in the other Services, we've been training to that standard, and living to that standard, since the beginning of our Army, and we continue to do so.

Senator MCCAIN. Admiral?

Admiral MCPHERSON. It created no new requirements for us. As General Black had said, we have been training to, and operating under, that standard for a long, long time.

Senator MCCAIN. General?

General RIVES. Yes, I agree.

General SANDKULHER. Yes, sir, my opinion is that that's been the baseline for a long time, sir.

General ROMIG. Yes, sir, that's the baseline. As General Black said, we train to it, we always have. I'm just glad to see we're taking credit for what we do now.

Admiral HUTSON. I agree with what was said, but I'd point out that the President, on February 7, 2002, said that Common Article 3 did not apply. Although we've been training to it and so forth, I think this is an important, if only perhaps symbolic, change of policy by the administration, that I welcome.

Senator MCCAIN. A foreign court's interpretation of Common Article 3, as the Supreme Court says, should be considered, but would not be binding. Is that correct?

Admiral HUTSON. Yes, sir, Senator. It is, indeed. There are lots of terms in the law—probable cause, reasonable doubt—that are susceptible to interpretation. The concerns with the interpretation of "humiliating and degrading treatment" arise only when you are very much pushing the envelope. If you're staying comfortably within the meaning and texture of Common Article 3, it's not going to be a problem.

Senator MCCAIN. I want to ask the obvious, General—we'll go back down this way. What we do, isn't it very important that we consider what other nations may interpret the Geneva Conventions and the treatment of prisoners in the case of our service men or women being taken captive?

General ROMIG. Yes, that's correct. What we do could influence what they do. It's important that we set the higher standard.

General SANDKULHER. Yes, sir. I would like to go back to your point you were making before, about the foreign interpretation. We all agree that the foreign courts' interpretations do not control. However, there are developments that occur around the world that do impact how those words are interpreted, and there should be close consideration of the point made by the DOJ representative as to how other forums are interpreting that and how others will think that we should interpret that.

Senator MCCAIN. But we are not bound.

General SANDKULHER. We are not bound, but it becomes influential.

Senator MCCAIN. The way that the international criminal court has become influential, in some ways, is that——

General SANDKULHER. Yes, sir, and other forums. There's many other agencies out there who look at this language, and are giving meaning to the language, that we should be careful to recognize and set ourselves apart from.

Senator MCCAIN. We'd better be very careful how we interpret it, to make sure that any foreign court or constituted body would have any influence on our decisions, as far as the men and women of the American military are concerned.

General SANDKULHER. Yes, sir.

Senator MCCAIN. General, could I just ask——

Chairman WARNER. Would you suspend, just a minute?

I ask the persons in the rear of the room—you've had the opportunity to silently make your statement—you have the option now to quietly join the audience or I'll ask the officers to escort you peacefully from the room.

Please resume, Senator McCain.

Senator MCCAIN. General?

General RIVES. Senator, I agree that the interpretations of other nations in international courts are only matters for consideration by our courts. I also agree that it's critically important for us to hold ourselves to the highest standards so no one looks to us to say we lowered the standards, in the appropriate treatment of prisoners of war (POW), in particular.

Senator MCCAIN. You agree, Admiral and General, we ought to be able to work through this in a way that doesn't bounce us back to the Supreme Court, and then back again, to accommodate their instructions?

General RIVES. I do. I read the Supreme Court opinion as looking for further guidance from Congress, should you decide to give it, in this area.

Senator MCCAIN. Admiral?

Admiral MCPHERSON. I agree, Senator. I have two points. One is, currently the UCMJ and the Manual for Courts-Martial (MCM) direct our attention to international law—specifically, the law of war—as a consideration in interpreting other provisions of both those documents. That's not new for us. We've been doing that since we came on Active-Duty.

The second point is, I think what you say is very important, in that it speaks to the need to take very careful and deliberate action

in drafting and passing this legislation. It shouldn't be something we rush to. I like the timeline that you, Senator Warner, have laid out. That gives us time to, in a partnership with this body, come up with the right answer.

Senator MCCAIN. General Black?

General BLACK. Yes, sir. I agree that we are not bound by the interpretations of other countries. I also agree that we can work through this in a meaningful and purposeful way. You said it best, sir, in your opening statement: setting the bar high protects our future generations of soldiers, sailors, and airmen.

Senator MCCAIN. I thank you, Mr. Chairman. I want to especially thank all the witnesses. I think they have been extremely helpful today with the collective 100 years or more of experience here before us today. I thank the witnesses.

I thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator McCain. I'll join you in the observation. We are very privileged. I think it was a good way to have a starting point for this hearing.

Now, Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

Gentlemen, I join in welcoming you. I want to join with others to say how constructive and helpful you have been to not only our committee, but to the military and to our country. This has been enormously positive and helpful for all of us. I thank you for your service—as Senator McCain said, about 100 or 120 years of experience that are before us, and a remarkable amount of commonality and viewpoints.

Sitting here today, I was wondering, how did we ever get it so wrong? How can we protect it, that we don't get it wrong in the future? As I was sitting here and listening to all of you, I just said, "if your voices, your counsel, your ideas, so powerful here among Republicans and Democrats alike, have been over there in positions of responsibility, how is it that the DOJ has prosecuted—261 defendants have been convicted or pleaded guilty in terrorism or terrorism-related cases, and we have 560 of which only 4 have been charged, and no one has been convicted? Why is it that we have this so wrong? What can we learn from that experience that isn't going to interfere with trying to make sure that we're going to get it right in the beginning? That's a question.

There are several members of the panel here that have been there right from the very beginning when what they call the MC–01 was published. We have had articles that have been written, the most comprehensive one in the New York Times on October 24, 2004, by Tim Golden, "After Terror, A Secret Rewriting of Military Law." In that article, there are references to a number of those of you who are sitting here being involved in working groups, that you submitted your views. I'm sure a number of those views were similar to what you've said today. Nonetheless, we had the publication of commissions that came out. What went wrong there? What can we learn from that experience so that we're not going to have it repeated, in terms of the future? We're going to delay the prosecution and bringing to justice those that ought to be prosecuted and brought to justice?

I'll start with General Rives. Would you comment?

General RIVES. Thank you, Senator. It is critically important to get this right. I believe one of the problems with proceeding more quickly had been a desire to make sure we got it right.

The uniformed professionals, the Judges Advocate who participated in working groups, have certain ideas. As the committee here has asked, we have used our independent voices to tell what we really believe is the right way to go. Ultimately, we're not the decisionmakers. The political leaders in the Pentagon make a number of decisions. All we can ask, I suppose, is that they give us the opportunity to be heard, and that they listen to and consider our inputs on these matters.

Senator KENNEDY. General Sandkuhler?

General SANDKULHER. Sir, I would repeat some of what General Rives said. We have been involved with the working groups. The atmosphere post-September 11 was different from the atmosphere today. We worked hard to make sure that we got it right. We gave our voice to concerns, and we were heard. Decisions were made. I think I would equate it to: sometimes legislation doesn't achieve the expected goal, and you have to go back and correct that. Unfortunately, we're here today.

Senator KENNEDY. In the New York Times article, it talked about a group of experienced lawyers who had been meeting with Mr. Haynes, who's a general counsel, repeatedly on the process, began to suspect what they said did not resonate outside the Pentagon, several of them said. On Friday, November 9, 2001, officials said, Mr. Haynes called the head of the team, Colonel Lawrence J. Morris, into his office to review a draft of the presidential order. He was given 30 minutes to study, but not allowed to keep a copy, or even take notes. The following day, the Army's Judge Advocate, Major General Romig, hurriedly convened a meeting of senior military lawyers to discuss the response. The group worked through Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to the existing military justice. When the final document was issued that Tuesday, it reflected none of the officers' ideas. Several military officials said they hadn't changed a thing, one official said.

Is that fairly accurate?

General ROMIG. Yes, sir, it is.

Senator KENNEDY. Would you say that your suggestions or recommendations—can you provide for us, to the committee, the copies of your comments, and analysis on the military commissions from 2001 to 2002?

Chairman WARNER. I think the question has been put. We should allow the witness time to reflect and take such consultations as need be to respond. Would that be agreeable to the Senator? I would suggest he respond to that for the record.

Would you feel more comfortable with that, General Romig?

General ROMIG. Yes, sir.

Let me give it a little background—there was a long process. Prior to that November presidential order, we were engaged in doing research. We were essentially looking at the historical precedents and putting together and it was a very tentative product at that time—recommendations on where we thought we should go.

You're correct, Colonel Morris headed that effort. He was, and still is, a great young colonel—not as young as he was then, but still a great colonel. As we went through the process—you're correct, there was a meeting on that weekend. We actually met at my house. We were not allowed to have copies of that document. Our comments were oral comments—they were not written comments—back through Colonel Morris.

After the order came out, there was an extended period of time where we worked on the first military order. There was a lot of back and forth as to what are the correct procedures—given we now have this order that we have to live with that sets out the structure and some of the procedure and processes very superficially, but, nevertheless, sets them out. It was our impression that a lot of that paralleled what was done in the *Quirin* case, the Supreme Court case in 1942.

We were able to get a lot of due process back into the first product. There are literally hundreds of memos and things that went back and forth. There were working groups that met.

Senator KENNEDY. My time is up, but finally, maybe Admiral Hutson, were the final and ultimate decisions made by the Judge Advocates General (JAGs), the lawyers, or by the politicians?

Admiral HUTSON. Sir, I'm sorry, I was gone. I retired in 2000. So, I'm not able to go.

General?

General ROMIG. As is always the case, they ultimately were made by the civilians.

Senator KENNEDY. Thank you.

Chairman WARNER. Senator Kennedy and other colleagues, the committee will, in consultation with each of these witnesses, seek to get as much material as we can regarding the decision process as we move along in this hearing. In no way am I trying to curtail any member or the committee's ability to probe and ascertain all the facts that are relevant to the challenge before us.

Senator KENNEDY. Great, thanks.

Chairman WARNER. Thank you, gentlemen. Why don't you take a seventh-inning stretch. We are paid to vote. That's what we're going to do.

[Recess at 11:05 a.m.]

[Resumed at 11:15 a.m.]

Senator MCCAIN [presiding]. If the witnesses would return, Senator Warner is on his way back. In the interest of not taking too much time of the witnesses' time, we'll go ahead and reconvene. We'll have those West Point cadets be quiet down there. I'll tell you, if they were Naval Academy guys, they'd have been quiet. [Laughter.]

Thanks for being here today, guys.

I would like to ask Senator Graham if he would like to go ahead and be recognized.

Senator GRAHAM. Thank you, Mr. Chairman.

Gentlemen, you just make me proud to be a part of the JAG Corps. I think you represent not only the best in military officership, but also the best in what we're trying to accomplish as a Nation in the war on terrorism.

I want to start with Senator McCain's line of questioning. Simply put, with appropriate definition to how Common Article 3 will be applied domestically, can we win the war and still live within Common Article 3?

General BLACK. Yes, sir.

Admiral MCPHERSON. I agree with that, yes, sir.

General RIVES. Yes.

General SANDKULHER. Yes, sir.

General ROMIG. Absolutely, sir.

Admiral HUTSON. Yes, sir, in fact, I'd turn it around and say I don't think we can win the war unless we live within Common Article 3.

Senator GRAHAM. That's probably a better way to put it. Let's start with that general framework, that we can, and we must, win the war using our value systems, because if we change who we are to win the war, then I agree with you, Admiral Hutson, we've lost.

Now, the military commission infrastructure that we're talking about comes from the UCMJ, is that correct, General Rives?

General RIVES. Yes.

Senator GRAHAM. It's my understanding that the reason Congress made available military commissions to try war crimes in the code itself is because we were not very proud of the products that were going on before it was part of the code, in World War II and some other cases, where the trial procedures were less than adequate. Is that correct?

Anybody. Is that correct, Admiral Hutson?

Admiral HUTSON. Yes, it.

Senator GRAHAM. As a matter of fact, Congress made a conscious decision after World War II, in 1951, when the code was enacted, that we're not going to go down that road again. We're going to make military commissions an option, but we're going to give some structure to them that we'll feel more comfortable with, as a Nation. Does everyone agree with that concept?

That structure was envisioned by Congress to have, as its baseline, similarity or uniformity where practical to the underlying document, the UCMJ. Is that correct, General Black?

General BLACK. Yes, sir.

Senator GRAHAM. So, Congress understood there would be two forums available in a time of war for the United States Government through its military to operate within—one, the UCMJ, to try our people for any alleged misconduct engaged in by our people, using the UCMJ, and realizing that other people may be tried, in terms of law-of-armed-conflict violations that are not part of our military, but the military would conduct those trials; thus, creating the military commission as a second forum. Do you all agree with that?

Let the record reflect yes.

It seems to me the Court understands that, equally; and that my belief has been—since our first time we met here—that for us to get it right we need to have military commissions as uniform as possible with the UCMJ, because that's the root source of the law of military commissions. Is that correct?

An affirmative answer by everyone on the panel.

Understanding needs to deviate—as Admiral Hutson has indicated, need to be well-articulated and well-defined. Does everyone

agree there will be times when you need to deviate from the UCMJ when it comes to a military commission trial venue?

General BLACK. Absolutely.

Admiral MCPHERSON. Absolutely.

Senator GRAHAM. The international criminal court has hearsay rules far more lax than the UCMJ or the Federal Rules of Evidence. Do you all agree with that?

General BLACK. Yes, sir.

Admiral MCPHERSON. Yes, sir.

Senator GRAHAM. Would you agree that one of the things we might do is look at the international criminal court's hearsay rules when it comes time to create hearsay legislation for military commissions?

General BLACK. Yes, sir.

Admiral MCPHERSON. Yes, sir.

Senator GRAHAM. Is that okay with you, Admiral Hutson?

Admiral HUTSON. Yes, sir.

Senator GRAHAM. We're not going to take the whole 6 minutes writing the law. What I would like to reinforce to the committee members, that I think this panel has it right, that this panel represents military expertise and legal knowledge not possessed by many. They are unique. But what they possess, more than anything else, Mr. Chairman, is, they don't have any ax to grind. They're not going to get elected in November. They don't have to worry about political appointments. They have to just worry about following the law and being a good officer, and, in your case, being good citizens.

Now, the more problematic area, for me, is the application of Common Article 3 in terms of it not being a regularly constituted court. We could give you a regularly constituted court that meets human dignity standards really quickly, but we're not going to do it quickly, we're going to do it really thoughtfully. When it comes to the techniques that would be applied to interrogating non-uniformed personnel—al Qaeda members, Sheikh Mohammed and people like him that are the masterminds of September 11—that is a different arena. Sheikh Mohammed is not a member of a uniformed service representing a sovereign nation; he is a terrorist whose battlefield includes the schoolbus, the schoolhouse, and any and all institutions that represent democracy.

Having said that, it is not about Sheikh Mohammed and his way of thinking; it is about us. When he falls into our hands, it becomes about us. Can we prove to the world that we're different than Sheikh Mohammed? One of the ways to do it would be how we treat him. I would like to aggressively interrogate every al Qaeda member to make sure that our Nation is defended and still live within the spirit of who we are.

Admiral Hutson, could you give me some ideas of how we could do that?

Admiral HUTSON. I think that that is absolutely necessary, because, you're right, we need to be able to interrogate people, we need to be able to get intelligence information from them. The question of interrogation and gaining intelligence information is a somewhat different question than prosecution.

Senator GRAHAM. Don't you think it's the hardest question that we face as a Nation?

Admiral HUTSON. That's right. We made a decision, as a Nation, that we were going to treat terrorism, henceforth, as a war, rather than as a criminal activity. I think that was the right decision.

Senator GRAHAM. Yes.

Admiral HUTSON. It is, in itself, a new paradigm, which carries with it certain difficulties that we need to be able to address. One of those difficulties is that we have decided that, during the course of this war, during the prosecution of the war, we also want to prosecute people criminally. Those two things don't exactly match.

Senator GRAHAM. Right.

Admiral HUTSON. We need to be able to figure out where to draw the line, how to make those kinds of distinctions so that we can both prosecute the war successfully and prosecute, to use the verb in a different way, judicially, the terrorists.

Senator GRAHAM. Well said. I would ask your input on how to do that. I know my time's up, and I apologize, Mr. Chairman; this is my last line of inquiry—title 18 of the United States Code makes it a felony for a military member or civilian to violate the Geneva Convention. Is that correct? Punishable by death.

General RIVES. To violate Common Article 3.

Senator GRAHAM. To violate Common Article 3, even more specifically. The dilemma we have now is, we need to look at title 18, in terms of the *Hamdan* decision, and we need to make sure that those that are on the front lines of interrogating al Qaeda members have enough guidance so that they will not inadvertently put themselves in legal jeopardy.

I would ask the panel to help us find a way to reconcile the standards of title 18, which makes it a felony for our troops to violate Common Article 3, and how we write this statute, because I think the more specific the statute, the better the guidance to our troops. The thing about the treaty that probably needs to be reined in is to give some structural definition to it when it comes to domestic law application. I would ask for your input, because, to me, that's the hardest challenge the committee faces.

General Rives, you were involved in a working group, back in January 2003, about interrogation policies. Is that correct?

General RIVES. That's correct, Senator.

Senator GRAHAM. As a matter of fact, you and other Judges Advocate strenuously objected to the interrogation techniques being proposed in December 2002, because you thought they would violate the UCMJ if our personnel engaged in those techniques. Is that correct?

General RIVES. We had a number of objections, yes, sir.

Senator GRAHAM. Okay. The final product that came out, in April 2003, did you ever see that product?

General RIVES. I saw the April 2003 report about 14 months after it was issued. No one in Air Force JAG had seen it before then, to my knowledge.

Senator GRAHAM. Thank you very much.

No further questions.

Chairman WARNER [presiding]. Colleagues, we'll now turn to Senator Dayton.

Senator DAYTON. Thank you, Mr. Chairman. Thank you for convening this very important hearing. I thank you, also, for what you said at the outset about the need to proceed on this in a deliberative and bipartisan way.

Having said that, I think it's also important that we recognize that what we're discussing here today, the parameters of what you gentlemen are recommending to us today, is a very major departure from the practices of the administration to date. I thank the Supreme Court for this imperative. I think it's long overdue that Congress asserted itself in this area. Now we have the opportunity and the requirement to do so.

We have a situation where we have people who have been held now for over 4 years, in some instances, at some indeterminate locations, in some cases, that have been subjected to what some people allege is torture in part of their interrogation. Would it be possible, under our UCMJ, to now introduce or assimilate these people into a new or revised set of procedures?

Anybody care to respond?

General BLACK. Yes, sir, I believe it could.

Senator DAYTON. All right.

General BLACK. We can do that. We can make a transition from where we have been to a new and revised commissions process, and do so successfully.

Senator DAYTON. If those alleged actions had occurred to someone who is under the province of the UCMJ, would that be, then, allowed to give that person a, "fair" trial, or would that disqualify or unduly prejudice the case against that individual?

General BLACK. I think you've lost me a little bit there, sir.

Senator DAYTON. If we had done to one of ours who was supposed to be treated according to the UCMJ, which I believe you're recommending, or Common Article 3 of the Geneva Convention—if we had violated either of those by our treatment and by the length of time we detained that person, would that compromise, or would that disqualify, a trial or adjudication of that individual?

General BLACK. Sir, if you're asking whether a person who's been in our custody, and presumably facing commissions, could, in a subsequent iteration of the commissions, challenge their continued detention, I think the rule should be drafted to allow something like that.

Senator DAYTON. Anyone else?

Admiral HUTSON. One of the great strengths of the UCMJ and the case law that emanates out of that is that there are some very strong protective rules with regard to speedy trial. That's one of the things that we would have to address, in terms of modifications, because there are presumptions with regard to speedy trial after 120 days, so that somebody who's been in a dark, dank hole for 4 years is going to run into speedy-trial issues, I suppose, and that would have to be addressed.

As I said earlier, I think it is absolutely imperative that we draw a bright line prohibiting coerced evidence of any kind. In the hypothetical that you pose, that may create problems, in and of itself. The answer to the basic question of "could we use this system for those people?" is yes.

Having said that, are you going to get a conviction when you exclude evidence and you go through all the other things that we would impose into the system? The answer is, I don't know.

Senator DAYTON. Anyone else?

General RIVES. Senator, it depends on the procedural rules that we adopt. For example, if we use the court-martial processes, evidence obtained through torture would not be admissible, clearly. For the commission rules, it depends on what processes we have. If we say that evidence obtained through torture is not admissible for any purpose, that evidence would not be admissible, but we may be able to get a conviction based on independent evidence that was not acquired by means of torture.

Senator DAYTON. We have to speculate, to some extent. Given the spectrum of individuals that are in custody throughout the world, their alleged actions, can we devise one system of procedures that will apply to all of those cases, or are we going to have to devise multiple systems based on different situations and people?

Admiral MCPHERSON. I think we can devise one system that would apply to all, but I think, realistically, there may be some individuals that the evidence is such that we simply could not prosecute them; we have to be willing to embrace that eventuality, as well.

Senator DAYTON. What do we do in those instances?

Admiral MCPHERSON. I think we continue to hold them until the cessation of hostilities, in accordance with the Geneva Convention.

Senator DAYTON. That, "the cessation of those hostilities," being what we define as the war against terrorism.

Admiral MCPHERSON. That's correct. Yes, sir.

Senator DAYTON. Okay. Anyone else care to respond? [No response.]

No further questions. Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

You announced at the beginning that this is the first of a series of hearings that we're going to have. I see some dangers in this, because some of the responses that we've gotten, some of the opinions that we've received here, some people at this table, and others, are going to go dancing to the media and say that we now know where we're going to go with this thing, when, in fact, we don't.

About half of you, in your opening statements, talked about baselines, that you're going to use either Common Article 3 or the UCMJ. Now, the chief criticism that we hear from people, the hysteria that hit the media right after the United States Supreme Court decision, was that we are going to be affording, as we would do, I suppose, if we used as a baseline—or this—could be interpreted this way—the UCMJ—in affording the same privileges and defenses and—for the terrorists as we would for our own troops. For those of you who are talking about using that as a baseline, I assume this is not where you want to end up. Is that correct? I can't remember which one of you said that you wanted to use that as a baseline.

General ROMIG. Senator, I was one of the ones that said that. I also said that we needed to look at those things in the UCMJ that did not make sense, that would not work, and should not be applied to military commissions, given the environment that these people come from, the battlefield. Do you have evidence that you can use on the battlefield? Do you have chain of custody, like you have in a search-and-seizure that you might have in the civilian life? Those all need to be looked at. I still think we could, as a baseline, using the structure and the processes and procedures, start with the UCMJ, and then look at those things that don't make sense.

Senator INHOFE. Still you would say that we're not going to be affording them the same privilege as our own troops.

General ROMIG. It depends on what it is.

Senator INHOFE. Okay.

Those of you who said you wanted to use Common Article 3, I know what's going to happen on that, too. There are going to be people going to the media and saying, "all right, they all agreed," because you all did say you are training toward Common Article 3. You didn't say, necessarily, that we are already there, but we could achieve that. My concern—and I would believe that some of the terms in Common Article 3 are inherently vague, is exactly what does "humiliating treatment" mean? What does "degrading treatment" mean? Is there any specific written guidance that the armed services have developed to give definition to these terms? Do you all have firm definitions of these terms that you think we could train to? Do you see that they are vague, or not vague? Are they specific in your minds?

Admiral HUTSON. Senator, legal terms and other sorts of terms are inherently vague and need a certain amount of definition. Part of the definition comes from the Army Field Manual. Part of the definition comes from 200 years of tradition. But, as I said earlier, the problems are going to arise when we're pushing the envelope. If we stay comfortably within it, we're not going to have to worry so much about it. We can't let the inherent unavoidable vagueness of all of these terms such as "torture," stop the effort, however. I think we have to work toward defining them as best we can, and explaining them to the troops. I'm worried about the boots on the ground.

Senator INHOFE. That's exactly why I'm bringing this up. These guys are out in battle, they're going to have to have, in their own mind, a definite determination as to what these terms mean.

Admiral HUTSON. Absolutely.

Senator INHOFE. What do you think, General?

General SANDKULHER. Sir, I'd like to go back to the training level of the people in the field. When we train marines, soldiers, sailors, and airmen, when we talk about handling people that we grab or get on the battlefield, we're normally talking about in context of the Geneva Conventions regarding POWs. Our training levels are generally to the POW standards. When we take somebody on the battlefield, we are applying those standards, which are far higher than Common Article 3.

I cannot recall for you a document that defines "inhumane treatment" or "humiliating acts" that ousts in our panoply of——

Senator INHOFE. Okay. Our time's running out here. Let's get back to the——

Chairman WARNER. I want to make sure the recorder got the last of your sentence. You cannot recall——

General SANDKULHER. I can't recall, Senator, a document that defines "inhumane treatment" or "humiliating acts." I don't know if we have one out there that has a listing of—we may have examples of what could constitute it, but I can't think of a definition, off the top of my head. That would be something for the record that we could respond to.

[The information referred to follows:]

General Sandkuhler was correct in that the Department of Defense (DOD) did not have a document defining "inhumane treatment" or "humiliating acts." There were, however, several documents used by the Services that addressed those issues by listing examples of prohibited acts.

For instance, at the time of Brigadier General Sandkuhler's testimony, Army Field Manual (FM) 34–52, September 28, 1992, was in effect and governed interrogation procedures for DOD. It was referenced in the Detainee Treatment Act (DTA) of 2005, as the guiding document for interrogations. This document was superseded by FM 2–22.3, on September 6, 2006, states that the Geneva Conventions and U.S. policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." (See FM 34–52, page 1–8).

FM 34–52 does not give a definition of "inhumane treatment," but the document does set forth specific examples of physical torture, mental torture, and coercion. It also lists articles of the UMCJ that may be violated if interrogators were to cross the line. (See FM 34–52, page 1–8, and Appendix A). Figure 1–4 (page 1–11) of FM 34–52, also lists pertinent articles of the Geneva Convention Relative to the Treatment of Prisoners of War, which must be followed. Additionally, Appendix D lists pertinent articles of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which must be followed, including Article 5, which states that individual protected persons shall "be treated with humanity."

Moreover, section 1–5 of Army Regulation 190–8, sets forth the general protection policy with respect to the treatment of enemy prisoners of war and other detained persons, and specifically requires that "prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria." It then lists several acts that are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment. The very next paragraph states that all persons will be "protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind."

Also, DOD Directive 3115.09, DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, of 3 November 2005, states that the DOD policy is to treat all captured or detained personnel humanely, and that all interrogations, debriefings, and tactical questioning shall be conducted humanely in accordance with applicable law and policy. The document does not define the term "humanely."

Subsequent to Brigadier General Sandkuhler's testimony, the new Army FM on intelligence interrogations was promulgated. This is FM 2–22.3, Human Intelligence Collector Operations, and was promulgated on September 6, 2006. FM 2–22.3 states that the principles and techniques of human intelligence collection are to be used within the constraints established by U.S. law, including the Uniform Code of Military Justice, the Geneva Conventions of 1949, and the DTA of 2005. (See FM 2–22.3, page vii). It further states:

> All captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the DTA of 2005 and DOD Directive 2310.1E, "Department of Defense Detainee Program", and no person in the custody or under the control of DOD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in U.S. law. (See page viii).

On page 5–21 of FM 2–22.3, there is a discussion regarding the prohibition against cruel, inhuman, or degrading treatment. If references the DTA, which de-

fines "cruel, inhuman or degrading treatment" as the "cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th, and 14th amendments to the Constitution of the United States." FM 2–22.3 provides a list of actions that will not be approved in any circumstance. FM 2–22.3 provides two tests to be used in order to determine whether a contemplated approach or technique would be prohibited. These tests are found on page 5–22. These tests demonstrate the difficulty in trying to establish hard and fast definitions to terms such as "degrading treatment" or "inhumane acts." FM 2–22.3 addresses the issue of inhumane acts throughout the document without defining the term. (See FM 2–22.3, pages 5–26, 6–9, App. A, M–1, and M–4–5).

Finally, DOD Directive 2310.01E, the Department of Defense Detainee Program, dated 5 September 2006, states that all detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy. It provides that at a minimum the standards of Common Article 3 to the Geneva Conventions of 1949, shall apply. DOD Directive 2310.01E includes the text of Common Article 3 as an enclosure. (See Enclosure 3, DOD Directive 2310.01E). Enclosure 4 to DOD Directive 2310.01E also contains a Detainee Treatment Policy. DOD Directive 2310.01E does not specifically define the term "humane treatment," but it does provide specific examples of both proper and improper treatment.

The Geneva Conventions of 1949, which are the guiding documents in this area, do not define the terms "humiliating" and "degrading treatment", which are found in Common Article 3. Like all legal instruments, the text of Common Article 3 is subject to interpretation. As is true for legal interpretation elsewhere, a reasonable person standard should be followed.

Chairman WARNER. There is the Army Field Manual, the current issue. Then, Senator McCain and I are anxious to see how soon the new and revised one will come out. That's a separate subject we're going to probe together.

General SANDKULHER. Ask General Black, sir.

Senator INHOFE. Reclaiming my time, here.

When you talk about the baseline, using UCMJ or using the Common Article 3, would any of you want to use as a baseline the existing procedures?

Admiral MCPHERSON. As I testified before, I think the existing procedures are wanting.

Senator INHOFE. Do you all? Anyone?

General ROMIG. I agree.

Senator INHOFE. You're talking about a baseline here, you're not talking about an end product. We've already established that.

General ROMIG. That's correct.

Senator INHOFE. But a place to start. Would any of you think that, currently, the procedures that have been in place would be a good baseline to start?

General SANDKULHER. I think you could start there, Senator. I think you could start with the UCMJ. I think we need to work towards a middle between those two, if want to call them extremes.

Senator INHOFE. All right, sir.

This morning, in the New York Times—I'll read this to you, and I'm going to ask you if you agree with this—"The administration lawyers have argued that the most desirable solution would be for Congress to pass a law approving the tribunals that the Court said the President could not establish in his own proceedings that would grant minimum rights to detainees."

Do any of you support that statement?

General ROMIG. No, Senator.

Admiral MCPHERSON. No, sir.

Senator INHOFE. Thank you, Mr. Chairman.

Chairman WARNER. Thank you.

Forgive me for the interruption, but I thought that response to your important question had to be accurately reflected in the record.

Senator Clinton.

Senator CLINTON. Thank you, Mr. Chairman.

Thanks especially to this panel. I commend you all for your years of service and for your deep concern about the issues that we're discussing today, and I certainly look forward to your continuing guidance. I hope that those of you still in uniform—actively involved and permitted in the consultation process going forward, so that we try to work this out on a bipartisan, bicameral basis, certainly for the good of our men and women in uniform, and, frankly, for the good of our country.

I think that there's been so much confusion about this issue, the way it's been discussed, the way it's been, to some extent, sensationalized. I appreciate the very sober and prudent way you've addressed these matters.

Some of you have talked about looking to the Nuremberg trials, and even the other international tribunals that have been established over the last 50 years, as examples as we move forward and try to determine what best course to take. Do any of you have specific lessons that you think we should draw either to apply or not apply from those international experiences?

Admiral HUTSON. I would say accountability, coming out of Nuremberg.

Senator CLINTON. Accountability up and down the chain of command?

Admiral HUTSON. Accountability up and down the chain of command, that people are responsible for the actions of their subordinates, and so that when you're trying bin Laden, he's Yamashita—I think that that's one of the lessons that came out of World War II, and that following illegal orders isn't a defense.

Senator CLINTON. Can there be illegal orders when you have a terrorist organization? Is there such a thing as a baseline of legality? I think those are the kinds of questions people have to ask. This is different than what we've attempted to do before, and I think looking to the international tribunals could be enlightening.

Anyone else have anything to add about that? Yes, General?

General SANDKULHER. Senator, we've looked at some of the ideas of discovery that exist under the Rwanda and the Yugoslav international criminal courts that have procedures that recognize the need for classified information or security documents of interest to the other nations being controlled in a way that is not perhaps revealed to an accused. There are items out there from those forum that we think we can look at, and we have looked at the past, that provide us with criteria that are internationally acceptable.

Senator CLINTON. We've had two examples, one here, with the Moussaoui trial and one in Germany, where the refusal of our Government to share information arguably affected the outcomes of those trials. I think this question about confidential evidence and hearsay evidence is going to be especially thorny.

One of the concerns that I have is that, as you look at the evidence that could be presented, a lot of it will be hearsay or confidential, classified in some form or another. May I ask if you've

given thought, as I'm sure you have, that you could share with us, about the understanding of the specific issue of confidentiality as a precedent in war crimes tribunals? Would the rules in the Classified Information Procedures Act (CIPA) be sufficient? On the issue of hearsay and the challenges of obtaining evidence from continents away, from battlefields that are 8,000 feet in the air, how do you address that? Does anybody have that initial impressions that you'd be willing to share with us on confidentiality and hearsay?

Admiral HUTSON. Senator, Military Rule of Evidence 505 deals quite nicely with classified sources-and-means kinds of things, where there's a variety of ways, in camera, in showing it to the judge in camera, unclassified summaries and that sort of thing, that can be used as, again, a starting point or a baseline for dealing with that aspect of your question.

With regard to hearsay, of course, you're absolutely right, there's going to be lots of hearsay problems if you were to just use the military rules with regard to hearsay, which are basically the same as the Federal rules.

I would suggest that you need to have some sort of apparent authenticity—it may be corroborating evidence—aspect to it so that what you can't do, I think, is say to the accused, "We know you're guilty. We can't tell you why. We can't tell you who told us something. We can't tell you what. But you're guilty."

Senator CLINTON. I also want to reinforce something that one of you just said, and that is, we're not talking about a choice between trying somebody or letting somebody go. That's been very confusing to people in this process, and there's been a lot of hyped rhetoric about "You're going to tear down the system. Look what the Supreme Court did. We're going to let all these terrorists loose." You do not have to let people go. These are enemy combatants, POWs, whatever we want to call them. We had Nazis in prison camps in our country for years. Then the hostilities ended, and they were let go.

I think it's useful, not only to be talking about the details as to what we need to consider, going forward, but maybe to clear the air a little bit. I listened to some of the hearings that some of you participated in yesterday, and frankly, it was embarrassing.

Senator GRAHAM. Would the Senator yield?

Senator CLINTON. I certainly would, Mr. Chairman.

Senator GRAHAM. Isn't it correct that you could be acquitted in a military commission and still be held as an enemy combatant, even if you're acquitted?

Admiral MCPHERSON. That's correct, sir.

Senator GRAHAM. To go to your point, you're absolutely right.

Senator CLINTON. Thank you for that clarification and addition.

I just want to be sure, Mr. Chairman, as we go forward with this, that the Senate does not engage in the same kind of heated, inaccurate rhetoric that will undermine this very important, serious endeavor. Therefore, we need to clarify many of the points, and that is one of the critical ones that I wanted to get on the record, because this is not about whether you try terrorists or let them go. We have to be very clear about that, going forward.

Chairman WARNER. I thank the Senator from New York for that very insightful observation.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

The problem is that these persons, for the most part, that we are dealing with, that are most dangerous, are unlawful combatants, they're not German soldiers who wore uniforms and who served a nation-state. They're unlawful combatants. Many of them are obsessively committed to suicidal destruction of American lives. At some point, as one of you said, when someone declares this war is over, they'll be released. It is important, if they are guilty and are actual terrorists who are bent upon destruction of American lives or Iraqi lives or Afghani lives, that they be detained more than the length of this hostility.

With regard to the military commissions, I think the Supreme Court ruling reversed ex parte *Quirin.* I believe the President and the DOD correctly set up commissions under the existing law at the time, as has every President before this one, and they've changed the law. So, we now have to comply with it. I don't think the President, the DOD, or anyone else should be condemned for carrying out a system that has been consistent with the history of America.

Let me just ask this, so the American people will know. General Black, I can start with you, or if someone else would like to answer, that would be fine. These commissions provided certain protections and procedures. Would you summarize for us what was in place and what protections and procedures were set up to try persons for these kind of criminal unlawful-combatant acts?

General BLACK. Yes, sir. The commissions, as originally constituted, as they exist today, provided a great number of procedural rights and protections that we would find acceptable, to include the right to counsel, the right to be present, the right to confrontation of witnesses against you. There are discovery rights accorded to the accused in these proceedings. There are fundamental rights that are all very familiar to us, as Americans, and to the world, in general, as just and fair.

My colleagues here at the table would agree that the commissions process that was built is, again, a good place to start from, and we can add to that and improve upon it and build it into something we can all be very proud of.

Senator SESSIONS. Thank you, General Black. I think we need to remember that. Now, this was a 5-to-3 Supreme Court decision—really 5-to-4, since Chief Justice Roberts had already voted to sustain this case. They found that a few areas of the commissions were inadequate. Would you just describe for us what the Supreme Court said was inadequate about this, I think, a fair procedure that had been set up to try persons accused of these crimes?

General BLACK. Yes, sir. In a nutshell, I believe the Court found that the commissions are defective because they violate the UCMJ and the Geneva Conventions. To follow on with that, they said the executive could go ahead and proceed with military commissions, either following the UCMJ model or by following a model that's adopted by Congress.

We can do that and achieve, I think, the goal that the Court is getting at, with the underlying basis of Common Article 3, with some relatively easy changes, many of which have been articulated

here already today. Presence of the accused throughout the proceeding is a great example. The right to view all evidence is another great example. Independent defense function and the presiding officials, and the independence of the presiding officials, are other examples of areas that we can proceed forward on to achieve the——

Senator SESSIONS. Why is that—review and see all evidence—does that mean that they have to see the machinery, perhaps, that did electronic surveillance to obtain data that you might have to see in a Federal trial courtroom?

General BLACK. No, sir, I don't think so.

Senator SESSIONS. I don't think they should.

General BLACK. We'll have to formulate those rules very carefully. I think we can expand upon what we have right now.

Senator SESSIONS. I noticed a couple of gentlemen mentioned that we should not have coerced evidence. I've been a prosecutor for 15 years, and "coercion" is a legal term generally applied in the American court system that's awfully strong. For example, if someone is approached by a large police officer, and he says, "What are you doing here?" that's considered a coercive inquiry. That's considered to be an involuntary confession if the person said, "I was here to make a bomb." What if a soldier goes in a house with a gun and says, "Why did you make this bomb?" and he says, "Because I'm a part of a jihad," and now they move to strike it because it's coercive? Don't you think we have to be very careful about how we do these terms so that what's happening in the battlefield is understood to be different than the American legal system?

General BLACK. Oh, yes, sir, I do. In fact, the DTA requires a slightly higher standard than the commissions currently use. I believe that's the probative value review of any coerced statements. I think we can refine that language and get exactly to the goal that you're talking about.

Senator SESSIONS. What is exculpatory evidence? Real exculpatory evidence needs to be produced, no doubt about it. What if his defense is, "I was taking orders from somebody" that can't be found, and we're supposed to find them—or maybe, "I had a bad childhood. I want to bring my abusive father"—which you could do, perhaps, in the American courtroom. I'm not making light of it, but I'm just saying, how you define "exculpatory evidence" is no small matter.

I would also express my concern that when you go from the basic UCMJ, Mr. Chairman—and maybe there are certain provisions that you don't change, and you adopt and leave as part of the law—we will have adopted, presumably, the case law that goes with it, and that case law will have been developed for the purpose of trying American soldiers, providing them certain protections, that may not be necessarily legitimate to provide to those who would destroy the United States.

We need to be really careful. I think military commissions are legitimate. They've been part of our history from the beginning. The Supreme Court didn't say to the contrary. Let's meet the standards the Supreme Court said, but it's not the greatest piece of legislation that this Congress will be passing when we do so, in my view.

Chairman WARNER. Thank you, Senator.

Senator Reed.

Senator REED. Thank you very much, Mr. Chairman.

Thank you, gentlemen, not only for your testimony today, but for your service.

Admiral Hutson, if I may, with the decision by the DOD, Secretary England, to affirm that Common Article 3 applies, is there any category of detainee today that is not under the provisions of Common Article 3?

Admiral HUTSON. No, Senator. My opinion is that Common Article 3—common as it is to all the Geneva Conventions, applying to all four conventions—is the minimum standard that covers everybody. If you're a POW, it's an entirely different situation, and there are lots of attributes and rights and requirements that are different, but that Common Article 3 provides a floor for everybody.

Senator REED. If there is any disagreement, I would encourage the other panelists to just jump in.

On July 7, 2006, Secretary England said, "It's my understanding that, aside from the military commission procedures, existing DOD orders, policies, directives, executive orders, and doctrine comply with the standards of Common Article 3." Is that the common understanding of this panel, that all the procedures, except for the commission procedures, are consistent?

Admiral MCPHERSON. Yes, sir. Senator, what Deputy Secretary of Defense England asked us to do was, within 3 weeks, review all our policies, directives, written orders, and ensure that that, in fact, is the case. We're doing that right now.

Senator REED. That will be reported not only to the Secretary, but to Congress?

Chairman WARNER. We certainly would take judicial notice, and we'll see that that material is provided.

Senator REED. I think this is a good point to establish what we have to do, here in Congress. I commend the chairman for this hearing, and this series of hearings. General Black, I'm responding, I think, to your response to Senator Sessions—the choice the President has after *Hamdan* is to use the full panoply of the UCMJ with respect to these trials—all the rights, all the procedures—or to come to Congress and get authorization for a commission. Is that a fair understanding?

General BLACK. I believe that's what the Court said, sir in the *Hamdan* case.

Senator REED. Is there any disagreement on that point? [No response.]

I presume, since the administration seems to be reluctant to embrace the full panoply of the UCMJ procedures, that we have to give them, the administration, the President, or any President, the authority to conduct these commissions. Is that the correct understanding? [No response.]

The next issue, I think, is what procedural rules would apply? From your testimony, I assume that you are all urging us to begin with the UCMJ, as it exists today. Again, any disagreement? [No response.]

Thank you. Then the real question becomes, what are the exceptions? I open it up to the panel. There are two ways, at least, to do the exceptions. We could sit down and laboriously go through

every provision of the UCMJ and author legislation that would categorize and specify exemptions, or we could give the President, subject to appropriate review, and by regulation, the opportunity to make exceptions, have a record justifying those exceptions, subject to review. Posing those two points, perhaps rhetorically, would you like to comment on your preferred approach? We can go up and down the line.

Admiral Hutson?

Admiral HUTSON. Senator, the National Institute of Military Justice (NIMJ), which is an organization of which I'm on the board, proposed legislation that would, one, authorize commissions and would provide the President the authority to make those changes that he felt were absolutely necessary, in a narrow and specific way, based on military necessity and practicality, and then report them to you. That is a reasonable way to proceed on the issue. Although in his testimony yesterday, Mr. Dell'Orto said that the DOD had already gone through the UCMJ, the MCM, and identified the changes that need to be made.

Senator REED. General Romig, any comments?

General ROMIG. Senator, I've thought about this, and I don't know if this is feasible, but it strikes me that, if it is feasible, you probably ought to put together a working group on this committee with people that come from the Services, nominated from the Services, under the supervision of a couple of the staffers, maybe from each side, so you have a bipartisan effort, and then get input from all these different places, get input from DOD, and get input from the NIMJ. That way you're going to get all kinds of input, you're going to have smart young people that the Services nominate to come over and work on this. You're going to get a broader perspective than any of the other possibilities.

Senator REED. Thank you, General.

General Sandkuhler, let's go down the line on just this issue.

General SANDKULHER. Sir, I think the method you choose is the one that will produce the best product. The deliberate process of going line by line will come up with a great product. Doing the reporting process that you're referring to, where you—the President is authorized to produce the rules and report back, and then the rules are blessed or not blessed, and that could produce the right product, as well. The key is a deliberate process to make sure we understand all that we are doing is appropriate not only for trying the people that we hold as terrorists, but also for the UCMJ, as it exists today, so we don't inadvertently corrupt our current system.

Senator REED. General Rives, then Admiral McPherson, other comments?

General RIVES. Senator, I personally favor the idea of Congress passing something in title 10 to provide baseline standards—in title 10 either as a part of the UCMJ or otherwise—to provide baseline standards of the sense of Congress on what the minimum standards for military commissions ought to be, and then deferring to the President to come up with, perhaps, a manual for military commissions or some other executive order to work out all the details, just like we have the UCMJ and the MCM as an executive order.

Senator REED. Admiral McPherson?

Admiral MCPHERSON. Senator, I think it's not as important where you start as where you end up. I think where we start has become a polarizing theme. "Do we start at the UCMJ, or do we start with the current rules?" has caused us to be poles apart. I would like to see us utilize every reference we can, and pull from each reference to come up with a set of rules that are just. That's going to be some things out of the UCMJ, some things out of the current rules, and some things out of the international law. That's how we come to a conclusion and we get to the end. At the end of the day, we'll get to the same place. I think we come at it from that direction, rather than the polarizing direction.

Senator REED. Thank you.

General BLACK. I would agree with Admiral McPherson, sir. I think that's the right way to go.

Senator REED. Thank you.

Senator REED. Thank you very much, gentlemen.

Thank you Mr. Chairman.

Chairman WARNER. Thank you very much.

We have, in the possession of the committee now, the report of the National Institute of Military Justice. I have it here. We will include it in today's record.

Thank you for making reference to it.

[The information referred to follows:]

NATIONAL INSTITUTE OF MILITARY JUSTICE

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

Discussion Draft Rev. 1, July 6, 2006

A Note from NIMJ

On July 5, 2006, the National Institute of Military Justice ("NIMJ") circulated proposed amendments to the Uniform Code of Military Justice ("UCMJ"). The purpose was to stimulate discussion and help focus the issues for congressional consideration. We have already received a number of thoughtful and constructive suggestions. Some are reflected in the following revision. Others we decided did not need to be resolved in this legislation.

Hamdan v. Rumsfeld addressed a host of important issues. This proposal does not attempt to address them all. Our focus is on the UCMJ, and our objective is to preserve the integrity of the statute and keep any surgery to the absolute minimum. While we refer at one point to the Detainee Treatment Act, we have not attempted to address detention-related issues raised by the Supreme Court's decision.

NIMJ has always placed a high priority on the need to foster public confidence in the administration of military justice. It is equally critical that the public have confidence in the legislative process. Only if Congress acts on the basis of a

fully-developed record of hearings, without undue haste, with an eye to the Constitution, and with a full explanation of and open debate on the conclusions reached will the result gain the confidence of the public.

In the following text, matter to be deleted from the UCMJ is ~~struck-through~~. Matter to be added is double-underscored.

For further information on NIMJ, please visit our website, www.nimj.org.

Text

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

In time of war or pursuant to an authorization for the use of military force, 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 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) Pretrial, trial, and post-trial procedures, including modes of proof, for military commissions and provost courts may be prescribed by the President by regulations which shall, so far as he considers practicable and with the exception of section 832 of this title (article 32), apply the principles of law and the rules of evidence prescribed for general courts-martial, but which may not be contrary to or inconsistent with any applicable rule of international law. He shall state with particularity the reasons for any determination of impracticability under this subsection, and his determination shall be subject to review only for abuse of discretion or violation of law.

(~~b~~c) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress. Any determination of impracticability under subsection (b) of this article shall also 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 policies 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 proposal 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 "time of war" clause is intended to governed by the same standard as is currently found in Rule for Courts-Martial 103(19): "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists . . . ."

The second purpose is to tie military commission procedures to court-martial procedures except to the extent the President determines that court-martial procedures are unworkable. At present, Article 36(a) addresses conformity with district court procedures, but leaves open what the rules may provide if and to the

extent the President determines that district court procedures are unworkable. For military commissions, this 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 proposal would establish a presumption in favor of using general court-martial procedures, but permits the President to make exceptions based on a particularized statement of reasons. 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 proposal 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.

Hamdan v. Rumsfeld did not articulate precisely what level of deference applies to presidential determinations of impracticability. 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." The proposal seeks to clarify this with respect to presidential determinations not to apply general court-martial procedures in military commissions. Proposed Article 36(b) provides for abuse-of-discretion and contrary-to-law judicial review based on a required presidential statement of reasons. These standards of review are appropriate because the President is entitled to deference on matters committed to his discretion, while questions of law are typically freely reviewable in the courts. The proposal is not intended to authorize the President to establish rules that are inconsistent with treaty obligations. This is consistent with the current text of the *Manual for Courts-Martial*.

To the extent that it permits the President to apply different rules to courts-martial on the one hand and military commissions on the other, the proposal liberates the President from the constraints imposed by the uniformity clause in the present Article 36(b), as understood by the *Hamdan* majority. The effect of the uniformity clause in proposed Article 36(c) would be to require that rules for courts-martial be uniform, to the extent practicable, as among the armed services, and that rules for military commissions also be uniform, to the extent practicable, as among the armed services.

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 proposal restores the requirement and would apply to rules for military commissions and provost courts as well as those for courts-martial. It would also require reporting of Article 36(b) presidential determinations (including the reasons therefor) to depart from general court-martial procedures in military commissions.

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

The third purpose 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. The proposal 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

11

of limited military commission appellate jurisdiction to the United States Court of Appeals for the District of Columbia Circuit.

The proposed amendment to Article 66 would require the President to designate which of the Courts of Criminal Appeals will have jurisdiction over a military commission case.

A suitable name for the proposed legislation would be "The Military Commissions Act of 2006."

12

Sources

1. *Manual for Courts-Martial, United States* (2005 ed.)

2. Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAW., December 2005

3. Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049 (1976)

4. Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003

5. David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003)

Chairman WARNER. Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman. Thanks, each of you, for being here today.

I guess, initially, we've been trying to figure out, where do we start? There have been some who have suggested that we could start with Military Order 1 and figure out in what ways that it may be deficient from Congress's perspective, and to add to that. There's some reluctance in Congress to adopt the executive order, Military Order 1. So, others have suggested, "We can do it with something that Congress is more comfortable with, the UCMJ, and

carve out exceptions." Obviously, it's all about, as many of you have said, where we end up. I'm advised that preliminary assessment by staff is that 110 rules for court-martial would have to be changed, 73 rules of evidence, and 145 to 150 UCMJ articles. I haven't done that count myself. I'm just reporting what I've been advised by staff.

Let me get to the area that concerns me the most, and that depending on how we approach this, whether we would be unnecessarily hamstringing our ability to get actionable intelligence from detainees because of some of the provisions of Common Article 3, which the Court applied in this context. Of course, what makes this unusual is that al Qaeda detainees have been held—at least three Federal courts, the 9/11 Commission observed, the Schlesinger Commission observed—they are not subject to or entitled to the rights of POWs, generally. Because they don't wear a uniform, they don't observe the laws of war. In fact, we know this enemy is perhaps uniquely barbaric in terms of their attacks on innocent civilians and others. So, we have Common Article 3 applying to some aspects of this, without the full panoply of POW's rights under the Geneva Conventions.

Let me just ask you specifically, in the DTA there is a prohibition against cruel, inhumane, or degrading treatment or punishment. That's already the law of the land. But in Common Article 3 there is a prohibition against humiliating treatment. For example, it also includes degrading treatment. There's been some allusion, already, to interpretation by European courts as to what this may mean. For example, is it degrading treatment to put two detainees in the same cell with an unscreened toilet? That's what the European Court of Human Rights has held. What about close confinement in a cell without access to outdoor exercise? The same court has held that that was degrading treatment. European courts have also held that a long wait on death row for a convicted murderer who is sentenced to death was degrading treatment. European courts have said that degrading treatment includes conduct that is intended to arouse feelings of fear, anguish, and inferiority, possibly to break the detainee's moral resistance.

I hope I've framed my concerns, and I would like to, perhaps, start with General Black and go down the row to get your reaction to how we can address those problems, without impairing our ability to get actionable intelligence, while complying with the law.

General BLACK. Sir, I think that the Supreme Court has at least set the groundwork for us on this in the *Hamdan* case by applying Common Article 3 to our operations. We at least know we have a fundamental, again, baseline, to use that term, with respect to our operations.

This has been a subject of discussion in prior questioning, and it gets to the heart of the definitions that we apply here. That's something that I believe that we'll need the help of this Congress on to set the guidelines for our soldiers, sailors, airmen, and marines as they go forward. These are difficult issues, and I don't have ready answers for you. You've already pointed out the disparity with respect to the international community's view of degrading treatment. You'll find the same disparity in any conversa-

tion in any lunchroom in America, too, I believe. I think it will fall upon this body, ultimately, to help us resolve those issues.

Senator CORNYN. General Black, you've raised an important issue that I know is important to a number of us, and that is the ambiguity that's created by some of these terms, and if we're going to embrace interpretations of foreign courts, or not. What does this tell our interrogators? What does this tell our military personnel who are in charge of trying to obtain intelligence that can hopefully keep not only American civilians safe, but also our troops in the field? To me, it seems like a recipe for disaster. Ambiguity is not our friend here. I think clarity, if at all possible, certain lines, which will allow us to use every legal avenue available to get actionable intelligence, is important. I worry about that, and I hope you can give me some comfort.

Admiral, do you have any comforting words in that regard?

Admiral MCPHERSON. I wish I did, Senator, thank you. We need to just exercise extreme care in drafting those definitions, and that's part of what the legislation needs to do, is give us some framework for those definitions. Words like "coercive," "humiliating," and "degrading," you can do a lot with those words, but we can get it right by carefully drafting the definitions to those words.

Senator CORNYN. Since time is short, let me jump down to General Romig. In your opening comments, you mentioned that court-martial procedures that apply to servicemembers shouldn't apply to terrorists. I believe that's a correct quote. Could you just identify for us—and I don't want you to go through the hundreds or however many that were identified by staff that I mentioned earlier, but can you identify, let's say, three of the most prominent protections provided to servicemembers under our court-martial procedures that should not apply to terrorists?

General ROMIG. Yes, sir. I think what I said was that we need to look to see what processes and procedures would not work well in a military commission because of the unique environment. There are a number of them. Article 31 rights, upon capture, I think that would be silly to require something like that. You capture somebody on the battlefield, you don't even know, until they've been interrogated, and once you decide that now you have a criminal, perhaps—I would suggest that—and Article 31, by the way, is a Miranda right, basically, but it's broader than that—I would suggest that, once they're charged, speedy-trial rules that were mentioned earlier, the 120 days and all of that, I think that just doesn't work in the environment we're talking about. Evidence-handling, chain of custody, the requirements that we put on law enforcement just won't work in a military environment where people are capturing people on the battlefield. They're not going to have all the technicalities that we would like in a court of law for a criminal case in the United States. Right to counsel upon capture, of course not. That doesn't even make sense.

There are a number of those that don't. I'm not sure the number that you quoted. I haven't looked at it. That sounds to me fairly high, but I don't know. I don't know whether that number of articles are truly ones that would have to be revisited. I suspect that

there are a number of those that would need to be tweaked, perhaps.

Senator CORNYN. My time is up. Thank you very much.

Chairman WARNER. Thank you very much, Senator.

Before I proceed to Senator Byrd, I think the importance of this hearing is such that I'm going to ask the witnesses to remain so that Senators who desire can have a second round. I wish those not present to be informed by their staff that that opportunity will be made available. I hope the witnesses can remain with us.

Thank you.

Senator Byrd.

Senator BYRD. Thank you, Mr. Chairman.

The Supreme Court forcefully, with both arms, beat back this administration's transparently shameless and ill-conceived attempt to wrest unto itself power that is properly delegated to the legislative branch, the U.S. Congress, this Congress, and this committee. The Court held that the President had no—and I repeat, no legal authority to establish the type of military commissions he created to try detainees at Guantanamo Bay. The Court found that the President's actions exceeded the statutory authority provided by Congress in the UCMJ, and that the procedures of the military commissions violated each of the four Geneva Conventions. The Supreme Court dramatically and forcefully put its foot down, and every American is all the better for it.

As Justice Kennedy wrote in his concurring opinion, "Trial by military commission raises separation-of-powers concerns of the highest order."

Justice Breyer also put it succinctly, "The Court's conclusion ultimately rests upon a single ground. Congress has not issued the executive a blank check."

Because we are at war does not mean that we agree to jettison our legal rights or rewrite the Constitution. I do not believe that we should now rewrite U.S. law to give the President the blank check that he has been seeking. Incomprehensibly, some argue that we should simply paste the military order that established the invalid commissions into U.S. law. They forget that our Government is comprised of three—not just one, not just two—three separate, but equal, branches of government. As Justice Breyer wrote, "Whereas, here no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. It strengthens it."

Justice Breyer advises that such insistence on consultation with Congress, the people's branch strengthens the ability of the United States to address adversity through democratic means. Justice Breyer reminds us that the Constitution places its faith in those democratic means, and so must we.

Question, to General Romig and Rear Admiral John Hutson. If *Hamdan* rejects the theory that there are inherent presidential powers not subject to legislative and judicial checks, what does the decision say about claims of inherent presidential powers in other areas, such as the program of National Security Agency eavesdropping, extraordinary rendition, or holding detainees indefinitely in secret prisons overseas?

General ROMIG. I'll start, Senator, and I'll then defer to the dean, who I'm sure has studied this much more than I have.

The *Hamdan* decision is limited to the scope of the facts of that particular case, and that it remains to be future cases that will determine the issues that you talk about, if they are brought and get to the level of the Supreme Court. I think it would be a stretch to expand that decision beyond the four corners of the facts of that case.

Senator BYRD. Admiral Hutson?

Admiral HUTSON. Thank you, Senator Byrd.

It is absolutely true, wise lawyers read Supreme Court cases narrowly and conservatively. In that case, the Supreme Court said, among other things, that the President did not, in his inherent authority or in the authorization to use military force that was given to him by Congress in the wake of September 11, have the authority in waging this war to create commissions himself, to prosecute people found on the battlefield. One could speculate, if he can't do that, taking people off the battlefield and prosecuting them, then what else could he do, or could not do? As my learned colleague said, that would only be speculation. We've talked a lot about what *Hamdan* stands for, if *Hamdan* stands for anything, it stands for the proposition that this has, for too long, been a dialogue between the executive and the courts, and that it needs to become a dialogue between the executive and Congress. I believe that *Hamdan* was not a revolution, it was a return to the normal state of affairs.

Senator BYRD. Would it be possible to circumvent the *Hamdan* decision by simply moving those held at Guantanamo Bay to Eastern Europe or elsewhere? How does this decision affect those detained by the U.S. in other countries?

General ROMIG. I guess I'd need a little more facts on that—are these moving them back to their home countries? Are they returning to where they originated from, or are we just moving them somewhere to warehouse them? I think, given the focus of the Court, if that were to happen, we would probably have another case back before the Supreme Court, although *Hamdan* only talked about the military commissions. What you're talking about, then, Senator, would be the warehousing or sometimes called "renditions," of detainees. I don't have a solid answer on that, as far as what the Court would do, if it came to the Court. I don't know.

Senator BYRD. My time has expired.

Chairman WARNER. Thank you. Thank you very much, Senator Byrd.

Senator Thune.

Senator THUNE. Thank you, Mr. Chairman.

I, too, want to thank the panel for their service to the country and also for their very expert testimony today and your many contributions to a system which has worked remarkably well for a really long time. In light of that court decision, we will now look to you for direction and guidance as we attempt to involve the legislative branch of the Government in this discussion, which, as some of you have noted, may be overdue.

I have a question I'd like to direct to all of you, because it seems to me that one of the things we're running into is, we're really subjecting modern warfare of the war on terrorism to a framework—

that being, Common Article 3 of the Geneva Convention—that is a very antiquated standard, if you will, to warfare, as we know it today, in a war on terrorism. In other words, you don't have nation-states, you have a very different set of circumstances that we're dealing with. I think one of the issues that we all here debate and discuss when we talk about combatants, we hear talk about lawful and unlawful combatants, and we make a distinction between those two types. I guess I'd just ask you a simple question, do you agree with designating two classifications of combatants?

General BLACK. Yes, sir.

Admiral MCPHERSON. Yes, sir, I think that's consistent with the Geneva Conventions.

Senator THUNE. Do you agree that terrorists should be classified as unlawful combatants? [Witnesses indicating yes.]

Currently, there isn't any Federal statute that comprehensively defines that term "unlawful combatant" or their legal rights. Do you consider it reasonable, as part of this process, that Congress clearly define what that term means, what "unlawful combatant" is? Is that something that is a part of our discussion here?

General ROMIG. Senator, the law of war defines what a "privileged" or "lawful combatant" is, and what isn't. The law of war is part of the law of the United States, as far as the Conventions, and those that we've ratified. We could enhance or embellish, but we certainly couldn't detract from what that is.

Senator THUNE. You said you all trained to Common Article 3 as the standard and the base today, even though that's not something that was adopted; in fact, it was rejected by the Senate. When you're dealing with an enemy that routinely and systematically will kill innocent civilians without remorse or conscience, you have a very different type of enemy than we've ever faced before. You talk about some of the terms that we use here, and clarifying them and their interpretation, and what the world community believes. Senator Cornyn has shared some of the definitions that have been applied in places like Europe. For the commonsense standard that people would apply in a State like where I'm from, in South Dakota, when you talk about "humiliating" or "degrading" or those types of terms, in applying them to terrorists, to people who, as I said, without remorse or conscience, will systematically kill innocent human beings, those types of terms are not something that people in my State would be really concerned that we might be infringing on the inferiority, or sense of inferiority, that terrorists might have. People across this country, as they listen to this debate, are going to apply what is, I think, a very commonsense standard.

I know we have a responsibility to come up with some legal definitions here, but I hope that, as this process moves forward, that we don't deviate too far from a very successful system that has been in place for a very long time, both with respect to the UCMJ, the commission structure, as it has been applied historically. I'd share and echo some of the concerns that have been raised by other members on this committee, that, as we contemplate doing this, that we address as much clarity as we can.

My concern, too, is, in doing this, since we set the standard for the world, that these types of standards are going to be applied by

other nations to our military personnel in the future. I don't believe that terrorists are going to care what we do here, because they don't live by the same set of rules and standards. I think it's important that we get it right, but that we not deviate too far from where we are today. That's why I was encouraged to hear all of you say that we have a good starting point, and I hope that we can perhaps refine and improve upon it, but certainly not do away with it and move to definitions that come out of a world community or other places in the world that I don't think ought to be dictating what we accomplish and what we use here as a standard in the United States.

I thank you, again, for your testimony, and appreciate the opportunity to hear your insights, and, as we go forward, and look forward to your guidance and direction in trying to get this right.

Thank you.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator Thune.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks to you and Senator Levin. Thanks to the members of the panel.

Mr. Chairman, I got here a little bit late today, so, according to the early-bird rule, I've had a while to wait until I got to ask my questions. But I must say, it's been an extraordinary morning. I've learned a lot, and I've been reminded of a lot. One of the things I've been reminded of is what an extraordinary and great country we are blessed to live in.

We believe in the rule of law. We make mistakes. As the Court said, the administration made—in its decision in the *Hamdan* case—we are a far-from-perfect people, but we hold ourselves, ultimately, to our a high standard of law and justice. That's exactly what we're doing here today.

It's all the more remarkable, without belaboring the point, when one considers, as we sometimes forget in the back-and-forth, that we are talking about a war we're involved in here against an enemy, radical Islamist terrorism, which is totally lawless, holds itself to no standards of accountability. Common Article 3 of the Geneva Convention? Forget about it. A brutal enemy whose very existence and purpose for being assaults and violates the premise of our existence as a Nation. The Declaration of Independence says it, right at the beginning, "these self-evident truths that we're all created equal, and we're endowed by our Creator with the rights to life, liberty, and the pursuit of happiness," and that the Government, as they said in the next paragraph, our Founders, was created to secure those rights. Every time we make mistakes, we do come back to that standard of those rights and the law that guarantees them.

I thank the witnesses, I thank my colleagues, and I thank the chairman and Senator Levin for bringing us through this process to remind us of this. I hope the American people see this and are proud of what's happening here, that mistakes were made, but we should go beyond our defensiveness and embarrassment to pride that we're going to make them right. I hope the people of the world give us a little credit for that, as well, because, after all, the Supreme Court of the United States comes along and says, just as the

Founders intended it to, "No one is above the law, not even the President in a time of war against inhumane people and nonstate actors." Quite remarkable. We are now proceeding from there.

I want to emphasize, before I ask a question, I think Senator Byrd really hit a very important point, and it was validated in the responses some of you gave. The *Hamdan* case is essentially a separation-of-powers case. Very important. It makes some references to the rights of detainees, but this is basically the Court saying that Congress, because we already acted to authorize military commissions using the UCMJ, that the President, in that context, simply did not have the authority to deviate from those procedures, absent further congressional authorization. Although they're probably—and, one assumes, would be—some type of procedure the Court would find unconstitutional to try enemy detainees, even if authorized by Congress, the Court actually did not opine on what that would be. That's up to us, working together with the administration now to do that.

I think we've said here that the current system that the administration adopted doesn't have enough rights in it. There seems to be a consensus on the panel about that, that the UCMJ, if I may use the term simplistically, has too many rights. We don't want to give terrorists all the rights that our troops have when we use the UCMJ to try them. Therefore, we have to find our own way, built primarily, I would say, on or starting with, the UCMJ and moving from there.

Here's the first question. Some have argued, as has been referred to in other parts of Capitol Hill in the last few days, that if military commissions followed the procedures of courts-martial, then our military personnel in the battlefield would be forced to follow Supreme Court rulings on Miranda rights, et cetera, give them their rights before they're arrested; interrogations would have to be conducted according to all of that. You've debunked that. I believe that's right.

Let me ask you this kind of question. We're not going to do this, but if we adopted the UCMJ requirements regarding enemy detainees, would they be required to receive Miranda warnings, even under the UCMJ, or—in other words, would we have to make changes explicitly in the UCMJ to make clear that enemy detainees don't have to receive those warnings?

Admiral Hutson?

Admiral HUTSON. If I understand your question, Senator, my answer would be that what envision is that—as I think one of the other witnesses may have described in some respects—the UCMJ is the umbrella over which it all hangs. You have courts martial for U.S. service people, and you have military commissions, and you have other kinds of provost courts and courts of inquiry and that sort of thing. The military commissions, as the vehicle, would be under the UCMJ, so that you wouldn't be changing Article 31 or Article 32, for example.

Senator LIEBERMAN. Do those require Miranda warnings in the case of normal courts-martial?

Admiral HUTSON. Yes, sir. Article 31 is the equivalent of Miranda, except that it's broader and it requires the rights be af-

forded at the point of suspicion, not at the point of custodial interrogation.

Senator LIEBERMAN. So, presumably, if we were to use the UCMJ as a basis for dealing with enemy detainees, we would want to alter that particular provision so they're not required to receive Miranda warnings.

Admiral HUTSON. Absolutely.

Senator LIEBERMAN. Let me ask a final question, briefly, which is about Article 32 proceedings, which we've not talked about. Generally speaking, I describe them as the UCMJ version of grand juries. Again, I know there was some concern expressed at Tuesday's Judiciary hearing that Article 32 proceedings are generally open to the public. If applied to the detainees in Guantanamo, I think the concern is that classified information could be jeopardized and can fall into, obviously, the wrong hands. Is Article 32 something that we ought to amend if we apply the UCMJ to enemy combatants?

General SANDKULHER. Yes, sir. I think you would have to look at Article 32, because it's much broader than a grand jury setting.

Senator LIEBERMAN. Right.

General SANDKULHER. There are rights to counsel, there are rights to discovery, and there are rights to evidence. Evidence is presented in the public setting. You would have to look and see if you want to consider using Article 32. You may want to say that Article 32 probably shouldn't apply in this kind of setting, and remove that from any commission rules. That would be an alternative to step around some of those issues.

Senator LIEBERMAN. Right.

General SANDKULHER. You'd have to determine whether it's really necessary in this kind of event where you have a terrorist and you've detained, and you have evidence to show he's a terrorist. Do you need to do the Article 32, which is a product of our system from the early 1950s to make sure minor offenses weren't being taken to our most severe level of punishment?

Senator LIEBERMAN. Thank you. My time is up. That's my inclination. I appreciate your saying that about Article 32 not being necessary to be part of the UCMJ if we apply it to enemy combatants.

Thanks very much for all you do every day to uphold the rule of law in our country.

Chairman WARNER. Thank you very much, Senator Lieberman.

Senator Talent.

Senator TALENT. Thank you, Mr. Chairman.

I, too, appreciate the service of the members of the panel. I have three or four questions.

To make certain I get them in, let me maybe just ask General Romig if you'd comment, and then, when we're done with our comments, then anybody else who wants to add something can add to it.

Is it your understanding that the Supreme Court held that Geneva Convention applies to all those we have captured, or only to those who are subsequently brought before a military tribunal, or is there some other understanding that you have of the decision?

General ROMIG. It doesn't apply to the entire Geneva Convention; it only applies to Common Article 3 of the Geneva Conventions.

Senator TALENT. Right, Common Article 3.

General ROMIG. Yes, it applies to all those that have been captured.

Senator TALENT. Captured.

General ROMIG. That's my understanding.

Senator TALENT. That's your understanding of the Court's decision.

Now, is it your understanding of Common Article 3 that one of the protections it affords captured prisoners is the right not to be interrogated, or is it limited to the right to be interrogated in a humane fashion?

General ROMIG. It doesn't address interrogations directly, it only addresses abusive treatment that, quite frankly, is what we train our soldiers not to do anyway.

Senator TALENT. Sure. I understand. In your judgment, it would not give a captured suspected terrorist the right to say, "no, I just prefer that you not ask me any further questions," and then you have to go away.

General ROMIG. No. That's right. It is not like the Geneva Conventions for POWs, where all you have to give is name, rank, and serial number.

Senator TALENT. Right.

General ROMIG. It doesn't give that kind of right, because they are not protected.

Senator TALENT. So, our interrogators can say, "no, I'm sorry, we're going to continue asking you these questions."

General ROMIG. Absolutely.

Senator TALENT. "We have to do it in a humane way, but we're going to continue." Okay.

Now, I think you testified—and I was out of the room, but staff tells me you testified in response—not you, but the panel—to Senator Cornyn, that we're not sure what the protections in Common Article 3 may mean as applied to specific cases, that, in certain respects, it—because I think he asked, "how does that add to what we already did in the DTA?" and I think the panel's view was that, "we have to work that out in particular cases." Is that fair, in your judgment?

General ROMIG. I think so, yes, Senator.

Senator TALENT. Okay. What are we going to do on the ground while we're figuring out what Geneva means? We know the Secretary's applied this now to everybody, so what are our interrogators doing now while we sit here trying to figure out what all this means?

General ROMIG. I'm probably not the right person to ask now, but I will give you an answer, and then you might want to talk to the uniformed individuals.

Senator TALENT. They're going to the staff judge advocate, and he's trying to figure it out. Is that it, basically?

General ROMIG. No, the answer is, do what they've been trained to do, because they've been trained to treat everybody as a POW. At that standard, you're never going to violate Common Article 3.

Senator TALENT. Okay, well, we hope.

General ROMIG. If they meet the standard of their training, that's correct.

Senator TALENT. That actually leads to the next question. We are talking about what Congress is going to do. Since we're applying, here, the terms of an international convention, are we certain the Supreme Court will hold that Congress has authority over this, or is it possible they may say, "Look, we have the authority to determine what the Convention means, as applied to particular instances"? Are we going to be back before the Supreme Court if we clarify this, in your judgment?

General ROMIG. In my judgment, I doubt it. I don't think the Court would do that. I'm sure if you came up with a definition, it would certainly pass constitutional scrutiny, or Supreme Court scrutiny.

Senator TALENT. I think the thrust of it was that it's a statutory interpretation. I think the Court made pretty clear that Congress can, if it clarifies, satisfy the Court's concerns, which, for me, was the saving grace of it. That's your view, also?

General ROMIG. Oh, absolutely.

Senator TALENT. Would anybody like to comment on any of those points?

Chairman WARNER. Senator, we ought to very carefully get responses, because that's a key question.

Senator TALENT. On any of the four questions I asked. If you're all in agreement with the General, or if anybody's in real disagreement with any of that, maybe you could speak up or forever hold your peace?

Admiral HUTSON. I would just clarify General Romig's statement with regard to interrogation of POWs to say that the requirements with regard to POWs is a burden on the POW that they have to give that information. It does not mean that you can't continue to ask them questions, too. It's just that, that's the baseline requirement, to use that word again—for the information that they must give.

Senator TALENT. Okay. Thank you, Mr. Chairman. Thank you, General and Admiral and the whole panel. I hope, Mr. Chairman, that we can clarify this as quickly as possible, because sitting at this dais, these ambiguities don't affect us personally on a day-to-day basis, but our interrogators need to know. The only thing I disagreed with that you said, General, is the idea that, "as long as they treat people humanely, they're not going to"—they may be sitting down there worried that somebody's going to jerk their chain for something that they really thought was okay, in light of all this ambiguity. I know they're trained to do certain things, but I'm concerned about getting the intelligence we need. I'm not concerned about trying to dance around on the head of a jurisprudential pin. I'm trying to get the intelligence we need to win this war. This is fascinating for all of us lawyers here, which I guess is a lot of us, but I want our guys and gals on the ground to get the intelligence.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator.

We will now turn to you, Senator Chambliss.

Senator CHAMBLISS. Thank you very much, Mr. Chairman.

Gentlemen, thank you for your great insight into this issue. As a lawyer who never tried a case under the UCMJ, this has been fascinating to listen to.

I know Senator McCain is right, and I told him as we went to vote earlier, we have to think about how Americans may be treated, down the line, certainly. The fact of the matter is that we know how U.S. prisoners are treated today by al Qaeda. We've seen that in the last month. It certainly irritates me to no end to think that we have to continue to do what's right at all times when the enemy that we are fighting is going to be cruel and inhumane to American men and women who wear the uniform at such time as they might fall into their hands.

That having been said, we have to deal with this issue in the right way. General Romig, you, in response to Senator Cornyn and Senator Talent, listed a few items. Like Senator Reed, I don't want to rewrite the UCMJ or write this particular piece of legislation here today, I like the idea that Admiral McPherson discussed relative to picking out the best parts of the different laws, regulations, and methods that we have in place today, one of which is the international hearsay rule that I understand is a little more liberal than our Federal rules of evidence and the UCMJ rules, which I guess are about the same. Are there any others? General Romig is the only one that really addressed this, and I want to give everybody else an opportunity to address that issue, too. Are there any other issues like that which we should be thinking about, issues that jump out at you and say, "yes, this is something that you really ought to look at," from the standpoint of modifying current UCMJ provisions?

General SANDKULHER. Senator, you would have to look closely at the rules of evidence, in general. You would have to look closely at—if you want to—the exclusionary rules for what's an unlawful search and seizure. Exclusionary rules have a purpose in our jurisprudence, in a lot of ways, to prevent unlawful activity by police officers. That's why we exclude certain evidences taken in violation of your right against an unlawful search and seizure. Can we even have that on the battlefield? That's within the general rubric of military rules of evidence. I think you have to look very closely. That goes with the classified information and other security information. The names of witnesses. How do we handle providing the names of witnesses in the trail of a detainee where that witness may have family still remaining in an area of danger? Do you do that? Some of the international tribunals have provisions where witnesses testify without their real name being exposed. There are a variety of those areas that we would look at.

Senator CHAMBLISS. Good points.

Does anybody else have anything that kind of jumps out at you?

General SANDKULHER. Thank you, sir.

Admiral HUTSON. Chain of custody would be an issue I believe.

Senator CHAMBLISS. I think General Romig alluded to that earlier, as well as right to counsel and some of those basic things.

With respect to classified information, I understand that, under the UCMJ, the tribunal judge has the right to review classified testimony before it's given, he or she can basically clear the courtroom, and makes a decision as to what's done with it that classified information. Under the UCMJ appellate process, there would be a military review, but, under the DTA, the DC Circuit Court ultimately would review that particular information, if we're talking

about following that process. Does anybody have an opinion about whether or not that's the way to go here, or should we continue to allow the appellate process to only follow through the military appeals?

Admiral HUTSON. I'd prefer the military appeal system. It's tried and true.

General ROMIG. Yes, sir, they're certainly familiar with the procedures and all of that. I think either one would work. I think it would work more efficiently through the military process.

Senator CHAMBLISS. It's not that I don't have confidence in our Federal system, by any means, but it just seems to me that the military appellate process would be better to follow.

Going back to this issue, in the interrogation process, title 18 subjects civilian and military personnel to the provisions of Common Article 3. I don't know whether I've said that correctly but that's the way I understood it. In any event, civilian and military personnel are subject to Common Article 3 when it comes to interrogation.

Should we take this opportunity to modify title 18 and clarify it?

General RIVES. Senator, it would be helpful if we gave better definition to some of the terms that are in Common Article 3 and also in—I believe you're referring to title 18 in, perhaps, the War Crimes Act?

Senator CHAMBLISS. I said "article," but I meant title 18. Excuse me.

General RIVES. Section 2441 is the War Crimes Act, and one of the real problems I see is it is defined as a war crime when we have conduct that violates Common Article 3. It would be helpful for Congress to better define those items within Common Article 3. For example, "humiliating and degrading treatment," to define, in or out, certain items to help the interrogators and others understand what the sense of Congress is for defining those terms. That would be very helpful.

Senator CHAMBLISS. Does anyone else have a comment on that? [No response.]

No? Okay.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Chambliss.

Senator Roberts.

Senator Roberts, of course, gentlemen, is chairman of the Senate Intelligence Committee on which I am privileged to serve, and our leadership have invited that committee to participate in this very important oversight and review process by the Senate.

Senator Roberts.

Senator ROBERTS. Thank you, Mr. Chairman.

My questions are repetitive and pretty much the same questions asked by Senator McCain, Senator Clinton, Senator Graham, Senator Cornyn, Senator Talent, and now Senator Chambliss. This comes under the heading of repetitive questioning, which one international court said was in violation of Common Article 3 and would cause you great anguish. Do you feel I am in violation of Common Article 3? Are you feeling fear and anguish yet? I don't want to cross any boundaries here.

I just want to say that I think Common Article 3 standards for detention and interrogation are incredibly vague. We've already said that. What constitutes an "outrage upon personal dignity"? What is, exactly, "humiliating treatment"? What is the precise definition of "degrading treatment"? By the way, if you violate this article, whatever it means, you have committed a war crime under U.S. law, which has led to a lot of risk aversion.

The question is, do the Services have a body of experience in making specific determinations as to where the line must be drawn in deciding whether a particular conduct is prohibited? Outrage upon personal dignity, humiliating treatment, or degrading treatment. Most of you have indicated that we do have that background knowledge and that we can do this. I'm extremely concerned that if Congress doesn't act to expressly clarify what Common Article 3 means for detention and also our interrogation efforts—Senator Graham touched on this—that American courts will resort to decisions of the European Court of Human Rights or the International Criminal Court to determine what is and what isn't "degrading treatment."

Senator Cornyn posed several interesting questions. My lawyers tell me that, under those international precedents, putting two detainees in the same cell, which Senator Cornyn has already indicated, with an unscreened facility, would constitute a violation of Common Article 3. What he did not say is that there is a definition of how high the screen ought to be, and what the conditions ought to be, in regards to having something that would be humane or would be—that's not exactly the word that I want. But that's what the European Court of Human Rights has held. What about the close confinement in a cell without immediate access? I'm not talking about leaving a cell, marching down a hall, and then going to outdoor exercise. I'm talking about immediate access. The same court held that that was degrading. They have also said that a long wait on death row for a convicted murderer who is sentenced to death was also degrading treatment.

What if a terrorist detainee has continued intelligence value, if he has information that could save American lives? Would that long wait then constitute degrading treatment under Common Article 3?

The European courts have said that "degrading treatment" includes conduct that is intended to arose feelings of fear, anguish, and inferiority, possibly to break the detainee's moral resistance. I would venture to say that the interrogators who questioned Khalid Sheikh Mohammed, or the interrogators who questioned the high-value targets who led to information of the Sheikh, who led to the death of Mr. Zarqawi, could conceivably be held accountable under Common Article 3. I don't think that's what we want. That's not what you want. That's not what we're trying to do.

That kind of definition certainly gives our service men and women very inadequate guidance and certainty in fighting this war, especially when the violations of these vague standards now constitute a war crime.

Gentlemen, my experience on the Intelligence Committee, in terms of briefing, and my experience on the Armed Services Committee, in terms of briefings, indicating that everybody's worried

about crossing the line. We're not even walking up to the line. One of the things that the 9/11 Commission said, one of the things that our weapons of mass destruction (WMD) inquiry said on the part of the Senate Intelligence Committee, one of the things that the WMD Commission said, and every other think tank or study group or inquiry that has said, is, we have to stay away from risk aversion. Obviously, these terms should be defined with certainty, for the sake of our service men and women who handle the detainees in the war on terrorism, and they should be clearly defined in U.S. law, it seems to me, rather than left up to foreign courts and also the prosecutors.

As I've indicated, many Senators have asked these questions. You have responded. I think you agree. I think this is so terribly important. If we're told in the Intelligence Community that detention and rendition and finding out intelligence represents anywhere from 40 to 60 percent, depending on the circumstance, of what we do to make America more safe, this is, indeed, a very serious question.

Could you explain how Military Rule of Evidence (MRE) 505 and the CIPA differ on process? Do you believe that additional protections for classified information are required, beyond the MRE 505? For example, the right to preclude the defendant from being present during the presentation of some evidence or additional procedural protection for the use of classified or sensitive information? Finally, are there international precedents that we can draw on? For example, in the International Criminal Tribunal for the former Yugoslavia, or the International Tribunal for Rwanda—I think somebody mentioned that—as we consider the appropriate standards for access to classified information, right to speedy trial, and access to proceedings by the defendant?

Those three deal with classified information. If anybody would like to take on one or all three, I would like to hear from you.

General BLACK. Sir, I'll start with question 1, and MRE 505 and the comparison with the CIPA. I don't have CIPA in front of me, but I believe that I'd be correct in saying that MRE 505 is consistent with CIPA in every respect, and provides a procedure that we could well adapt to the commissions process, a procedure that starts with alternatives for considering the evidence that's attempting to be introduced into the trial, and then allows for an in-camera process by the judge to perhaps redact pieces of the information to make it admissible. It ultimately leads to a decision by the trial team as to whether to go forward with that particular piece of evidence.

I think that CIPA and the application in MRE 505 can be adapted to the commission's process.

Senator ROBERTS. That is certainly good news if that is the case and I appreciate your response.

Anybody else have any comments?

General SANDKULHER. One of your other questions, sir, was about the Rwanda and the Yugoslav rules.

Senator ROBERTS. Yes.

General SANDKULHER. There are procedures there that we could draw on that would be helpful for the handling of classified information.

Senator ROBERTS. All right. I appreciate it.

Admiral, you have something to say?

Admiral MCPHERSON. I would agree with General Black. We have a wealth of experience under MRE 505 that's probably being used today in a court-martial someplace. The experience is there. We would have to change MRE 505 because normally our experience is, it applies to evidence that the accused already is in possession of, already is aware of. Where, in most of these commission cases, it would be classified evidence that the Government would want to be using against the detainee.

Senator ROBERTS. Exactly.

Admiral MCPHERSON. It would require some modification, but, yes, we have the experience, and we think we could sufficiently use it.

Senator ROBERTS. All right.

I thank you, Mr. Chairman.

Chairman WARNER. Thank you very much.

Gentlemen, Senator Levin and I have further questions, but I think it would be appropriate if we took about a 7-minute break. We've been in session continuously for 3 hours, and 7 minutes is well earned. [Laughter.]

[Recess at 1:00 p.m.]

[Resumed at 1:07 p.m.]

Thank you very much, gentlemen. We'll resume now.

Senator Graham, take your time. You have other commitments, but I'm going to remain here. Go right ahead.

Senator GRAHAM. Thank you, Mr. Chairman. I very much appreciate that.

I appreciate the witnesses trying to enlighten the committee about what we need to do about the law. We're trying to enlighten ourselves on what to do politically.

I want to get back to something that Senator Clinton brought up. One of the big confusions, gentlemen, that I believe has been created since this war began is the idea that there's one of two options, as Senator Clinton was trying to indicate, that every enemy combatant has to be tried or let go. The truth is that every enemy combatant is, per se, not a war criminal. Do you all agree with that statement?

General BLACK. Yes, sir.

Senator GRAHAM. An affirmative answer by the panel. As a matter of fact, we would not want to create a policy where every POW, lawful or unlawful, was per se, a war criminal, because that would put our own people at risk.

Chairman WARNER. I'm just wondering, Senator Graham, if we could indicate that they seem to all agree with your statement.

Senator GRAHAM. Yes, I feel like I'm back in a court-martial. Let the record reflect a positive response from all the witnesses. [Laughter.]

Okay. We have a Combat Status Review Tribunal (CSRT) procedure, that Senator Levin and myself and others worked on, that deals with determining enemy-combatant status. That is a noncriminal procedure that is designed to comply with Article 5 of the Geneva Conventions, a competent tribunal. Does everyone at the panel believe that the CSRT procedures and the Administrative Re-

view Board (ARB) procedures, as constituted, meet the test of what the Geneva Conventions had in mind in determining status?

General ROMIG. Yes, sir.

General BLACK. Yes, sir.

Senator GRAHAM. Affirmative response from all the witnesses.

Not only does it meet the test, I'm quite proud of it. Because of people like yourselves, it's gotten better over time. I would present this challenge to you. If you can think of ways to make it better—this is always a work in progress.

We did something unprecedented in the DTA. Not only did we put in a place a CSRT and ARB procedure that would comply with Geneva Conventions status determination, competent tribunal standards, we also allowed civilian review of those decisions for the first time. Do all of you agree that has strengthened the procedures?

General ROMIG. Absolutely.

Senator GRAHAM. Affirmative response from all concerned.

War criminals and enemy combatants are different, so the idea that if you don't try them, you have to let them go, is a false premise. I'm going to get us back to what this great debate's been about today—there seems to be, after *Hamdan,* one or two ways to do this. Do you all agree that the President, if he chose to, could, under the *Hamdan* decision, try these people in a full-blown UCMJ setting tomorrow, if he wanted to?

General BLACK. Yes, sir.

Senator GRAHAM. Affirmative response by all members.

Do you all agree that would be a very bad decision?

Admiral MCPHERSON. Yes, sir.

Senator GRAHAM. Affirmative response by all members.

I would like to say, for the record, I appreciate the President not going down that road, because it would create too many problems for our country.

The idea of us politically deciding whether to start with Military Order 1 or the UCMJ seems to be form over substance if you get to the right place. All of you are nodding your head. I'm going to throw a wrinkle into this. I think there's a legal reason why we would want to choose starting with the UCMJ and build out. My belief is, gentlemen—and please comment if you think I'm wrong—that after 1951 things changed when it came to military commissions. Military commissions had been instituted during World War II and other times in our history by the executive branch under his inherent authority as Commander in Chief, with very little congressional blessing or oversight. Is that a correct statement?

General ROMIG. Senator, there were provisions in the Articles of War for military commissions.

Senator GRAHAM. Right. Those provisions authorizing military commissions were very nebulous, as best.

General ROMIG. Absolutely.

Senator GRAHAM. After World War II, Congress seems to have made a conscious decision, when it enacted the UCMJ, to include military commissions within that document. Is that correct?

Admiral MCPHERSON. Yes.

Senator GRAHAM. Congress seems to have made a conscious decision to make a more robust system around military commissions, in terms of procedural rights. Is that correct?

Affirmative response.

What I'm trying to get to is that when Congress, after 1951, decided to put the military commissions within Articles 18, 21, and 36, whatever the numbers are, and we said military commissions, to the extent practical, should follow the UCMJ. It seems like we resolved that debate along the lines that any military commission should have as its source of being the UCMJ model. Do you disagree with that, General Black?

General BLACK. Yes, sir, I do. I think that starting with the UCMJ as the baseline of trying to modify that would be a task of monumental proportions, and that's why I think that it's better to throw the UCMJ on the table, along with the commissions as we have them today, and along with other models that we can derive from out there in the world.

Senator GRAHAM. Along those lines, I guess my legal argument is, isn't there some buy-in here by Congress, by referring back to the UCMJ, to the extent practical, military commissions should follow the UCMJ model, that we made a decision, a conscious decision—it wasn't a statutory decision—that we wanted to start from that premise? Does anybody like to comment on that concept?

Admiral?

Admiral MCPHERSON. One of a couple of points of departure with the *Hamdan* decision, and that's the use of the word "uniformity." Whenever the Supreme Court, with all respect, has delved into the UCMJ, the practitioners of the UCMJ end up being surprised by their decisions. This is one of those cases. Prior to *Hamdan,* we had always interpreted, assumed, that "uniform" meant the rules were the same among the Services, not that they were the same for the courts-martial, commissions, tribunals, those provost courts. Now we're told, by *Hamdan,* that's wrong. "Uniform" means that the commission rules and the court-martial rules must be the same.

Senator LEVIN. Except as not practicable?

Admiral MCPHERSON. Correct. Yes, sir.

Senator GRAHAM. Okay. But "uniformity" has taken a different meaning.

Admiral MCPHERSON. Under the Supreme Court's decision in *Hamdan,* yes, sir.

Senator GRAHAM. I would argue that Congress, by giving military commissions, as a separate option, to be used in trying people, understood there would be differences, so "uniformity" never meant that everything had to be like the UCMJ, or why have a military commission option? Congress understood there would be differences.

I think the Court's decision is exactly what you've said, that we can't do this in a legal vacuum, that, from the Court's analysis of "uniformity," we would be well-advised, as a body here, to try to create uniformity now between military commissions, the UCMJ, and, to the extent practical, or whatever adjustments need to be made, General Black, explain why those adjustments are needed, in terms of practicality and national defense.

Admiral Hutson, is that wrong?

Admiral HUTSON. No, I think the Court was saying that Congress had not given the President the authority to deviate from the UCMJ. Because of that, the commissions that he created had to be "uniform," in the sense that Admiral McPherson uses that, with courts-martial. What we're suggesting now, you're suggesting, is that we can use that as the starting point and deviate so far as practical or necessary.

Senator GRAHAM. All due respect, General Black, I see that there is a substantive legal difference between how you approach this after *Hamdan.* I think *Hamdan* is telling us basically that you can deviate from the UCMJ, but you have to articulate why. You can be different than the Federal rules of evidence. The military rules of evidence are the model. There's plenty of differences. You just articulate why. I would argue, gentlemen, there is a big difference, after *Hamdan,* how we do this. You get to the same place, but I don't want the Court—I think Justice Kennedy is telling us this, that uniformity now——

General Romig?

General ROMIG. I agree, sir. There is sometimes a misconception that UCMJ equals court-martial, always. Quite frankly, the UCMJ is more than the court-martial.

Senator GRAHAM. Absolutely.

General ROMIG. That is the biggest part in there. Military commissions are a creature of the UCMJ now. That's, I think, what you're saying, that we need to do it under that process.

Senator GRAHAM. I'm saying, after *Hamdan,* "uniformity" has a different meaning. That's all I'm saying. That the "uniformity" we relied upon all the years that I was in the JAG business, is now changed. Right or wrong, it's changed.

General ROMIG. Right.

Senator GRAHAM. We'll get to the same place, General Black. We're not going to have a UCMJ military commission model procedure that undermines our national security. It will be challenging, it will be robust, and it will be fair.

I just wanted to throw that out for the committee to think about, that uniformity has changed after this decision; and how we start the process, to me, is very important.

One of the concerns I have after the *Hamdan* decision is that Common Article 3, before *Hamdan,* had not been applied to al Qaeda members. The President, as you said, Admiral Hutson, in 2002, said, that we will treat them humanely, but not under Common Article 3. Does Common Article 3 go beyond the McCain language, in terms of treatment requirements—cruel, inhumane, degrading? What do you think, Admiral?

Admiral HUTSON. I think that there are some deviations of the words. I think Senator Cornyn pointed out "humiliating" is in Common Article 3 and not in the DTA. I don't think that there is a wits worth of difference. I think that you are comfortably within the confines of Common Article 3 with a DTA.

Chairman WARNER. As long as we abide by the McCain amendment.

Admiral HUTSON. Absolutely. Yes, sir.

Senator GRAHAM. I totally agree with you. But there's two different scenarios that we're talking about here. This idea that a

military commission, fairly constructed, would impede combat operations, is that a false idea?

General Black?

General BLACK. Sir, I think that, properly constructed, it's not going to impede combat operations.

Senator GRAHAM. Does everyone agree with that? So, all the people who are out there ranting and raving about having a military commission with some basic due process cripples us in the war effort, you're flat wrong. You don't know what you're talking about. You're talking politically rather than legally. Military operations and prosecuting war crimes are two distinct endeavors.

Now, you're training our troops to follow the Geneva Convention standards on POW treatment for every enemy combatant that we may come in contact with. Is that correct?

An affirmative response.

This is important, Mr. Chairman. From the boots on the ground, we don't worry about the differences. We train as if they were members of a uniformed service representing a sovereign nation. Don't ever change that, because we don't want to confuse the troops.

Once we get these people, then the second layer begins to come into being, and that is, what intelligence value do they have? That's where the military will have experts come in, or the civilian community, the Central Intelligence Agency (CIA), and they will now engage in conduct differently than capturing them on the battlefield. To me, that is the hardest thing that we face as a Nation. Don't ever change what you tell our troops to do. McCain language, Common Article 3. You just keep teaching the Geneva Conventions, and they'll be okay. But I now am worried about the military intelligence officer, the CIA operative in unknown places throughout the world. Let's come up with a system that puts them on notice of what's inbounds and what's not.

Last year, Senator Levin and I allowed an intelligence operative, or CIA official, to raise as a defense if they're ever prosecuted under title 18 for violations of human rights or the law of armed conflict, "I was following orders." We used the UCMJ standard—not the Nuremberg standard, but a standard available to all military members. If you raise, as a defense in your court-martial, "The Lieutenant told me. I'm the Corporal," the corporal is immune from prosecution only if a reasonably ordinary person in like circumstances would have believed the order to be lawful. Do you think that would be a fair thing to do for our CIA folks and our military intelligence officers when they try to implement interrogations? Think about that. Admiral Hutson, what do you think?

Admiral HUTSON. My initial reaction, and I haven't thought this through because I haven't thought about it——

Senator GRAHAM. This one's kept me up at night.

Admiral HUTSON.—is that the standards ought to be the same. The people at that stage of the game, as important as their business is, are in a significantly different position than the boots on the ground are on the battlefield.

Senator GRAHAM. We're moving from now fighting a war to gaining intelligence against a terrorist enemy to thinking about prosecuting. We're beginning to move.

Admiral HUTSON. Right.

Senator GRAHAM. How do we make that movement?

General Rives, while he's thinking about it?

General RIVES. Senator, I have no problem with the Intelligence Community gathering intelligence effectively. Speaking to a lot of folks in the Intelligence Community, and having read a fair amount about it, I don't believe they need to cross the lines in violations of the DTA or Common Article 3 to effectively gather intelligence. Sometimes we will gather intelligence, knowing that we're not going to be able to use that evidence against an individual in a criminal court. That's okay. Sometimes you can't have your cake and eat it, too.

Senator GRAHAM. Would you agree that some of the techniques we have authorized clearly violate Common Article 3?

General RIVES. Some of the techniques that have been authorized and used in the past have violated Common Article 3.

Senator GRAHAM. Does everyone agree with that statement?

Affirmative response by all concerned.

Now, those of us in elected office, as well as this panel, need to find a way to be fair to those people who have been following orders that were clearly not outrageous, in terms of the way they were delivered.

I just want to end it, Mr. Chairman, that I think we can construct a military commission using the UCMJ as our model that we all can be proud of. We can do it quickly. Well, not quickly. If we can do it, we'd have a great product that will be fair to the accused and allow us to defend the Nation and the world will say is fair.

I do need your help. We desperately need your help to find out how Common Article 3 and title 18 can work together, in the past and in the future, because the troops on the ground know what to do. Keep telling them what to do, "treat them all as POWs and you'll never go wrong." But once you get that high-value detainee in an interrogation environment, we need to think long and hard about how to conduct those interrogations and putting our people on notice what these terms mean. To me, that's the hardest thing that lies ahead for us as a Nation.

Any comments? Admiral Hutson?

Admiral HUTSON. I think there are times in which, as a Nation, as interrogators, we're not going to be able to do what you might want to do in order to get information because we have these rules. We can't say that because this is our war, and as awful as the terrorists are, that we're going to throw the rules over the side in order to get information, because we have to remain true to ourselves, remain true to our traditions, and look forward, not only to the next war, but to the peace, and be careful to ensure that our troops, who are more forward-deployed than all other troops combined, by any definition of "forward deployment," who are, therefore, in harm's way, when they're the interrogatees, rather than the interrogators, we have a leg to stand on.

Senator GRAHAM. The reason I bring this uncomfortable topic up, is that we do have to make that conscious decision, because those of us who will advocate that decision are going to be accused of caring more about the terrorists than we do our national defense. I think all of us here in this hearing today care equally about our

national defense, and we've come on the side of the best way to protect the Nation is to adhere to the values that made the Nation strong. The best way to take care of the troops is to make sure you don't engage in conduct that could come back to haunt you.

I appreciate your testimony and look forward to working with you, as how we work all this out.

Thank you.

Chairman WARNER. Thank you very much. Senator, before you leave, you and I both, having been members of the bar and so forth, always think of that famous Scales of Justice. There's a real challenge before Congress now to make sure that Scales of Justice remains in balance, and, at the same time, that our forces can protect this Nation. It seems to me, if we let it go, Federal courts will have us right back up here.

Senator GRAHAM. Well said, Mr. Chairman. If I had all of the answers, I would write a book and sell it. But I don't. I just do appreciate you and Senator Levin having this hearing, because this is probably the most important thing we will do in the war on terrorism for years to come. It will survive the next President and the next President after that. We have a chance to start over again. We should welcome the opportunity to start over. We should not be fearful of coming up with a new system. We should embrace it. We should look to every source of law we can, General Black, to get it right. I think we would be well-served starting with what we know works—and it has been in place for a long time—the UCMJ.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator.

Senator LEVIN. Mr. Chairman, I'm wondering, while Senator Graham is here, if I could just add one other thing. In addition to the things which both of you have said, it could also help to restore our credibility as a nation of laws and a nation that follows and believes in practicing human rights, not just talking about human rights, because of the importance that we be perceived this way if we're going to win the war on terrorism. With all the people whose help around the world we need, and whose assistance we need, and whose information we need, we need them to believe, basically, in us, as well as our cause in fighting terrorism. This is an opportunity, as you, Mr. Chairman, Senator Graham, and others have said, to build back that kind of confidence in us, and that perception of us as a nation of believers in human rights and practicers of human rights.

Senator GRAHAM. If I may, and I promise I'll shutup. You keep bringing up emotions within me that I think are important. To our House colleagues, no one on this panel, no one in this committee hearing—wants to come up with a procedure to weaken our Nation. No one here wants to come up with a procedure to let the terrorists go, to compromise national security. That's not what this discussion is about. We want to come up with a procedure to strengthen our Nation, make us stronger, not weaker.

My goal, simply put, Mr. Chairman and Senator Levin, is to produce a product that is a collaborative effort between the executive and legislative branch that the courts will review and say is fair. Then we can go to the world and say, "All three branches of Government view the way we treat detainees, interrogate them,

and try them, as one. America, when it comes to the war on terrorism, in terms of legal infrastructure, is one." That would do enormous benefit in protecting our troops in the future and restoring our image that has been damaged.

Chairman WARNER. I share in that. When I started this hearing, I said that the eyes of the world are upon us, and I meant it. It's the most serious thing that we're going to do.

Senator LEVIN. Mr. Chairman?

Chairman WARNER. Yes?

Senator LEVIN. I didn't mean to interrupt you, but I wanted to catch Senator Graham before he left, because he's raised, and others have raised, a question which may be addressed in section 1404 of our DTA. That has to do with the fear that people might be prosecuted—our troops or intelligence officers, either one—based on various interpretations of Common Article 3 of the Geneva Conventions. Section 1404 of the DTA establishes the Corporal's Defense not just for troops, but for anybody, as I read it—anybody, any officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person arising out of that person's engaging in operational practices. So, we do have that Corporal's Defense applied not just to our uniformed folks, in the law that you've drafted, that we all worked on, but for every agent/employee. If that is true, it is beyond Guantanamo, it is anywhere in the world, if the way I read that is accurate.

Senator GRAHAM. Yes, I think, from just a cursory review, that that solves the problem. It's a problem that needs to be solved.

Senator LEVIN. I agree with that.

Senator GRAHAM. If there's a better way to solve it, I'm open-minded to it.

Senator LEVIN. Thank you.

Senator GRAHAM. Thank you.

Chairman WARNER. Senator Levin, I now turn to you, and then I'll do the wrap-up.

Senator LEVIN. Mr. Chairman, the committee has received a letter from five retired senior military officers recommending that Congress adopt a system based on the UCMJ Manuals for Court-Martial, acknowledging that there may be a need for narrowly targeted amendments to enhance the already strong protections of classified evidence in the UCMJ to accommodate specific difficulties in gathering evidence during a time of war and other narrowly tailored exceptions. I would ask that a copy of this letter from our five retired officers, including, I see here, Admiral Hutson, who's with us today, but there are four others who are not, that this letter be made part of the record.

Chairman WARNER. Without objection.

[The information referred to follows:]

MAJOR GENERAL JOHN L. FUGH, USA (RET.)
REAR ADMIRAL DONALD J. GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL DAVID M. BRAHMS, USMC (RET.)
BRIGADIER GENERAL JAMES CULLEN, USA (RET.)

July 10, 2006

The Honorable John Warner, Chairman
The Honorable Carl Levin, Ranking Member
Senate Armed Services Committee
Washington, DC 20510

Dear Chairman Warner and Senator Levin:

In the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld*, some commentators posit a stark choice between trials of accused terrorists in civilian courts and providing Congressional authorization for the deeply flawed military commissions that the administration established in 2001 and that the Court rejected in *Hamdan*.

We are writing to say that there is a better way — a middle ground consistent with America's interests, our values, and our laws. It is to bring accused terrorists to justice in military trials based on the Uniform Code of Military Justice (UCMJ) and Manual for Courts Martials (MCM).

As Congress considers its response to the *Hamdan* ruling, it should start from the premise that the United States already has the best system of military justice in the world. That system would provide the government with the tools and the flexibility it needs to prosecute accused terrorists through time-tested proceedings that protect sensitive information. It would ensure that military judges, prosecutors and defense counsel work within an established system of justice that affords clarity on laws, rules and procedures. It would give the victims of terrorism the justice that they deserve, while underscoring our Nation's respect for the rule of law and avoiding the questions of legitimacy that have embroiled the military commissions in litigation for the past four and a half years. If we use this system now, we will be well on our way to prosecuting the worst of the worst in our custody.

It is possible that Congress may want to consider narrowly-targeted amendments to enhance the already strong protections of classified evidence in the UCMJ and to accommodate specific difficulties in gathering evidence during the time of war. But the core American values that are incorporated in the UCMJ and highlighted by the Supreme Court in the *Hamdan* decision need to be preserved: defendants must be able to see and rebut all of the evidence against them;

defendants must not be shut out of portions of the trial; and, defendants must be assured access to an independent and impartial court of review.

Throughout our Nation's history, both military commissions used to try enemies captured in war, and courts-martial used to try our own personnel, have applied the same basic procedures. It is precisely that fact — our longstanding promotion of the basic rights of all persons, including even our worst and most vicious enemies — that makes our country worth fighting for and distinguishes us from the terrorists.

As retired judge advocates, we also strongly support the universal application of Common Article 3 of the Geneva Conventions.

Common Article 3 of the Geneva Conventions provides the basic protections of humane treatment and fair justice that apply to all persons captured in an armed conflict — and specifically those who fall outside the other, more extensive coverage of the Conventions. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were enacted — in the Vietnam War, in Korea, and in two conflicts with Saddam Hussein's Iraq. In each case, we applied the Geneva Conventions even to enemies that systematically violated the Conventions in their own actions. Congress, after considered debate, made violations of Common Article 3 a war crime in our country's criminal code. Last year, Congress made clear again that no person may be subjected to cruel, inhuman or degrading treatment, the type of conduct prohibited by Common Article 3. Our respect for, and application of, these universally applicable requirements of humane treatment protect our own soldiers as much as it protects our enemies. It is, after all, our troops who are forward deployed now and will likely be in the future. For this reason, from boot camp to officer schools, every sailor, soldier, airman, and Marine learns that the rules of humane treatment embodied in Article 3 of the Geneva Conventions are part of the core ethic of our armed forces and the highest law of our land. We sincerely hope that Congress takes no action to confuse the message our men and women in uniform have long received about this important standard. If we eliminate the applicability of Common Article 3's protections, it opens the door for our enemies to do the same.

It is time to replace trials of military commissions with a legitimate system to try accused terrorists. The UCMJ and MCM provide the model. We are fortunate already to have this tried and true system, which should be used to bring terrorists to justice, to showcase our respect for the rule of law and fundamental fairness, and to restore our moral authority at home and abroad.

We urge your consideration of these views on this matter.

With respect,

Major General John L. Fugh, USA (Ret.)
Rear Admiral Donald J. Guter, USN (Ret.)
Rear Admiral John D. Hutson, USN (Ret.)
Brigadier General David M. Brahms, USMC (Ret.)
Brigadier General James Cullen, USA (Ret.)

BIOGRAPHICAL INFORMATION

Major General John Fugh, USA (Ret.)

General Fugh was the Judge Advocate General of the U.S. Army, retiring from that post in July 1993 as a Major General. General Fugh was 15 years old when he migrated to the United States with his family from China. He was the first Chinese-American to attain General Officer status in the U.S. Army. General Fugh currently lives in the Washington,D.C. metropolitan area.

Rear Admiral Don Guter, USN (Ret.)

Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as the Dean of Duquesne University Law School in Pittsburgh, PA.

Rear Admiral John D. Hutson, USN (Ret.)

Admiral John D. Hutson served as the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Brigadier General David M. Brahms, USMC (Ret.)

General Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James Cullen, USA (Ret.)

General Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Senator LEVIN. One of the things that this letter says is something which all of our witnesses here today have emphasized, that from bootcamp to officer schools, every sailor, soldier, airman, and marine learns that the rules of humane treatment embodied in Common Article 3 of the Geneva Conventions are part of the core ethic of our Armed Forces and the highest law of our land. While questions can be raised about "how do you define this, or how do you define that?" in Common Article 3—and they're legitimate questions—there can be no doubt. Although the rest of you didn't sign this letter, from what you've said here today, I believe that you would all agree that from bootcamp to officer schools, every sailor, soldier, airman, and marine learns that those rules are part of the core ethic of our Armed Forces. Is that a fair statement, Generals? Admirals?

Chairman WARNER. Let the record reflect that each of them assented to your question.

Senator LEVIN. Thank you.

Admiral, when you responded to Senator Reed's question about whether or not one possible approach here would be to have the President make recommendations of specifics, and that perhaps we

adopt more general rules, and then, after those general rules were adopted, the fleshing out into more specifics could be done by the executive branch, as one possibility. If that possibility were pursued, would you personally recommend that the specifics, particularly where there's deviations from the law that applies in UCMJ—be sent to Congress for our yea or nay?

Admiral HUTSON. Yes, sir, I think I would. As I said earlier with regard to the *Hamdan* decision, it stands, among other things, for the proposition that this needs to be a dialogue between the executive and Congress, and that Congress should be right smack in the middle of it. This should be your creature. I think Congress should approve all the narrow, specific, well-articulated deviations that the President considers to be necessary, and pass on that, yea or nay. How you do that, specifically, the mechanics by which that is done? There are a variety of different ways to do that. I think that Congress has to be involved in it. Among other reasons, it clearly satisfies, then, the Court's need for congressional authorization for whatever it is you do.

Senator LEVIN. General Romig, do you have a comment on that?

General ROMIG. Sir, I agree. That's why I made the comment about Congress perhaps taking the lead, doing a working group, headed here in Congress, that brings in all the experts and gets input from DOD and gets inputs from those outside, and then the onus is on Congress to come up with this product, but to draw upon all the resources that are out there. That's why I suggested that. There are a number of different ways of doing it, but I think, ultimately, it has to go through Congress.

Senator LEVIN. Any of our other witnesses want to comment on that question?

General SANDKULHER. Senator, we could follow a procedure that's similar to what we do today, in that when we have statutory construction changes, statutory changes, we, of course, have to come to Congress and change the UCMJ. But then, the rules and the procedures for the Manual for Courts-Martial, the Rules of Evidence, et cetera, are done through executive order. That's basically a model that we all are familiar with dealing with.

Senator LEVIN. There has been a lot stated about ambiguity of Common Article 3. I think all of you have commented on it. Common Article 3 talks about outrages upon personal dignity; in particular, humiliating and degrading treatment. Humiliating and degrading treatment. Last year's DTA actually had the following language, that no individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhumane, or degrading treatment or punishment. So, Common Article 3 of the Geneva Conventions says "humiliating and degrading treatment" is not allowed. Our own statutory law, which applies to everyone, everywhere—CIA as well as DOD, everybody in our custody—uses the words that "nobody shall be subject to degrading or inhuman treatment." I don't see that one is more ambiguous, frankly, than the other. They both have to be filled in by either rule or practice, seems to me, whether it's under our law, called "degrading or inhumane," or under Common Article 3 of the Geneva Conventions, called "humiliating and degrading." Am I wrong on this?

I understand the argument about words not having specific meaning. You have to fill them in either with some kind of a regulation or with practice, but is there any difference in terms of the level of ambiguity between our law, which we just adopted, which prohibits "degrading and inhumane treatment," from the Common Article 3 of the Geneva Conventions, which prohibits "humiliating and degrading treatment"? Is there any difference in terms of the level of ambiguity?

Admiral HUTSON. Senator, it's like "cruel and unusual punishment," it's just one of those things. In fact, Common Article 3 has been on the books longer than the DTA has in terms of having created a body of law. We need to follow the definitions given to us by international courts, particularly. They may be instructive, but they're certainly not directive. That's just the nature.

Senator LEVIN. But my question is in terms of degree of ambiguity, is there greater ambiguity in the words used in Common Article 3, than there are in our own law, in any of your views? I'll just look at all of you.

I'll take that as you don't—none of you see any difference. I don't. But, anyway, I'll assume, from your headshakes and nods and silence that I'm not misinterpreting anything.

General RIVES. Senator, from my perspective, part of the problem is that Common Article 3 has been on the books more than 50 years now, almost 60 years, as an international treaty, and as a number of your colleagues pointed out, there have been some examples that don't play very well in Peoria. As people say, "this amounts to degrading treatment," and it shocks the conscience, frankly, of American citizens to say, "why would that potentially amount to a war crime under title 18?"

Senator LEVIN. I would agree with them. But what about our word "degrading"?

General RIVES. Our word, we can define without having to worry about the international community, and to a degree, we have Justice Stewart's definition of "pornography": "I can't define it, but I know it when I see it."

Chairman WARNER. You know it when you see it.

General RIVES. Yes, sir.

Chairman WARNER. I knew him very well, Potter Stewart.

Obiter dictum.

Senator LEVIN. I accept what you say about there's been some interpretations we don't buy, but, in terms of the level of ambiguity in the word themselves is there any greater level of ambiguity in the word "degrading," when it's used in our statute than the word "degrading" when it's used in Common Article 3?

We don't buy other people's interpretation of the word, but, in terms of the level of ambiguity, there is no greater level.

Okay. When our procedures have been perceived by much of the world as falling short of treating people the way we want our people to be treated, does that, would you agree, hurt us, in terms of gaining support for our war on terrorism?

General Romig?

General ROMIG. Absolutely. We have always taken the high ground on legal issues like this; and, to the extent that somebody perceives us not doing that, I think it's diminished us some.

Senator LEVIN. Does it hurt us in carrying on a war against terrorists effectively if people perceive us as falling short of humane treatment?

General ROMIG. I think it does. As you pointed out, or somebody pointed out, that in order to get support from other countries, not only do they need to feel like the effort is the right effort, but the reason behind it, and the people that are engaged in it, are doing the right thing. If we have people perceiving, in other countries, that we're not adhering to the rule of law, there is not going to be a lot of support, among the populace, at least, in that country.

Senator LEVIN. That was my last question. Does anyone else want to add to that answer? [No response.]

Thank you.

Thank you all, again, for your service, as well as your testimony.

Chairman WARNER. Thank you, Senator Levin. I appreciate it.

Gentlemen, I'm going to read this question, because I want those studying the record to note—this committee will come back and study it, but I just want to put in the record and read it in. Senator Graham touched on it.

Should Congress attempt to build a system of permanent authority for law-of-war military commissions generally or concentrate on fixing the immediate problems in Guantanamo?

Senator Specter recently introduced S. 3614, a comprehensive bill which would not only authorize and regulate military commissions, but would also provide a statutory basis for the combat status review tribunals and administrative review boards that review the status and continued detention of all Guantanamo detainees, whether suspected of war crimes or not. Should Congress address these matters in legislation now or limit itself to the points raised by the Court in *Hamdan*?

We will address that as we go along. I just wanted to put that in the record.

Lastly, on Protocol I, it's been asserted that the 1977 additional Protocol I to the Geneva Conventions, which the U.S. refused to ratify, has, over time, become a customary international law. Do you think that to be true, Admiral Hutson?

If you want to take it for the record, do so.

Admiral HUTSON. Yes, let me take it for the record. I need to take that for the record.

Chairman WARNER. Well, it's a tough one.

Admiral HUTSON. I need to think it through.

Chairman WARNER. It's a tough one. I think I'll let all of you take that one for the record, then.

[The information referred to follows:]

Congress's efforts should provide permanent and lasting executive authority for conducting military commissions. There is a need for such authority due to the current armed conflict, and there will be a similar need in all future conflicts. The United States has not officially recognized the 1977 Protocol I in its entirety as customary international law. Also, it has not drawn bright-line distinctions about which portions of Protocol I have achieved that status. Rather, it has noted that there are varying degrees of international acceptance and observance for various provisions. The United States has elected to support some portions of Protocol I purely as a matter of policy. For example, the United States has traditionally supported the principle that medical units should be respected and protected at all times and not be the object of attacks or reprisals. Similarly, it has supported the principle against refusing quarter—that is, no order shall issue that there will be no survivors, that

an adversary be threatened with such an order, or that hostilities be conducted on that basis.

Chairman WARNER. I close by the very difficult question which we're going to have to deal with, the classified information. Substantial attention has been given to the question of classified information and its use as evidence in the commissions. In your opinion, can we, Congress, devise a statute that passes constitutional statutory muster without giving the accused and counsel possessing the necessary clearances access to such material in some form? Again, take that one for the record.

[The information referred to follows:]

Yes, Congress can devise a statute that strikes a balance between the rights of an accused before military commissions and national security concerns over the disclosure of classified information. Such a statute might resemble the existing Military Rule of Evidence (MRE) 505 that is used in courts-martial. The MRE 505 process deals specifically with access to classified information and how that classified information can be placed in a public forum. With modifications, this process could strike the correct balance.

Chairman WARNER. There's a lot of sensitivity in that, and it's one we have to deal with.

So, I let you answer those for the record, because I think they need careful reflection.

I want to thank Senator Levin and you and other members of the committee. I think our committee, if I may say, has conducted this very important hearing with a matter of calmness and thoroughness and fairness, basically unemotional approach to a very tough subject. This subject deserves no less as we try, as a Congress, to fulfill our duties. Most importantly, as I opened, the end game is the man and the woman beyond our shores who are trying to preserve our democracy and freedom. At the same time, we want to stand as a nation in the eyes of the world with one that accords the proper balance to human dignity, human rights, and legal rights.

So, thank you very much. I think you'll think back on this day as a very important one in your respective careers. I'm certain that those within your command look upon their senior partners as having discharged their function with great dignity in keeping with the finest traditions of our U.S. military.

Thank you. We are adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

COMMON ARTICLE 3

1. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, the Supreme Court found that Geneva Common Article 3, which bars cruel and humiliating treatment, including outrages upon personal dignity, applies to al Qaeda. In response, some have argued that the terms included in Common Article 3 are vague and undefined in law of war doctrine. In Tuesday's Judiciary Committee hearing, for example, the head of Justice's Office of Legal Counsel said that some of the terms are "inherently vague." Is this your understanding?

General BLACK. Though not precisely defined, the terms of Common Article 3 are sufficiently clear for soldiers to continue to apply them on the modern battlefield.

The proscription of Common Article 3 on "humiliating and degrading treatment" and "outrages upon personal dignity" is not specifically defined in the Geneva Conventions. In fact, the commentary observes that the framers of the Conventions affirmatively decided not to define the term because "However much care were taken

in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes."

This is true of numerous legal terms commonly used in our own legal system and in the military justice system. Article 93 of the Uniform Code of Military Justice (UCMJ), for example, prohibits cruelty and maltreatment. The definition given in the UCMJ is less than one paragraph long and is meant to be exemplary, rather than exclusive. Yet, we have successfully prosecuted soldiers for cruelty and maltreatment of their subordinates.

The United States Army has been applying the standards of Common Article 3 as a baseline for treatment of all individuals in all armed conflicts for several decades. Recently, Congress, in section 1003 of the Detainee Treatment Act (DTA) has provided greater clarity by tying the meaning of "humiliating and degrading treatment" and "outrages upon personal dignity" to a Constitutional standard that soldiers have grown up with in our own American system and that they can understand and apply.

While the wording of Common Article 3 may not be completely clear, the standard of humane treatment is a standard that can be trained by commanders and noncommissioned officers and that soldiers can continue to apply on the battlefield.

Admiral MCPHERSON. This text has been binding on the United States since it became a party to the 1949 Geneva Conventions in 1956. Our Armed Forces have had 50 years of practice in implementing Common Article 31 which stands for minimum mandatory rules for humane treatment. Army Regulation 190–8 (which is a joint service regulation, applicable to all the Services) provides practical guidance for those in the field on the meaning and effect of Common Article 3.

General RIVES. Common Article 3 defines the minimum humanitarian norms applicable in "armed conflicts not of an international character." Under section 1, the following acts are prohibited:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) 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.

Most of these are self-explanatory. In any statute or treaty, there are terms that must be interpreted by practitioners and ultimately are left to the courts to define and thus provide reasonable parameters on conduct.

The issue with Common Article 3 comes as a result of 18 U.S.C. 2441, which contains the war crimes provisions. Under section 2441(c)(3), behavior that violates Common Article 3 is a war crime. In that light, clearer definition of the meaning of terms such as "outrages upon personal dignity, in particular humiliating and degrading treatment" would provide useful guidance to the members of the Armed Forces and ultimately to the courts who are required to interpret the provision in the context of a criminal trial. Clarity could be provided by either limiting the behavior to "serious" or "outrageous" violations or a list of specific offenses that would define the terms.

General SANDKUHLER. Common Article 3, as part of the full body of the Geneva Conventions, has been binding on the United States ever since it became a party to the 1949 Geneva Conventions in 1956. Common Article 3 sets forth minimum mandatory rules for humane treatment that must be followed in armed conflicts not of an international character. But the Department of Defense (DOD) policy is to apply the Law of War in all armed conflicts, regardless of how characterized, and in all other military operations. As is the case with any legal document, portions of the text of Common Article 3 are subject to interpretation. A reasonable person standard should be the backdrop against which the text is read.

General ROMIG. No. U.S. military personnel are trained to the standards of Field Manual (FM) 34–52, the interrogation field manual. These standards exceed the requirements of Common Article 3. As long as they adhere to those standards, there should be no concern about vagueness under Common Article 3. The standards in FM 34–52 have never been challenged by the international community for being violative of Common Article 3.

Admiral HUTSON. The meaning of many legal terms are susceptible of debate. "Obscenity" is perhaps the classic example, but "probable cause," "reasonable

doubt," "reasonable man," and a host of other terms could be faulted for being "inherently vague." Indeed, I would submit that by that test, "inherently vague" is inherently vague. Fortunately, common usage and common sense serve to define them, albeit perhaps not to a "moral certainty."

2. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, is there a body of opinion that defines Common Article 3?

General BLACK. There are numerous sources which attempt to provide clarity to the standard set out in Common Article 3.

As mentioned in the answer to question 1, there is no precise definition for some of the terms in Common Article 3 of the Geneva Conventions. However, Congress has provided a definition of torture in 18 U.S.C. 2440 and a definition of cruel, inhuman, or degrading treatment of punishment in the DTA.

In addition, many governments, organizations, and commentators throughout the world have sought to add clarity to the term. Others such as the International Criminal Court, International Criminal Tribunals for the Former Yugoslavia and for Rwanda, International Criminal Court, International Committee of the Red Cross, and numerous scholars both from the U.S. and from other countries have also provided their insight into what the terms of Common Article 3 mean.

Admiral MCPHERSON. In the case of *Prosecutor* v. *Dusko Tadic* at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICTY, while not defining every aspect of Common Article 3, made it clear that international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of warfare.

General RIVES. International law is a realm of law agreed on by universal, or near-universal practice. International law, as long ago defined by U.S. courts and accepted by Congress, comes primarily from several sources, including international conventions and treaties; customs and practices observed and accepted by states; and general principles of international law recognized by civilized nations.

Where there are disputes about the exact meaning and application of national laws, it is the responsibility of the courts to decide what the law means. In international law as a whole, there are no courts which have the authority to do this and thus it is generally the responsibility of states to interpret the law for themselves. Unsurprisingly, this means that there is rarely agreement in cases of dispute.

It is a basic rule of sovereignty that the United States would not be bound by the decision of a foreign or international tribunal that a certain act constituted a violation of Common Article 3. Interpretations provided by other state parties or courts are not binding on U.S. practice or domestic interpretations. As in other cases, how other state parties and courts have addressed an issue can be helpful in framing issues and identifying concerns, but those decisions or writings are not considered binding precedent that must be followed by the United States. If universal agreement develops among states that a specific conduct or act violates Common Article 3, then the United States is bound to abstain from that act.

General SANDKUHLER. There is not, to my knowledge, a body of opinion which clearly defines Common Article 3.

General ROMIG. No, there is no universally recognized definitive all-encompassing listing of Common Article 3 offenses. This is like so many other areas of the law where precise definitions are not provided for very good reasons. The drafters of the laws realized that they could not conceive of every possible act that would run afoul of the intent of the law. Examples in the UCMJ of offenses that do not provide precise definitions include: violations of "good order and discipline"; violations of a "nature to bring discredit upon the Armed Forces"; and "conduct unbecoming an officer"; to name just a few. It is always dangerous to try to go into too much detail with offenses that encompass a broad statement of intent such as these. As one of the drafters of the Geneva Conventions and later the leading commentator, Pictet, said regarding Common Article 3: "However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and at the same time precise." We must never lose sight of the fact that we are also looking to protect our own servicemembers from such imaginative torturers.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

3. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, what interpretation of Common Article 3 concerns the administration?

General BLACK. Questions concerning interpretations by the administration are more appropriate for response by the General Counsel, DOD.

Admiral MCPHERSON. Concerns have been expressed over the interpretation that Common Article 3 applies to members of al Qaeda since they are neither combatants of a nation-state party to the Geneva Conventions nor engaged in solely in an internal armed conflict.

General RIVES. Common Article 3 defines the minimum humanitarian norms applicable in "armed conflicts not of an international character." Under section 1, the following acts are prohibited:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) 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.

Most of these are self-explanatory. In any statute or treaty, there are terms that must be interpreted by practitioners and ultimately are left to the courts to define and thus provide reasonable parameters on conduct.

The issue with Common Article 3 comes as a result of 18 U.S.C. 2441, which contains the war crimes provisions. Under section 2441(c)(3), behavior that violates Common Article 3 is a war crime. In that light, providing clearer definition of the meaning of terms such as "outrages upon personal dignity, in particular humiliating and degrading treatment" would provide useful guidance to the members of the Armed Forces and ultimately to the courts who are required to interpret the provision in the context of a criminal trial. Clarity could be provided by either limiting the behavior to "serious" or "outrageous" violations or a list of specific offenses that would define the terms.

General SANDKUHLER. In my understanding, concerns have previously been expressed with the interpretation that Common Article 3 applies to members of al Qaeda, since they are neither combatants of a nation-state party to the Geneva Conventions, nor engaged solely in an internal armed conflict. I believe that the meaning of "humiliating treatment," as the term is listed in section 1(c) of the article, has presented vagueness concerns as well.

General ROMIG. For a complete answer, you really would need to ask an administration official. However, I suspect their biggest concern relates to section (1)c: "outrages on personal dignity, in particular, humiliating and degrading treatment". I further suspect that the concern is that certain individuals would be subject to prosecution for past practices in violation of these standards. Again, if we would be outraged if it was done to U.S. servicemembers, then we ought not to be doing it.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

4. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, and Brigadier General Sandkuhler, in Deputy Secretary England's memo to the DOD, he stated his understanding that all DOD procedures are in compliance with Common Article 3. Mr. Dell'Orto, DOD's Deputy General Counsel, said the same thing at the Tuesday hearing. If Common Article 3 is this vague, how is it possible to determine that DOD is in compliance with its obligations?

General BLACK. Common Article 3 represents a baseline of treatment that soldiers have recognized as applicable in all conflicts for several decades. In fact, in most cases, soldiers have, as a matter of policy, been providing greater protections than those afforded in Common Article 3. While there may be some ambiguity as to minimum protections provided by Common Article 3, soldiers have been trained to treat all individuals with dignity and respect and in a humane manner rather than to apply minimum standards.

Admiral MCPHERSON. DOD has been implementing Common Article 3 for the past 50 years. The concept of humane treatment has not changed. What is different today, following the Supreme Court decision in the *Hamdan* case, is the categories of persons to whom Common Article 3 applies, i.e., individuals, including members of al Qaeda, not associated with a Geneva signatory and regardless of the nature of the conflict.

General RIVES. Common Article 3 defines the minimum humanitarian norms applicable in "armed conflicts not of an international character." Under section 1, the following acts are prohibited:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) 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.

Most of these are self-explanatory. In any statute or treaty, there are terms that must be interpreted by practitioners and ultimately are left to the courts to define and thus provide reasonable parameters on conduct. As required by the Geneva Conventions, DOD directs that members of the DOD components "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." To ensure compliance, DOD trains its personnel on the law of war. The training is generally to a higher standard of behavior than that required by Common Article 3, that required toward prisoners of war. As a result, the standards of Common Article 3 are not an issue.

The issue with Common Article 3 comes as a result of 18 U.S.C. 2441, which contains the war crimes provisions. Under section 2441(c)(3), behavior that violates Common Article 3 is a war crime. In that light, providing clearer definition of the meaning of terms such as "outrages upon personal dignity, in particular humiliating and degrading treatment" would provide useful guidance to the members of the Armed Forces and ultimately to the courts who are required to interpret the provision in the context of a criminal trial. Clarity could be provided by either limiting the behavior to "serious" or "outrageous" violations or a list of specific offenses that would define the terms.

General SANDKUHLER. As indicated in the answer to question 1 above, DOD has implemented the full body of the Geneva Conventions for the past 50 years. DOD has been in compliance with Common Article 3 because it has based policies, such as Army Regulation 190–8 (Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees), on the full-body of the Geneva Conventions, which are more expansive than Common Article 3. DOD policy is to apply the Law of War in all armed conflicts, regardless of how characterized, and in all other military operations. By that measure, the minimum standards of Common Article 3 are covered.

5. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, the Department of Justice (DOJ) representative said on Tuesday that the Common Article 3 prohibition of "outrages upon personal dignity, in particular, humiliating and degrading treatment," is a phrase "susceptible of uncertain and unpredictable application." He went on to say that the Supreme Court has held that in interpreting treaty provisions such as Common Article 3, the meaning given by international tribunals and other state parties to the treaty must be accorded consideration. This, he cautioned, will create uncertainty for those who fight to defend us from terrorists. Isn't it true of any treaty, and of all of international law, that courts may take into consideration the views held by other state parties?

General BLACK. U.S. courts may consider foreign nations' interpretations of treaty provisions or customary international law when contemplating the judicial interpretation of the same provisions under U.S. law if determined to be relevant. However, the specific methods of application or legal interpretation are not binding on U.S. courts.

Admiral MCPHERSON. Yes, those views may be generally taken into account, but they do not control and should be used only to the extent they are helpful in contributing to a logical understanding of the provisions under consideration.

General RIVES. It is a basic rule of sovereignty that the United States would not be bound by the decision of a foreign or international tribunal that a certain act constituted a violation of Common Article 3. Interpretations provided by other state parties or courts are not binding on U.S. practice or domestic interpretations. As in other cases, how other state parties and courts have addressed an issue can be helpful in framing issues and identifying concerns, but those decisions or writings are not considered binding precedent that must be followed by the United States. If uni-

versal agreement develops among states that a specific conduct or act violates Common Article 3, then the United States is bound to abstain from that act.

General SANDKUHLER. Yes, those views may be generally taken into account, but they are not controlling.

General ROMIG. Yes, it is a common and longstanding practice of U.S. courts, to include the U.S. Supreme Court, to look to the manner in which certain treaty provisions have been interpreted by other state parties and international tribunals. It is not required that U.S. courts engage in this practice. However, if other state party/international tribunal interpretations of treaty provisions are looked to, such interpretations are merely one of many factors taken into "consideration" by U.S. courts. To raise the specter of U.S. courts being bound by treaty interpretations made by the European Court on Human Rights or the International Criminal Tribunal is truly a red herring and simply untrue.

Admiral HUTSON. The courts may and should consider views held by other state parties, certainly in matters of international importance and character. Those views are never controlling. So long as those views only inform and never control decisions by domestic courts, there can never be a danger. Not even considering other views is intellectually lazy and ill-advised.

6. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, isn't it also the case that the interpretations given by foreigners are not binding on domestic interpretations?

General BLACK. Statements by foreign leaders, academics, or members of important associations such as the International Committee of the Red Cross may be looked to by U.S. courts when determined to be relevant and helpful. But this information is in no way binding on U.S. courts or determinative of the action U.S. courts should take on an issue.

Admiral MCPHERSON. Yes.

General RIVES. It is a basic rule of sovereignty that the United States would not be bound by the decision of a foreign or international tribunal that a certain act constituted a violation of Common Article 3. Interpretations provided by other state parties or courts are not binding on U.S. practice or domestic interpretations. As in other cases, how other state parties and courts have addressed an issue can be helpful in framing issues and identifying concerns, but those decisions or writings are not considered binding precedent that must be followed by the United States. If universal agreement develops among states that a specific conduct or act violates Common Article 3, then the United States is bound to abstain from that act.

General SANDKUHLER. Yes.

General ROMIG. Yes, see above.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

7. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, do you believe that the U.S. runs a danger along the lines of that articulated by the DOJ representative?

General BLACK. I understand this question to refer to Senator McCain's statement "On the issue of Common Article 3, the DOJ representative said yesterday, that Common Article 3 'prohibition of outrages upon personal dignity'—in particular, 'humiliating and degrading treatment'—is a phrase susceptible of uncertain and unpredictable application." He went on to say that the Supreme Court has held that interpreting treaty provisions such as Common Article 3, that meaning given by the international tribunals and other state parties to the treaty, must be accorded consideration; therefore, this would create uncertainty.

Certainly, U.S. courts may consider the views of other tribunals and state parties to conventions when relevant and appropriate in arriving at a decision. However, these other views are not binding and I know of no court decision that requires U.S. courts to consider and apply international interpretations of law of war provisions. In any event, there seems to me, no greater uncertainty here than in any case where courts interpret statutory language.

Admiral MCPHERSON. I do not believe the interpretations of international tribunals or other state parties will create uncertainty for those who fight to defend us. The Armed Forces will continue to issue guidance to those in the field so they clearly understand national law and policy which will enable them to fully support our national security.

General RIVES. It is a basic rule of sovereignty that the United States would not be bound by the decision of a foreign or international tribunal that a certain act

constituted a violation of Common Article 3. Interpretations provided by other state parties or courts are not binding on U.S. practice or domestic interpretations. As in other cases, how other state parties and courts have addressed an issue can be helpful in framing issues and identifying concerns, but those decisions or writings are not considered binding precedent that must be followed by the United States.

General SANDKUHLER. I believe that interpretations by international tribunals or other state parties will create uncertainty as to the meaning of such terms, however, our commanders will continue to issue guidance to our soldiers, sailors, airmen, and marines in the field to help them understand our legal obligations and policies as they continue to focus on the fight.

General ROMIG. No, for the reasons stated in #5 above.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

8. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, some have suggested that Congress put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last year's DTA. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Is this a good idea and what are the implications of our redefining Common Article 3 in this way?

General BLACK. Common Article 3 contains provisions in excess of fundamental treatment provisions—prohibition against cruel, inhuman, and degrading treatment—of the DTA of 2005. Because international law evolves, it is impossible to fix for all time any given understanding of the provisions of Common Article 3. Nonetheless, it would be a good idea for Congress to clarify its understanding that the cruel, inhuman, and degrading treatment standard in the DTA was essentially the same as those provisions of Common Article 3 related to "cruel treatment" and "outrages upon personal dignity, in particular, humiliating and degrading treatment." Soldiers will continue to be trained to apply the principles of humane treatment that will exceed the baseline standards these two definitions contemplate.

Admiral MCPHERSON. Each of those amendments has produced extensive jurisprudence associated with domestic criminal law and civil rights issues. Those issues and the attendant case law might be misapplied in the context of the global war on terror.

General RIVES. Compliance with Common Article 3 does not require providing unlawful combatants with the full panoply of rights enjoyed by American citizens in U.S. courts and guaranteed by the U.S. Constitution. Because jurisprudence on the U.S. Constitution's 5th, 8th, and 14th amendments is broad and comprehensive, incorporating these amendments into Common Article 3 risks guaranteeing rights and protections far above the standards required by international law. Care should be taken to ensure that any definition not necessarily expand the protections beyond those required by Common Article 3 and the DTA of 2005.

General SANDKUHLER. I would respectfully state that tying the 5th, 8th, and 14th amendments to Common Article 3 should cause some concern, given that these amendments have each produced extensive and varied jurisprudence regarding domestic criminal law and civil rights. The global war on terror, as the committee is well aware, is a completely different paradigm from our domestic legal system.

General ROMIG. No, this would cause more confusion than currently exists. It would subject the military to the relatively vague standards of U.S. court interpretations of cruel, inhuman, or degrading treatment or punishment per the Constitutional Amendments in contrast to the clear guidance in the field manual on detainee treatment and interrogation. Furthermore, the international community would perceive this as an attempt by the U.S. to unilaterally legislate and define the meaning of the prohibited activities of Common Article 3. Finally, it would, by legislation, exempt out "humiliating and degrading" practices that might subject the perpetrators and their sanctioning superiors to prosecution under the War Crimes Act.

Admiral HUTSON. There is no valid reason to attempt to redefine Common Article 3. The United States should deal only with domestic law in this situation, not define ourselves out of a treaty we ratified because it served to protect U.S. troops. However, to do so would not be a de facto withdrawal from Common Article 3, only a grave mistake, and a violation of the spirit of Common Article 3.

9. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, if Congress were to ratify the military commissions as is, or authorize military commissions that fall short of what the Supreme Court has determined is re-

quired under Geneva Common Article 3, what would be the effect on our relationship to the Geneva Conventions and would such a step imply a de facto withdrawal from Common Article 3?

General BLACK. I do not believe the United States can "withdraw" from the provisions of Common Article 3 as it has become customary international law. More importantly, the idea of treating all people humanely is part of the moral fabric of the U.S. Army, a binding element that is especially important on the field of battle. I have confidence that Congress and the administration can work together, and I am prepared to help in any way I can, to design a set of military commission rules that will not only comply with Common Article 3 but uphold the moral underpinnings of American society and the military.

Admiral MCPHERSON. The Supreme Court opinion is consistent with opinions expressed by many experts in the international community. Failure to include the fundamental protections required under the Geneva Conventions might signal a repudiation of commonly understood principles of international law. This would be inconsistent with the two pillars of our National Security Strategy, to wit: promoting freedom, justice, and human dignity, and leading a growing community of democracies that embrace the rule of law. Finally, it would directly contradict the practice of the United States and its coalition partners regarding the prosecution of war criminals before the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Iraqi Supreme Criminal Tribunal.

General RIVES. The President may withdraw from an Article II Treaty, but the terms of the treaty require the President to formally do so. So long as the United States remains a signatory to the 1949 Geneva Conventions, and has ratified the Conventions, Common Article 3 is the law of the land. The U.S. Supreme Court held Common Article 3 to be enforceable law in *Hamdan.*

American jurisprudence does not formally recognize a de facto withdrawal from a treaty. So long as the United States is a party to the 1949 Geneva Conventions, without any reservation as to Common Article 3, there can be no de facto withdrawal. And, following *Hamdan,* until the United States formally withdraws from the 1949 Geneva Conventions, individuals directly affected by an act or omission of the government have judicial standing.

General SANDKUHLER. While I cannot say that it would imply a de facto withdrawal from Common Article 3, it would certainly send a mixed message to an international community to whom we have stressed our adherence to the rule of law.

General ROMIG. The problem with such a step would be that it would give our future adversaries the green light to interpret the Geneva Conventions as they see fit, to the detriment of future U.S. servicemembers who may fall into their power. Additionally it would further diminish both our international stature and our ability to influence in the critical arena of compliance with the law of war.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

10. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, you have raised some concerns about the enforcement of Common Article 3 following the *Hamdan* decision because the Supreme Court has ruled that it applies to the global war on terrorism and because it can be enforced through the war crimes statute. If the United States made it clearer what violations of Common Article 3 were enforceable through the war crimes statute, would this address your concerns for greater certainty about possible criminal prosecutions? In other words, can your concerns be addressed by clarifying U.S. law without throwing into doubt U.S. acceptance of Common Article 3, or without reinterpreting Common Article 3 itself?

General BLACK. Yes, and I believe if the DOJ and the DOD engage in a deliberative process to review what War Crimes Act amendments are necessary, we can provide Congress some proposed legislation that will accomplish this important task. Army Judge Advocates are now involved in the process, led by the DOJ and with Judge Advocates of the other Services to propose to Congress the best way to enable military commissions to adjudicate the full-range of offenses that are at issue in the global war on terrorism.

Admiral MCPHERSON. Yes; and I would like to note that military personnel are already accountable to a higher criminal standard by operation of articles 92, 93, and 134 of the UCMJ, and thus interpretation of the War Crimes Act is primarily a matter of interest for our civilian employees and contractor personnel. There is one phrase in Common Article 3 that many would like to see better defined for purposes of War Crimes Act enforcement, and that is "outrages upon personal dignity, in particular humiliating and degrading treatment."

General RIVES. Yes, I believe that is a reasonable approach. Under 18 U.S.C. 2441(c)(3), conduct that violates Common Article 3 is a war crime. In that light, providing clearer definition of the meaning of terms such as "outrages upon personal dignity, in particular humiliating and degrading treatment" would provide useful guidance to the members of the Armed Forces and ultimately to the courts who are required to interpret the provision in the context of a criminal trial. Clarity could be provided by either limiting the behavior to "serious" or "outrageous" violations or a list of specific offenses that would define the terms. That would be very helpful.

General SANDKUHLER. I think it is possible to clarify U.S. law without throwing into doubt U.S. acceptance of Common Article 3. Drafters would obviously need to use care in order to avoid the appearance that we are either backing away from any of our obligations, or changing our position on Common Article 3 in the midst of a conflict to which the Supreme Court has held it applies.

General ROMIG. I do not recall that I expressed any concerns about enforceability of Common Article 3 under existing law. I do not believe it is necessary for the U.S. to clarify the standards set out in Common Article 3. To do so would open the door for future adversaries to do the same to the detriment of our servicemembers captured by them. As I stated in my answer to question #2, it is not possible to conceive of every future interrogation technique or detainee treatment that would violate the intent of the language of Common Article 3. I have no doubt that imaginative interrogators and detention personnel will find ways to inflict treatment that violates the clear intent of the Article and which we would find objectionable if applied to our servicemembers.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

MILITARY COMMISSIONS

11. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, in his testimony before the Senate Judiciary Committee on Tuesday, Mr. Daniel Dell'Orto, the Principal Deputy Counsel at the DOD, stated that "courts-martial are more solicitous of the rights of the accused than are civilian courts," and that, "[f]or every court-martial rule that is arguably less protective of the accused than its civilian analog, there are several that are indisputably more protective." Mr. Dell'Orto concludes that these greater rights afforded to defendants in a court-martial would compromise intelligence gathering and military operations if they are granted to detainees. Do you agree with Mr. Dell'Orto's assessment of the courts-martial rules?

General BLACK. Yes. In many respects the UCMJ and Manual for Courts-Martial provide greater procedural and substantive due process for the military accused than that provided to a civilian in the Federal criminal justice system. Just to remark upon a few, Article 31(b), Article 32, Article 46, and Article 66 of the UCMJ all provide substantially greater procedural and substantive due process than their civilian counterparts. These greater rights, if granted to enemy combatants, could affect intelligence operations, from the gathering of intelligence to its use at a commission.

Admiral MCPHERSON. Some court-martial protections are more stringent than their civilian criminal system counterparts. For example, the requirement to give Article 31(b) rights at the initiation of questioning and not solely in a custodial setting is one example. Other examples are the military requirement for speedy trial and broad discovery rules under the Rules for Courts-Martial. However, in most other areas the military rules are reflective of Federal rules and provide the fundamental guarantees discussed by the Supreme Court.

General RIVES. The military justice system gives servicemembers virtually all rights and privileges that are afforded to citizens who face prosecution in civilian courts. In many areas—such as the right to counsel, the pretrial investigatory process, discovery, sentencing, post-trial processing, and appeals—the military system offers benefits to an accused that are more favorable than those available in civilian systems.

The battlefield is not an orderly place. The military commission process has to take into account that fact. While I believe that the UCMJ and the Manual for Courts-Martial is a superb starting point for updating military commissions, I recognize there will necessarily be differences from those documents and the rules and procedures for military commissions. The processes and procedures in the UCMJ and Manual for Courts-Martial can be readily adapted to meet the needs of military

commissions and still meet the requirements of criminal systems established by Common Article 3.

General SANDKUHLER. Some aspects of the UCMJ and the court-martial rules do afford more protection to an accused than rules in the civilian criminal justice system. For example, Article 31(b) of the code requires that a rights warning be provided to a suspect at the initiation of questioning, without regard to whether the suspect is "in custody." Other examples are the speedy trial parameters set forth in Article 10 and rule 707, "open file" discovery rules, and the extremely detailed providence inquiry military judges must conduct with an accused before accepting any guilty plea. Some aspects of the military justice system, if transposed "as is" upon the commissions process without taking into account differences between mission accomplishment in the war on terror and standard criminal investigations could have an impact on battlefield missions.

General ROMIG. Although it is true that the court-martial process does provide significant due process protections for servicemembers, I believe it is misleading to say those safeguards would jeopardize intelligence gathering or military operations. There has been a number of courts-martial prosecuted where there was intelligence or operational issues involved. In each case there were adequate protections afforded to both the accused and the government to ensure prosecution without disclosing classified information or damaging military operations. For prosecuting military commissions, those rules that would not make sense for use on a battlefield should be modified or eliminated, see question 14 below.

Admiral HUTSON. I agree with Mr. Dell'Orto's assessment of the comparison of military and civilian law.

12. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, in your extensive collective experience with courts-martial have you found that the process currently in place would jeopardize our intelligence gathering and military operations?

General BLACK. Yes. There are a number of aspects of the court-martial system that could result in an unacceptable degree of compromise to intelligence gathering and military operations if the court-martial system was used to prosecute detainees. Of particular concern are the rules of discovery in the court-martial system. The rules of discovery in the courts-martial are extremely broad. Soldiers accused of a crime are required to have the same access to witnesses and evidence as the prosecutor. Prosecuting detainees in such an open discovery system could force the government to reveal classified evidence regarding how it came by intelligence and what was known or not known about terrorist operations.

Admiral MCPHERSON. The broad discovery rules used in military courts-martial practice are unlikely to jeopardize intelligence gathering and military operations. The substantive and procedural rights addressed in the MCM relate to the use of evidence against an accused at trial. While application of those rights to detainees might limit the ability to present legally admissible evidence against such detainees at trial before a military commission or court-martial, those evidentiary issues should not present a hindrance to intelligence gathering and military operations, especially given the procedural mechanisms available within the MCM for protecting sensitive information.

General RIVES. The process used to try individuals before military commissions must be compatible with intelligence gathering and military operations. Because each activity necessarily involves different processes, procedures, and objectives, policy makers must determine the primary focus, recognizing that focus can change depending on timing and individual circumstances. I believe that a process can be designed to accommodate those interests. The UCMJ and the MCM are certainly fine as starting points for updating military commission processes and procedures. I believe the administration is drafting legislation for your consideration that addresses and accommodates each of those concerns.

General SANDKUHLER. Adopting the UCMJ and rules for courts-martial "whole cloth" could impact intelligence gathering and military operations. But we can adapt to meet the required fundamental guarantees and minimize the impact.

General ROMIG. See number 11 above.

Admiral HUTSON. The process currently in place would not jeopardize our intelligence gathering or military operations. Protecting the rights of individuals would only serve to enhance them by making the U.S. stronger. It would preserve the ideals and aspirations that form the historical basis for our strength. It is who we are.

13. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, do you agree with Mr. Dell'Orto's assessment of the consequences of applying those rules to detainees?

General BLACK. Yes. I believe trying detainees by courts-martial would result in granting detainees more rights at trial then are provided to U.S. citizens facing trial in Federal court. Additionally, trying detainees under a courts-martial system would create a high potential for the compromise of intelligence information.

Admiral MCPHERSON. Yes, we must be very careful when adopting rules for military commissions in areas such as discovery, access to evidence, and self-incrimination. Overall, a careful balancing of individual rights and national security interests is required.

General RIVES. The battlefield is not an orderly place. The military commission process has to take into account that fact. While I believe that the UCMJ and the MCM is a superb starting point for updating military commissions, I recognize there will necessarily be differences from those documents and the rules and procedures for military commissions. The processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and still meet the requirements of criminal systems established by Common Article 3.

General SANDKUHLER. I would say that we must be very careful in drafting rules for military commissions, particularly in areas such as discovery, access to evidence, and self-incrimination. The application of these rules without modification could have unintended consequences on the battlefield as well as in the actual commissions process.

General ROMIG. No, see number 11 above.

Admiral HUTSON. No, I do not agree with his shortsighted assessment.

14. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, in a letter dated July 10, 2006, and addressed to the Chairman of the Senate Judiciary Committee, a group of retired Judge Advocates state that we should "bring accused terrorists to justice in military trials based on the UCMJ and MCM." The letter goes on to say that, in developing legislation to address the *Hamdan* ruling, "it should start from the premise that the United States already has the best system of military justice in the world" but that narrowly targeted amendments to the UCMJ to accommodate "specific difficulties in gathering evidence during the time of war" would be acceptable. Do you believe the UCMJ and the MCM are adequate to try detainees?

General BLACK. I would concur with the statement that the United States has the best military justice system in the world, but that does not mean it is the proper forum to try unlawful enemy combatants suspected of committing war crimes. Trying unlawful enemy combatants presents two major challenges that trying a U.S. servicemember does not. First, much of the evidence against suspected enemy combatants comes from intelligence sources that might be compromised if the enemy combatant were tried under the UCMJ. Second, collection of evidence against an enemy combatant is often done under difficult circumstances making it untenable to follow the usual rules of collection and authentication. Thus, probative evidence might be excluded because of its method of collection or challenges to its authentication.

Admiral MCPHERSON. Yes, if modified in the areas that present the most concern for trying terrorists as discussed above.

General RIVES. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. The administration is preparing legislation for your consideration using this approach.

As I indicated in my testimony, I believe you could enact an Article 135(a) that could detail the basic substantive requirements for military commissions and then permit an executive order to have the details, just as we have the MCM to provide detailed guidance for the trial of courts-martial. Alternatively, Congress could create a separate Code of Military Commissions as a new chapter in title 10, modeled to an appropriate degree after the UCMJ and similarly leave the details to an executive order. Either method must address the concerns articulated in *Hamdan* v. *Rumsfeld*.

General SANDKUHLER. Not without modifications regarding some of the aspects and rules previously addressed.

General ROMIG. As I testified, I believe the UCMJ and MCM should be the starting point for the military commissions. Those rules or procedures that do not make

sense for the unique situations of the combat environment should either be modified or removed for military commissions. An example of this would be the requirement to read a captured combatant a rights warning before questioning. This would be counterproductive to gathering intelligence and doesn't make sense on the battlefield. But the fact that there are rules or procedures that should be modified or not used does not mean that you could not use any of the UCMJ/MCM rules or procedures. They should be the starting point and then a point-by-point analysis could determine which ones should be modified/eliminated.

Admiral HUTSON. With minor modifications, I believe the UCMJ and MCM are adequate to successfully (i.e., justly) prosecute detainees.

15. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, what do you make of the suggestion by some that our starting point should be the military commissions set up under Military Order One, and that, in fact, Congress should consider merely ratifying those procedures?

General BLACK. I suggest that the starting point is not critical. So long as the structure of the military commissions is a blend of Military Order 1, the UCMJ, the MCM, and the law of war, they will fulfill their purpose of ensuring full and fair justice and order on the battlefield.

Admiral MCPHERSON. I do not believe it will matter whether the military commission procedures adopted will modify Military Order 1 to bring those procedures into conformity with Common Article 3 or, in the alternative, modify UCMJ procedures to accommodate national security concerns while still conforming to Common Article 3. What is important is that we end up with a system that is consistent with our obligations under Common Article 3.

General RIVES. I believe that the Nation would be better served by a fresh start to the military commission process. Existing criminal justice systems, including the process established by Military Commission Order 1, should be reviewed to develop a system that would best serve the interests of justice and those of the United States. The UCMJ and the MCM is a superb starting point in doing so. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. I believe the administration is preparing legislation for your consideration using this approach.

General SANDKUHLER. It is a balancing process, regardless of whether you modify Military Order 1 or UCMJ procedures. What is important is that we end up with a system that is consistent with our obligations under Common Article 3 and our interests in our national security.

General ROMIG. I strongly disagree with that proposal. The procedures set up under the President's military order were basically modeled on the practice of military justice 60 years ago. Today's military commissions should reflect the development and evolution of the practice of military justice over the last 60 years.

Admiral HUTSON. Merely ratifying the procedures of Military Order 1 would ensure convictions but equally ensure international and domestic disgust and eventual overturn by the Supreme Court.

16. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, if the current rules are not adequate, what changes need to be made to those rules?

General BLACK. The Supreme Court in the *Hamdan* decision cited to a number of areas that must be changed before military commissions will pass Supreme Court review. Among those changes are: the creating of additional rights and procedures to ensure military commissions are in compliance with Common Article 3 of the 1949 Geneva Conventions, and a statement confirming the date of commencement of armed conflict with al Qaeda.

Admiral MCPHERSON. A review of the necessary changes is underway. Preliminarily, the current rules need to address more adequately issues such as discovery, access to evidence, presence of the accused, and self-incrimination. This will require a careful balancing of individual rights and national security interests in order to ensure adequate protection of both.

General RIVES. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. I believe the administration is preparing legislation for your consideration using this approach.

As I indicated in my testimony, I believe you could enact an Article 135(a) that could detail the basic substantive requirements for military commissions and then

permit an executive order to have the details, just as we have the MCM with the details. Alternatively, Congress could create a separate Code of Military Commissions as a new chapter in title 10, modeled to an appropriate degree after the UCMJ and similarly leave the details to an executive order. Either method must address the concerns articulated in *Hamdan* v. *Rumsfeld*.

General SANDKUHLER. A detailed review of the necessary changes is underway. Preliminarily, the current rules need to more adequately address issues with respect to discovery, access to evidence, presence of the accused, and self-incrimination, to name a few. I believe that a thorough, deliberate review without a "rush to the objective" is extremely important.

General ROMIG. It would be much easier to modify the UCMJ/MCM procedures and rules than to try to correct the problems with the current process. The fundamental issues of fairness and independence and the appearance of fairness and independence cannot be addressed without major changes to the procedures and processes. The presiding officer should be redesignated as a military judge and that person should have the authority and independence of a military judge under the court-martial process. The prosecutors should not be selected by the appointing authority or be answerable to the appointing authority. The appointing authority should be a senior military commander and not someone selected by a political appointee. There should be a judicial review process that provides meaningful review that would allow action to be taken when there has been an injustice done. The accused should be allowed to hear all of the evidence that is presented against him. These are just a few of the concerns that I have about the process as it exists now.

Admiral HUTSON. The only necessary changes would relate to the Military Rules of Evidence in order to accommodate the reality of evidence gathering by soldiers overseas.

17. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, how, in your view, can Congress best fashion legislation that will stand up to Supreme Court scrutiny?

General BLACK. In the *Hamdan* case, and other cases involving military commissions, the Supreme Court has demonstrated a preference for congressional involvement in the establishment of such tribunals. The Supreme Court has repeatedly demonstrated its greatest deference to decisions relating to the conduct of war and national security when Congress and the President act together. To that end, Congress and the President, with the assistance of subject matter experts, should draft legislation that establishes a unified vision of the scope and mission of military commissions.

Admiral MCPHERSON. A judicial process needs to be created that provides for the protections afforded under Common Article 3. This process should utilize the UCMJ as a baseline, with modifications to rules such as those dealing with the presence of the accused, handling of classified information, admissibility of hearsay, and the like. Creation of this process requires a careful balancing of rights under Common Article 3 and national security interests.

General RIVES. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. I believe the administration is preparing legislation for your consideration using this approach.

General SANDKUHLER. Obviously, the system that we create must afford the protections provided for under Common Article 3. This process should utilize the UCMJ as a baseline, with modifications to rules such as those involving the right against compulsory self-incrimination (Article 31b), the handling of classified information, and admissibility of hearsay, to name a few. As the Court stated, Common Article 3's concept of "indispensable judicial guarantees" under subsection (1)(d) "must be understood to incorporate at least the barest of those trial protections recognized by customary international law." Our system must incorporate these "barest of protections" while remaining true to our national security interests.

General ROMIG. Congress should start with the current UCMJ and MCM processes and procedures and then scrutinize those provisions that are problematic for cases arising in the chaos of combat on the battlefield. It should be a review conducted by knowledgeable congressional staffers, uniformed JAG Corps experts from all of the Services, and other outside legal experts. This would ensure that the best of the current practice of military justice is adapted to the unique environment that military commissions would be called upon to address.

Admiral HUTSON. Supreme Court scrutiny can be best ensured by making only minor changes to the UCMJ and MCM.

18. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, how should hearsay evidence be treated in any legislation authorizing military commissions for detainee trials?

General BLACK. Although it may not be necessary to provide for the admissibility of hearsay evidence when fashioning legislation on this matter, it is critical that it be admissible in military commissions. Hearsay evidence has been found necessary and reliable in the international war crimes tribunal at Nuremburg, the ICTY, and is admissible under the rules for the International Criminal Court. As mentioned in an earlier answer, the nature of war makes the usual methods of securing and presenting evidence impractical.

Admiral MCPHERSON. The primary concerns regarding hearsay evidence are authenticity and corroboration. Consistent with international tribunals, hearsay evidence should be admitted as long as the court is satisfied it is reliable given the context and character of the evidence for which it is admitted.

General RIVES. Under the Military Rules of Evidence (MRE), hearsay is not admissible except as provided in the MREs or by statute. The MREs further define statements that are not hearsay and provide for exceptions conditioned on the availability of the declarant. Further, there is a residual hearsay rule that permits the introduction of other statements, having equivalent circumstantial guarantees of trustworthiness, if the court determines that the statement is material evidence; has more probative value than other available evidence; and serves the interests of justice. The residual hearsay rule is functionally very much like that used in international tribunals and requires a military judge to find the evidence is probative and reliable.

These existing procedures provide a significant starting point for addressing the hearsay issues arising in military commissions. I believe the administration is preparing legislation for your consideration which will address the use of hearsay statements.

General SANDKUHLER. It is not practicable to have the same foundational premise (i.e., hearsay is not admissible, pursuant to Mil.R.Evid. 802) for any prospective process as in courts-martial. It is virtually certain that cases will involve hearsay evidence from deployed servicemembers and foreign nationals, to name just two examples. Any legislation should approach a hearsay rule from the perspective that hearsay statements are admissible unless the circumstances in which they were made render them unreliable or lacking in probative value. A similar standard is used in international tribunals. Allowing only reliable/probative statements would certainly provide one of those "barest of trial protections" envisioned by Common Article 3.

General ROMIG. This issue of how to handle hearsay evidence should be addressed in the process described in number 17 above.

Admiral HUTSON. Regarding hearsay, I recommend that the standard be that it is probative and reliable. Reliability could depend on a requirement that there be some other bit of corroborating evidence, as we do with confessions.

19. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, should we adhere to the rules of the MCM or should we apply a broader rule that, for example, would permit evidence if it is probative and reliable?

General BLACK. The rules for the commissions should be broader than those for courts-martial. By establishing a single rule of evidence that requires documents or testimony to be probative and reliable prior to being admitted, Congress can ensure that only reliable evidence is introduced at military commissions and none of that reliable evidence is excluded based on a technical violation of a rule of evidence.

Admiral MCPHERSON. Consistent with international tribunals, the overriding concern should be admissibility of evidence based on its probative value and its reliability given the context and character of the evidence for which it is admitted.

General RIVES. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions with regard to evidentiary issues. I believe you could enact legislation that could detail the basic evidentiary requirements and then permit an executive order to have the details, just as we have the MCM with the details. I believe the administration is preparing legislation for your consideration using this approach.

Because of the differences between military commissions and courts-martial I believe that you could apply a broader rule that would admit evidence provided there are guarantees of its trustworthiness, the evidence has probative value, and the interests of justice are best served by its admission.

General SANDKUHLER. As addressed in question number 18 above, admissibility based upon probative value and reliability would be practicable and ensure fundamental fairness.

General ROMIG. See numbers 17 and 18 above.

Admiral HUTSON. Again, I would rely on a standard of probative and apparently reliable. I would also exclude coerced evidence in all cases.

20. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, does the UCMJ—and specifically Military Rule of Evidence 505—adequately protect classified evidence? If not, what do we need to do to enhance the protection of classified information in detainee trials?

General BLACK. Under normal circumstances MRE 505 does adequately protect classified information. However, the prosecution of unlawful enemy combatants is not a normal circumstance. MRE 505 permits the closing of a court-martial for the presentation of classified evidence, but it does not permit the exclusion of the accused soldier during the presentation of that evidence, nor does it exclude the accused soldier from access to relevant classified evidence. Clearly it is not in the United States' national security interest to permit unlawful enemy combatants to have access to information that may compromise the security of our Nation. As a result, we must carefully craft rules that balance the necessity for a full and fair trial with the United States' national security interests. We may determine that there are rare occasions when a detainee may be excluded from the military commission. That determination must be made by a competent authority as part of a rigorous and regimented process that ensures the accused receives a full and fair trial.

Admiral MCPHERSON. MRE 505 deals with access to classified information and how that classified information can be placed in a public forum. MRE 505 provides the Federal Government with a privilege against disclosure of classified information. The privilege may only be exercised "by the head of the executive or military department or government agency concerned," and then only upon "a finding that the information is properly classified and that disclosure would be detrimental to the national security." MRE 505 permits the government in courts-martial to delete specified items of classified information from documents or substitute a portion or provide a summary of the information from such documents to protect classified information. The military judge, upon motion by the Government, may make this redaction or substitution determination ex parte in camera.

General RIVES. I believe the procedures of MRE 505 adequately protect classified evidence.

MRE 505 is based on the Classified Information Procedures Act (CIPA) (title 18, U.S.C. App. III). CIPA is designed to prevent unnecessary or inadvertent disclosures of classified information and advise the government of the national security implications of going forward. MRE 505 achieves a reasonable accommodation of the United States' interest in protecting information, and the accused's need to be able to mount a defense. The rule permits in camera, ex parte consideration of the Government's concerns by a judge, the substitution of unclassified summaries or other alternative forms of evidence, and ensures fairness to the accused. Under MRE 505, both the prosecution and the accused rely on and know about the evidence going to the court. The accused knows all that is to be considered by the trier-of-fact, and has opportunity to respond to all, and to assist the defense counsel in responding to all.

General SANDKUHLER. First, I interpret Common Article 3's requirement of "at least the barest of trial protections recognized by customary international law" to mean that accused individuals should have access to the evidence presented against them. Common Article 3 does not require that such individuals have the same discovery rights as guaranteed by the Constitution or the UCMJ. (The UCMJ affords an accused servicemember far greater discovery rights than American civilians have in our Article III courts.) MRE 505 addresses an accused's access to classified information and how that classified information may be produced at courts-martial. At a minimum, an ex parte review should be conducted by the presiding officer (I favor a judge) who could then order production of an unclassified summary of the evidence. (Although addressing in camera review, MRE 505(i) provides a good starting point for addressing this matter.) Unclassified summaries used at trial would facilitate the protection of classified evidence and the accused's "barest of trial protections" under Common Article 3.

General ROMIG. MRE 505 has worked well over the years in numerous courts-martial cases involving classified material. I believe that this procedure would be adequate to protect the interests of the government and yet ensure the accused re-

ceived a fair trial. Having said that, I do believe it should be reviewed in the process described in number 17 above to ensure there are not unanticipated problems in the MRE 505 process.

Admiral HUTSON. Yes, the UCMJ and MCM 505 adequately protect classified information.

21. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, in testimony before the Senate Judiciary Committee on Tuesday, much was made of the potential problems posed by Article 31(b) of the UCMJ—which essentially sets up the military's Miranda rights—in the context of detainee trials. Is it the case that this article ties our hands with respect to intelligence gathering?

General BLACK. There is a real possibility that Article 31(b) could adversely affect the gathering of intelligence if soldiers were required to advise detainees that they are permitted to remain silent. Article 31(b) was created by Congress to protect the fifth amendment right of U.S. servicemembers against self-incrimination during criminal investigations. The questioning of suspected unlawful enemy combatants by U.S. servicemembers is not done as part of a criminal investigation; it is done for the purpose of gathering intelligence. The application of Article 31(b) to suspected enemy combatants would be harmful to intelligence operations and would not fulfill Congress's intent when it created Article 31(b).

Admiral MCPHERSON. UCMJ Article 31(b) does not apply to interrogations for intelligence gathering. Article 31(b) states that when an accused or person suspected of an offense is being questioned, that person must be informed of their rights to remain silent and not make incriminating statements. Failure to so inform a suspect results in inadmissibility at trial of the statements made during the interrogation, and any derivative evidence. Such rights advisements in the context of investigating criminal offenses will not "tie our hands" with regards to intelligence gathering.

General RIVES. Article 31(b), UCMJ, is applicable whenever an individual subject to the UCMJ interrogates, or requests any statement from an accused or a person suspected of an offense. If a person subject to the Code interrogates or questions a person suspected of an offense, the questioner must first inform the person of the nature of the accusation, advise him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. The primary difference between Article 31 and the civilian requirement to warn is that the requirement to warn is triggered much earlier than whether the individual is in custody. Article 31(a) provides that a questioner subject to the code may not compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

The remedy for failure to comply with Article 31 is the exclusion of the unwarned or compelled statement in a court-martial. If Article 31 were made applicable to military commissions, it would obviously preclude the admissibility of an unwarned or compelled statement. I do not believe these rules impact the intelligence gathering process, but they would impact any subsequent use in a criminal proceeding.

While I believe that the UCMJ and the MCM is a superb starting point for updating military commissions, I recognize there will necessarily be differences between those documents and the rules and procedures for military commissions. The processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and still meet the requirements of criminal justice systems established by Common Article 3. The requirement to warn an individual before questioning is one area where deviation from the established UCMJ framework may well be warranted. I believe the administration is preparing legislation for your consideration using this approach.

General SANDKUHLER. Article 31(b) requires that someone suspected of an offense must be advised of his right to remain silent when questioned, regardless of whether he is actually "in custody." Article 31(b) does not address interviews or interrogations conducted to gather intelligence. Therefore, Article 31(b)'s requirement does not tie our hands vis-a-vis intelligence gathering. Under a strict application of the UCMJ, a tougher issue could arise if an individual from whom U.S. personnel sought intelligence was suspected of an offense as well. Clearly a strict application of the UCMJ would go above and beyond our Common Article 3 obligations.

General ROMIG. This argument is a "red herring" in that rights warnings at the point of capture on a battlefield are not practical and should not be part of the procedures for military commissions. The review process I mentioned in number 17 above should look at whether there should be rights warnings at another point in the process such as a determination that a captured detainee lacks legal status as

a lawful combatant or later in the process such as when charges are preferred. It may be that rights warnings do not make sense for unlawful combatants until judicial proceedings are initiated or perhaps they should not apply in any context. This is not a "show stopper" issue that the administration representatives seem to indicate that it is.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

22. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, if the military's Miranda rule is truly problematic, how should we fix it?

General BLACK. Article 31(b) could be problematic. The simplest way to fix the situation is to ensure that Article 31(b) is not applicable to evidence used at military commissions.

Admiral MCPHERSON. UCMJ Article 31(b) is broader than Miranda in that it requires rights advisements at the point a person is suspected of a criminal offense, not at the point of custodial interrogation. When an individual is detained on the battlefield, that person is not necessarily an accused or a person suspected of an offense within the meaning of Article 31(b) and they can be interrogated, often for intelligence purposes.

To the extent that the issue is whether evidence from battlefield interrogations could be used at trial before a military commission, one change could be that rights under Article 31(b) not attach until after the individual is reasonably suspected of having committed an offense, and is subject to custodial interrogation. Another alternative is relaxing the "exclusionary rule" for unwarned statements. For instance the two most recent convening International Criminal Courts, ICTY and International Criminal Tribunal for Rwanda (ICTR), do not have an exclusionary rule and the accused has the burden of proving that the "manner of production casts substantial doubt on the evidence's reliability or that its admission would seriously damage the integrity of the proceedings."[1]

General RIVES. The battlefield is not an orderly place. The military commission process has to take into account that fact. While I believe that the UCMJ and the MCM is a superb starting point for updating military commissions, I recognize there will necessarily be differences between those documents and the rules and procedures for military commissions. The processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and still meet the requirements of criminal justice systems established by Common Article 3. The requirement to warn an individual before questioning is one area where deviation from the established UCMJ framework may well be warranted. I believe the administration is preparing legislation for your consideration using this approach.

General SANDKUHLER. I do not believe that Article 31(b) is truly problematic, because it does not apply to intelligence gathering. To address the ultimate issue, I do not believe that we need a 31(b) rights advisement (or Miranda warning) equivalent in a process designed for prosecuting unlawful enemy combatants.

General ROMIG. See number 21 above.

Admiral HUTSON. I would rely on the administration and DOD to formulate the rules to the extent they demonstrate an understanding of justice and the role of the United States in terms of human rights and the rule of law. To the extent they fail in that regard, Congress could assume its constitutional role.

23. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, some have suggested that, instead of setting forth a set of military commission rules that would comply with the *Hamdan* decision, we should give broad discretion to the administration and specifically to the DOD to permit them to formulate the new trial rules post-*Hamdan*. What is your view of this proposed course of action?

General BLACK. I believe a combination of specific rules and a grant of authority to the DOD is the best method of approaching this problem. The specific rules should reflect our Nation's commitment to the rule of law and establish guiding principles that ensure a fair trial. The DOD should be granted authority to establish

[1] Both tribunals adopted a "best evidence" type of probative value standard in Article 89 of their respective rules of procedure. The standards for excluding evidence are at Article 95 of each tribunals rules.

International Criminal Tribunal Yugoslavia Rules of Procedure: http://www.un.org/ictv/legaldoc-e/index.htm

International Criminal Court Rwanda Rules of Procedure: http://69.94.11.53/default.htm

the majority of the rules of procedure that will implement those principles embodied in the statute. This structure would be similar to the current structure of the U.S. military justice system where Congress passed the UCMJ and the President was granted the authority to create the MCM which implements the UCMJ.

Admiral MCPHERSON. The process of developing new trial rules for military commissions should be a deliberative process that maximizes the assets of the each respective Service's JAGs, the DOD, the DOJ, the administration, and Congress to ultimately produce legislation for military commission rules that are in compliance with *Hamdan.*

General RIVES. I believe that legislation is appropriate, because as the Supreme Court noted again in *Hamdan,* the President's powers in wartime are at their greatest when specifically authorized by Congress. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. The legislation should provide authority for the executive to draft regulations, similar to the MCM, that would specify the implementing procedures. I believe the administration is preparing legislation for your consideration using this approach.

General SANDKUHLER. My view is that the administration, DOD, and DOJ are capable of devising a new set of rules and procedures for military commissions based in large part upon the UCMJ, in full compliance with the *Hamdan* decision, and amenable to Congress and the American people. It would be helpful for Congress to give us broad authorization, as in the UCMJ, and allow DOD to establish the procedures as we do with the MCM.

General ROMIG. If this approach is taken, I am fairly confident that the Supreme Court will be hearing another case on military commissions in the future.

Admiral HUTSON. Admiral Hutson did not respond in time for printing. When received, answer will be retained in committee files.

24. Senator MCCAIN. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, at the House Armed Services Committee hearing on *Hamdan*, Mr. Bradbury of the DOJ's Office of Legal Counsel said the administration wishes to maintain flexibility in introducing evidence coerced from detainees. Specifically, he said, "We do not use as evidence in military commissions evidence that is determined to have been obtained through torture. But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I don't think you can make an absolute rule." Is Mr. Bradbury correct in his analysis of coercion and the need to introduce coerced evidence in detainee trials?

General BLACK. I believe Mr. Bradbury is correct that the term coercion is imprecise and susceptible to many interpretations. What constitutes impermissible coercion will certainly be the subject of significant motion practice/litigation before the military commissions. If military commissions apply the probative and reliable standard to statements that are offered into evidence, then statements that are the result of impermissible coercion will be excluded as unreliable.

Admiral MCPHERSON. Evidence obtained from a detainee through torture is inherently unreliable and should be inadmissible. Evidence obtained through coercion may be admissible so long as the court is satisfied of its reliability given the context and character of the evidence for which it is admitted.

General RIVES. Generally, the confession or admission of an accused that has been determined by a military judge to be involuntary is not admissible in a court-martial over the accused's objection. Generally, a statement is involuntary if it is obtained in violation of the self-incrimination privilege or due process clause of the fifth amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. Each situation is obviously fact determinative and the military judge makes a determination whether the statement is voluntary considering the totality of the circumstances.

I certainly trust the judgment of experienced military judges and I do not believe evidence that is found to be coerced and thus involuntary should be normally considered by a military commission.

General SANDKUHLER. I would certainly agree with Mr. Bradbury that the "coercion spectrum"—from pressure to speak, to something just short of torture—is difficult to quantify. I also assume that it is likely that a significant number of detainees would allege that their statements were a product of coercion (if not torture), because coerced statements are involuntary and inadmissible in our system of jurisprudence. An absolute exclusionary rule would therefore create practicability problems. In balancing this very real concern with the need for fundamental fairness,

I believe a rule could be fashioned such that, when "coercion" (whatever that may be) is alleged by an accused, such statement may still be admissible if a presiding official judge found by a preponderance of the evidence that the statement was reliable given the totality of the circumstances in which it was made.

General ROMIG. There should be no coerced testimony allowed in any trial sanctioned or approved by the United States. You can and should make an absolute rule on this and to do otherwise is to start down a very slippery slope. I find it disturbing that representatives of the United States Government would argue otherwise.

Admiral HUTSON. No, Mr. Bradbury fails to understand or appreciate the fundamentals of justice. Coerced testimony is always unreliable simply because it is coerced. Moreover, it is unbecoming the United States to use it. There is no point in "winning" the war if we lose our heart and soul in the process.

QUESTIONS SUBMITTED BY SENATOR LINDSEY O. GRAHAM

JAG PARTICIPATION IN DETAINEE INTERROGATION WORKING GROUP

25. Senator GRAHAM. Brigadier General Sandkuhler and Major General Romig, did you receive the March 2003 draft report of the Working Group on Detainee Interrogations in the Global War on Terrorism and at the time, what did you think happened to the March 2003 draft report?

General SANDKUHLER. I participated in the Working Group on Detainee Interrogations (WG). I attended several principal-level meetings, held with large groups, between 23 January and 3 April 2003, when our involvement ended. In my absence, my deputy attended principal-level meetings. I also assigned a lieutenant colonel as my primary action officer to this WG. After the initial WG meeting on 23 January, the WG met for several weeks at the action officer level, preparing several drafts of the WG report.

The last draft WG report we received was dated 6 March 2003. We took exception to portions of this draft, and my deputy, on my behalf, submitted comments on 10 March 2003. We were not provided a final draft WG report, nor was there final coordination on the report. We asked for the final WG report but did not receive it until 22 June 2004, when it was declassified and released to the public by DOD. That final WG report was dated 4 April 2003.

General ROMIG. We did receive the draft report and we were told that the Secretary of Defense was issuing separate guidance that incorporated our concerns. We were led to believe that there was not a final report—that it had been put on hold because of the actions of the Secretary of Defense. I did not learn that there was a final report until over 14 months later when I believe it was revealed at another hearing.

26. Senator GRAHAM. Brigadier General Sandkuhler and Major General Romig, did you receive a copy of the final April 2003 report of the Working Group on Detainee Interrogations in the Global War on Terrorism that was briefed to the Southern Command (SOUTHCOM) and Guantanamo commanders?

General SANDKUHLER. I received a copy of the final April 2003 report on 22 June 2004, when it was declassified and released to the public by DOD. The last draft I saw was dated 6 March 2003, to which I had provided comments on 10 March 2003. There was no final coordination of the report, and although I asked for the final report, I did not receive it until 22 June 2004.

General ROMIG. No, we did not receive copies of it and we did not know it had been briefed to the SOUTHCOM and Guantanamo commanders.

27. Senator GRAHAM. Brigadier General Sandkuhler and Major General Romig, when did you learn that the April 2003 report had been briefed to SOUTHCOM and Guantanomo commanders?

General SANDKUHLER. My final involvement in review of interrogation techniques consisted of a meeting with DOD GC on 3 April 2003. During that meeting, DOD GC allowed us to read, but not keep, a draft of a memo that the Secretary of Defense was expected to sign approving certain interrogation techniques. This memo required that Commander, SOUTHCOM, and his staff, be briefed by the Chairman of the Working Group on Detainee Interrogations before implementing any approved techniques. I later learned that the Secretary of Defense had signed a memo dated 16 April 2003, approving certain techniques for use at Guantanamo only, and I eventually received a copy of the memo. I cannot recall the specific date I received the memo. I do not know when Commander, SOUTHCOM, and the commander of

Guantanamo were actually briefed as required by that 16 April 2003 Secretary of Defense memo.

General ROMIG. When I read these questions.

28. Senator GRAHAM. Brigadier General Sandkuhler and Major General Romig, were you able to provide input on the final April 2003 report and on the contents of the briefing to SOUTHCOM and Guantanamo commanders?

General SANDKUHLER. No. With respect to the April 2003 report, after providing comments on 10 March 2003 to the draft WG report dated 6 March 2003, we did not see another draft, and did not receive a copy of the final WG report until 22 June 2004. We had no input at all on the contents of any brief provided to the SOUTHCOM and Guantanamo commanders.

General ROMIG. No, see numbers 25–27 above.

QUESTION SUBMITTED BY SENATOR BILL NELSON

THE UNIFORM CODE OF MILITARY JUSTICE AND PROSECUTING DETAINEES

29. Senator BILL NELSON. Major General Black, Rear Admiral McPherson, Major General Rives, Brigadier General Sandkuhler, Major General Romig, and Rear Admiral Hutson, a recent New York Times article, "Military Lawyers Prepare to Speak on Guantanamo," dated July 11, 2006 (see attached), states that "most military lawyers say they believe that few, if any, of the Guantanamo detainees could be convicted in regular courts-martial." An attorney representing a detainee indicated that, "she was confident that she would win an acquittal for her client, who is suspected of being an accountant for al Qaeda, under courts-martial rules." If we were to use the UCMJ to prosecute detainees, how, and how significantly, would it have to be changed to ensure its application would not be a "get-out-of-jail-free card" for terrorists?

MILITARY LAWYERS PREPARE TO SPEAK ON GUANTANAMO, BY NEIL A. LEWIS, NEW YORK TIMES, JULY 11, 2006

Washington, July 10—Four years ago, the military's most senior uniformed lawyers found their objections brushed aside when the Bush administration formulated plans for military commissions at Guantanamo Bay, Cuba. This week, their concerns will get a public hearing as Congress takes up the question of whether to resurrect the tribunals struck down by the Supreme Court.

"We're at a crossroads now," said John D. Hutson, a retired rear admiral who was the top uniformed lawyer in the Navy until 2000 and who has been part of a cadre of retired senior military lawyers who have filed briefs challenging the administration's legal approach. "We can finally get on the right side of the law and have a system that will pass Supreme Court and international scrutiny."

Admiral Hutson, one of several current and former senior military lawyers who will testify this week before one of the three congressional committees looking into the matter, plans to urge Congress to avoid trying to get around last month's Supreme Court ruling.

Beginning shortly after the attacks of September 11, 2001, the military lawyers warned that the administration's plan for military commissions put the United States on the wrong side of the law and of international standards. Most important, they warned, the arrangements could endanger members of the American military who might someday be captured by an enemy and treated like the detainees at Guantanamo.

But the lawyers' sense of vindication at the Supreme Court's 5-to-3 decision is tempered by growing anxiety over what may happen next. Several military lawyers, most of them retired, have said they are troubled by the possibility that Congress may restore the kind of system they have long argued against.

Donald J. Guter, another retired admiral who succeeded Admiral Hutson as the Navy's top uniformed lawyer, said it would be a mistake for Congress to try to undo the Supreme Court ruling. Admiral Guter was one of several senior military judge advocates general, known as JAGs, who after objecting to the planned military commissions found their advice pointedly unheeded.

"This was the concern all along of the JAGs," Admiral Guter said. "It's a matter of defending what we always thought was the rule of law and

proper behavior for civilized nations." One of the more intriguing hearings will be held Thursday as the current top military lawyers in the Navy, Army, Air Force, and Marines testify before the Senate Armed Services Committee. The main issue at stake will be whether they express the same concerns of those out of uniform who have been critical of the administration's approach.

Longstanding custom allows serving officers to give their own views at congressional hearings if specifically asked, and some in the Senate expect the current uniformed lawyers to generally urge that Congress not stray far from the UCMJ, the system that details court-martial proceedings.

Senator Bill Frist, the Republican leader, told reporters on Monday that he did not expect the Senate to take up any legislation on the issue until at least after the August recess of Congress. The opportunity to rewrite the laws lies in the structure of the Supreme Court's ruling, which emphasized that Congress had not explicitly approved deviations from ordinary court-martial proceedings or the Geneva Conventions.

The court majority said the military commissions as currently constituted were illegal because they did not have the same protections for the accused as do the military's own justice system and court-martial proceedings. In addition, the court ruled that the commissions violated a part of the Geneva Conventions that provides for what it said was a minimum standard of due process in a civilized society.

In response, some legislators have said they will consider rewriting the law to make that part of the Geneva Conventions, known as Common Article 3, no longer applicable. "We should be embracing Common Article 3 and shouting it from the rooftops," Admiral Hutson said. "They can't try to write us out of this, because that means every two-bit dictator could do the same."

He said it was "unbecoming for America to have people say, 'We're going to try to work our way around this because we find it to be inconvenient.'"

"If you don't apply it when it's inconvenient," he said, "it's not a rule of law." Brig. Gen. David M. Brahms, a retired officer who was the chief uniformed lawyer for the Marine Corps, said he expected experienced military lawyers to try to persuade Congress that the law should not be changed to allow the military commissions to go forward with the procedures that the court found unlawful.

"Our central theme in all this has always been our great concern about reciprocity," General Brahms said in an interview. "We don't want someone saying they have our folks as captives and we're going to do to them exactly what you've done because we no longer hold any moral high ground."

Senator Patrick J. Leahy of Vermont, the ranking Democrat on the Judiciary Committee, which will hold its hearing on Tuesday, said: "The first people we should listen to are the military officers who have decades of experience with these issues. Their insights can help build a system that protects our citizens without sacrificing America's ideals."

Underlying the debate over how and whether to change the law on military commissions is a battle over the President's authority to unilaterally prescribe procedures in a time of war. The Supreme Court's decision was a rebuke to the administration's assertions that President Bush's powers should remain mostly unrestricted in a time of war.

Most military lawyers say they believe that few, if any, of the Guantanamo detainees could be convicted in a regular court-martial.

Lt. Col. Sharon A. Shaffer of the Air Force, the lawyer for a Sudanese detainee who has been charged before a military commission, said she was confident that she would win an acquittal for her client, who is suspected of being an accountant for al Qaeda, under court-martial rules. "For me it was awesome to see the court's views on key issues I've been arguing for years," Colonel Shaffer said.

The majority opinion, written by Justice John Paul Stevens, said the two biggest problems with the commissions were that the military authorities could bar defendants from being present at their own trial, citing security concerns, and that the procedures contained looser rules of evidence, even allowing hearsay and evidence obtained by torture, if the judge thought it helpful. Colonel Shaffer said she was restrained under the rules from calling as a witness al Qaeda informant whose information had been used to charge her client. "I'm going to want for my client to face his accuser," she said, "and for me to have an opportunity to impeach his testimony."

General BLACK. The affect of using the UMCJ to prosecute suspected unlawful enemy combatants would be substantial. There are a number of aspects of the court-martial system that would compromise our warfighting mission, to include the open discovery and evidence collection methods. Moreover, the UCMJ provides additional protections to soldiers that are not afforded to civilians accused of a crime. It would be inappropriate to extend those additional rights not afforded U.S. civilians to unlawful enemy combatants. However, whatever process is used to try unlawful enemy combatants, it will never be a "get-out-of-jail-free" card. Regardless of the outcome of any unlawful enemy combatant's trial, he may still be detained on separate grounds as long as the conflict continues.

Admiral MCPHERSON. The Rules for Courts Martial should be changed only insofar as they remain in compliance with Common Article 3, while not undermining our national security.

General RIVES. I believe that the UCMJ and the MCM is a superb starting point for updating military commissions. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions. That process is under way and I believe the administration is preparing legislation for your consideration using this approach.

As I indicated in my testimony, I believe you could enact an Article 135(a) that could detail the basic substantive requirements for military commissions and then permit an executive order to have the details, just as we have the MCM with the details. Alternatively, Congress could create a separate Code of Military Commissions as a new chapter in title 10, modeled to an appropriate degree after the UCMJ and similarly leave the details to an executive order. Either method must address the concerns articulated in *Hamdan* v. *Rumsfeld.*

General SANDKUHLER. The UCMJ is a great model from which to develop a system to prosecute unlawful enemy combatants. But some of the provisions and rules would certainly need to be changed/adapted to address this paradigm. Many of these are discussed above (e.g., discovery, hearsay, self-incrimination/rights warnings, handling of classified material). I am quite confident that collectively we (e.g., DOD, DOJ, the administration) can create a system with rules and procedures for military commissions that will provide a fundamentally fair trial. The rules and procedures should be based in large part upon the UCMJ, in full compliance with the *Hamdan* decision, and be amenable to Congress and the American people.

General ROMIG. The focus and goal of fashioning rules and procedures for military commissions should be to meet the constitutional requirements of the *Hamdan* decision rather than attempting to create a process that will facilitate convictions. In meeting the constitutional requirements of *Hamdan* the drafters need to bear in mind the evidentiary challenges of prosecutions derived from the unique environment of the battlefield.

Admiral HUTSON. Principally, the MRE would have to be adjusted to accommodate the reality of gathering evidence. For example, hearsay could be admitted if it were apparently reliable and corroborated somehow. Physical evidence could be admitted absent a perfect chain of custody if it were apparently reliable. Confessions and statements against interest could be admitted under the same test in spite of a lack of Article 31 warnings.

Coerced testimony should never be admitted under any circumstances.

[Whereupon, at 1:47 p.m., the committee adjourned.]

CONTINUE TO RECEIVE TESTIMONY ON MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

WEDNESDAY, JULY 19, 2006

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m. in room SR–325, Russell Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Collins, Talent, Chambliss, Graham, Cornyn, Thune, Levin, Kennedy, and Dayton.

Committee staff members present: Charles S. Abell, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: William M. Caniano, professional staff member; David M. Morriss, counsel; and Scott W. Stucky, general counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Michael J. Kuiken, professional staff member; and William G.P. Monahan, minority counsel.

Staff assistants present: Micah H. Harris, Jessica L. Kingston, and Jill L. Simodejka.

Committee members' assistants present: Richard H. Fontaine, Jr., assistant to Senator McCain; John A. Bonsell, assistant to Senator Inhofe; Mackenzie M. Eaglen, assistant to Senator Collins; Clyde A. Taylor IV, assistant to Senator Chambliss; Matthew R. Rimkunas, assistant to Senator Graham; Russell J. Thomasson, assistant to Senator Cornyn; Stuart C. Mallory, assistant to Senator Thune; Mieke Y. Eoyang, assistant to Senator Kennedy; Frederick M. Downey, assistant to Senator Lieberman; William K. Sutey, assistant to Senator Bill Nelson; Eric Pierce, assistant to Senator Ben Nelson; Luke Ballman and Chani Wiggins, assistants to Senator Dayton; and Andrew Shapiro, assistant to Senator Clinton.

OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER. Good morning, everyone. The committee meets today to conduct the second in a series of hearings on military commissions in light of the recent Supreme Court decision in *Hamdan* v. *Rumsfeld.*

Last week, we had an excellent hearing, with the testimony from the incumbent judge advocates general (JAGs) of the Armed Forces, the staff judge advocate to the Commandant of the Marine Corps, and two retired JAGs. These officers gave the committee the benefit of their many years of expertise in the areas of military justice and the law of war. I believe that all members will agree that the committee will benefit greatly from having had that important testimony.

Today, we have two distinguished panels of witnesses from the private sector. The first panel is composed of representatives of nongovernmental organizations, including human rights groups and bar associations. The second is composed of academics who have significant research and teaching experience in the areas with which the committee is presently concerned.

I welcome all of our witnesses and thank them for finding the time to join us here in the Senate this morning. I know that some of you had to travel substantial distances to participate, but this is a very important decision on behalf of our Nation. The credibility of our Nation, in a way, is being examined in the eyes of the world. While there may have been the best of efforts in the first effort to try and reconcile this issue, the Supreme Court has now spoken, and it's the function of Congress to write a law consistent with the guidelines in that court of opinion.

Before turning to the distinguished ranking member, I would like to reiterate what I said last week. Congress simply must get it right this time. We must construct a means of prosecuting the detainees suspected of violations of the law of war, war crimes, that will afford them legal rights. Second, we must always keep in mind the world is watching what we do here. The United States has always stood for adherence to the international law of war, and we must proceed on any legislation carefully. That legislation has to be done to the best of our ability, such that it will survive future examinations by the Federal court system; and, indeed, possibly a future Supreme Court opinion.

The witnesses on our first panel are as follows: Elisa Massimino, Washington Director of Human Rights First; Katherine Newell Bierman, Counterterrorism Counsel, U.S. Program, Human Rights; Eugene Fidell, President, National Institute of Military Justice (NIMJ); Michael Mernin, Chairman, Committee on the Military Affairs and Justice, Association of the Bar of the City of New York; and Dr. James Carafano, Senior Research Fellow, The Heritage Foundation.

We welcome you all.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT BY SENATOR JOHN WARNER

The committee meets today to conduct the second in a series of hearings on military commissions in light of the recent Supreme Court decision in *Hamdan* v. *Rumsfeld.* Last week, we had an excellent hearing with testimony from the incumbent Judge Advocates General of the Armed Forces, the Staff Judge Advocate to the Commandant of the Marine Corps, and two retired judge advocates general. These officers gave us the benefit of their great expertise in the areas of military justice and the law of war, and I believe that all members will agree that the committee will benefit greatly from having had their testimony.

Today, we have two distinguished panels of witnesses from outside the Department of Defense. The first panel is composed of representatives of non-governmental

organizations, including human rights groups and bar associations. The second is composed of academics who have significant research and teaching experience in the areas with which the committee is presently concerned. I welcome all our witnesses to the hearing; I know that some of you have had to travel substantial distances to participate, and we are grateful that you did so.

Before turning to the distinguished ranking member, I would like to reiterate what I said last week: Congress must get this right. We must construct a means of trying detainees suspected of violations of the law of war that will pass muster, be effective, and protect our ability to wage this war. Second, we must always keep in mind that the world is watching what we do here. The United States has always stood for adherence to the international law of war, and we must proceed on any legislation carefully and, I hope, in a bipartisan manner.

The witnesses on our first panel are as follows:

Elisa Massimino, Washington Director of Human Rights First;

Katherine Newell Bierman, Counterterrorism Counsel, U.S. Program, Human Rights Watch;

Eugene Fidell, President, National Institute of Military Justice;

Michael Mernin, Chair, Committee on Military Affairs and Justice, Association of the Bar of the City of New York; and

Dr. James Carafano, Senior Research Fellow, The Heritage Foundation.

The witnesses on the second panel are:

Neal Katyal, Professor of Law, Georgetown University;

David A. Schlueter, Hardy Professor of Law and Director Advocacy Programs, St. Mary's University; and

Scott L. Silliman, Professor of the Practice of Law and Executive Director, Center on Law, Ethics, and National Security, Duke University.

Chairman WARNER. Senator Levin.

I'd also indicate that we discussed the International Committee of the Red Cross (ICRC) as being a possible participant this morning. In keeping with their long-time traditions, although they have a keen interest, they decided not to accept the invitation.

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. Mr. Chairman, thank you, and thank you for convening this series of hearings. They are extremely important to the Nation. You are proceeding with your customary thoughtfulness and care, and the Nation is very much in your debt for how you are handling this.

The Supreme Court in *Hamdan,* ruled that because the military commission structure and procedure did not meet the standards of the Uniformed Code of Military Justice (UCMJ) or those of the Geneva Conventions, that they lacked "the power to proceed." Congress has now begun the process of determining what needs to be done to ensure that our system for trying detainees for crimes meets the standards of the laws which are binding on the executive branch.

One administration official has testified recently that Congress should simply ratify the military commission procedures established by the Department of Defense (DOD), without change. At the House Armed Services Committee (HASC) hearing last Wednesday, DOD Deputy General Counsel Dell'Orto stated that such an approach would be "a very desirable way to proceed."

However, our Nation's top military lawyers disagree. Last Thursday, the committee heard from six JAGs, both Active and retired. They all rejected the idea that Congress should pass legislation authorizing the military commissions as currently configured. A majority of the JAGs, and I believe a majority of the members of this committee, favor taking the existing rules of courts-martial under

the UCMJ as the starting point for the framework for our consideration of military commissions and making modifications where necessary to meet the conditions of warfare and practicality. By doing so, we would benefit from the development of our system of military justice over the last 60 years.

In addition, all the JAGs before us last week agreed that, consistent with the Supreme Court's ruling, exceptions to the rules for courts-martial ought to be based on practicality and necessity, not on convenience. Our hearing last week highlighted a number of areas which Congress will need to examine carefully, such as discovery rights and access to classified evidence. We very much welcome and need the advice of our JAGs and other specialists in international law in working our way through these complicated issues of law.

Our JAGs are the ones most knowledgeable of our system of military justice. They are best able to evaluate the negative impact on U.S. Service personnel when we deviate from the standards and procedures of the UCMJ in our treatment of others. As the JAG of the Navy, Admiral McPherson stated, "We need to think in terms of the long view, and to always put our sailors, soldiers, marines, and airmen in the place of an accused when we're drafting these rules to ensure that these rules are acceptable when we have someone in a future war who faces similar rules."

So, we must not repeat the mistakes the administration made in establishing these military commissions. Congress needs to proceed deliberately and carefully, soliciting a range of views on the appropriate procedures to be applied to detainees in U.S. custody. Last week's hearing with our JAGs was the right place to begin our discussion. Today's hearing is an important next step in that process. Again, I want to thank our chairman for scheduling this hearing, to give us an opportunity to hear the views of others outside government who are knowledgeable of our system of military justice and its impact on our security throughout the world.

If our process of developing legislation on military commissions is perceived as open and fair, then there is a better chance that the end result will be accepted as legitimate, and that any convictions will be upheld by our courts.

Procedures for military commissions must reflect our values as a Nation and as a leading advocate for the rule of law. This will strengthen our cause and help rally others to join us in opposing terrorism.

I emphasize, finally, that the issue before us today is not whether, or for how long, detainees may be kept at Guantanamo or elsewhere, nor what the conditions of their detention or the rules for their treatment or interrogation are, or should be. We are only dealing with the rules that need to be adopted to apply in criminal trials of the small number of detainees who may be tried for violations of the laws of armed conflict. It must also be borne in mind that those who may be acquitted by a military commission after a criminal trial will not be automatically released thereby from detention.

Again, I join you, Mr. Chairman, in welcoming all of our panelists, and I look forward to their testimony.

Chairman WARNER. Thank you very much, Senator Levin.

One of our colleagues, the chairman of the Environment and Public Works Committee, must start his own hearing this morning. I invite you, Senator Inhofe, to give your comments.

Senator INHOFE. I thank you, Mr. Chairman.

Just to further elaborate on that, we had the water bill on the floor, and I'll be managing that bill, and I must get down there. I regret this, because I would like to stay here and hear the panel. However, I do want to express the minority view. I guess another way of putting that is once again being the skunk at the family picnic.

After the last hearing on this subject, last Thursday, I took some time to review what we discussed, and I am worried about what we did then and what we're doing here today. We seem to be trying to create some legislation that will afford more rights to the unlawful enemy combatants who fought against us than we afford our own citizens. Now, that's what I think we're doing today. Let me explain.

Historically, we tried to fight terrorism as if it were merely a criminal activity. We were attacked in the World Trade Center in 1993, in Beirut in 1983, our embassies in Tanzania and Kenya in 1998, and the U.S.S. *Cole* in 2000. Our efforts to use criminal law to hunt and try these terrorists didn't stop them, it didn't deter them. That's what we were doing in those days. It emboldened them.

So, here we have the attacks on the Twin Towers in New York and on the Pentagon and on the Flight 93 in Pennsylvania. But all of that changed after September 11. We started treating the enemy as the terrorists that they are. Now some here are trying to go back by treating these terrorists like criminals. Once again, we seem to be in denial that we are, in fact, at war. We cannot deal with this enemy with criminal law. We need to use all the tools available to us. I think the President set up a commission to deal with these enemy combatants the way they should be dealt with. I know that Senator Levin made the comment that we are not going to go back to exactly as that was. The Supreme Court isn't going to let us do that. But, nonetheless, the commission did set these things up, and I think that's the way that should have been dealt with. The Supreme Court doesn't agree, and the system in its entirety. However, the Supreme Court left the details up to us.

Now, I don't very often disagree, Mr. Chairman, with you, but I don't believe we need to have a lot of hearings and spend a lot of time on this and end up in major legislation. I believe we need to take the commission set up by the President and add the protections that may be needed to get on with the trials. Instead, we seem to be trying to make an argument to take the UCMJ, the same system used by our soldiers, take away a few rights, and use it. But that's not going to work. Criminal law doesn't belong in this debate. These are not criminals; they're terrorists. Should they have the same rights as citizens? You look at these rights that we have discussed last week in terms of access to classified evidence, attorney-client privileges, Miranda rights, a chain of custody, right to counsel, we're dealing with terrorists, now. I think of the troop in the field. Sometimes he's faced with two decisions: pull the trigger and kill somebody or try to capture someone. Now, could it be

another decision as to whether or not they're going to be having to read them their rights?

I would remind my colleagues that our troops are fighters, and they're not attorneys. I bet they're wondering what we're doing here today.

If you look closely at the panel before us today, you'd think that this is about human rights and torture. Now, that bothers me more than anything else. The *Hamdan* case was not about torture, it was not about human rights, it did not complain that we denied human rights. This hearing should be about a process and procedure by which we try certain detainees. Just as important, it should be about making sure some of these people do not return to this battlefield or any future battlefield. Look what happened at Guantanamo. In Guantanamo, we caved in to pressure by some of the same people that are causing these hearings today, and we released detainees, only to find them again on the battlefield. At least 10 detainees we have documented that were released in Guantanamo after U.S. officials concluded that they posed no real threat, or no significant threat, have been recaptured or killed by fighting the U.S. and coalition forces, mostly in Afghanistan. Now, you have to say, if we know of 10 of them, how many more are out there?

So, Mr. Chairman, these are not soldiers fighting for a country. They don't deserve that status. What we are doing here today seems to be trying to give them that status, to this one Senator.

Let's remember, we're at war, and we're fighting terrorists. They don't deserve the same rights as lawful soldiers. We don't need to overly complicate this thing, Mr. Chairman. Let's take the current system of commissions set up by the President, add a few protections to address the problems identified by the United States Supreme Court, and proceed on with defending America.

I appreciate very much your giving me this opportunity.

Chairman WARNER. Thank you very much, Senator Inhofe.

Are there other Senators present that would like to make some opening comments?

Senator McCain?

Senator MCCAIN. No, sir.

Chairman WARNER. Senator Dayton? Senator Graham? Senator Thune? [No response.]

Very well.

We are pleased, now, to receive the testimony of our distinguished panel of witnesses, and we'll start with Ms. Massimino, Washington Director of Human Rights First.

STATEMENT OF ELISA C. MASSIMINO, DIRECTOR, WASHINGTON OFFICE, HUMAN RIGHTS FIRST

Ms. MASSIMINO. Thank you, Mr. Chairman.

I have a longer statement that I'd like to submit for the record, if I could.

Chairman WARNER. Yes. I wish to advise all witnesses that their entire prepared statement shall be made a part of today's record. I think it would be wise if you selectively pick those parts that you feel should be highlighted.

Thank you.

Ms. MASSIMINO. Thank you.

Thank you, Mr. Chairman, so much for your leadership on this issue and so many important issues facing the country. We very much appreciate the opportunity.

Chairman WARNER. We have an unusual sound system in here. In my numerous years here, I've seen it go through a lot of iterations. We have a new one, and it requires being about 6 inches from the microphone and speaking directly into it. We have a lot of people here today who are quite anxious to hear your testimony.

Ms. MASSIMINO. Thank you, Mr. Chairman. Is that better? Can you hear?

Chairman WARNER. That is better.

Ms. MASSIMINO. Thank you very much.

Thank you, to all the members of the committee. We have very much appreciated the opportunity to work with many of you on these important issues related to detainee treatment and trial. We very much appreciate the committee's deliberate and careful approach to these difficult subjects.

We also share the committee's goal of identifying a system capable of bringing those who have committed war crimes to justice in a manner that's fair, consistent with our values, and satisfies the requirements of domestic and international law.

From the time that the President issued the military order, on November 13, 2001, authorizing trials by military commission, Human Rights First has focused particular attention on the development and operation of the system that proceeded from that order. We submitted formal comments on the subsequent military orders and instructions which make up the frequently changing rules under which the commissions operated. We published reports detailing the ongoing flaws in the commission system. We regularly monitored and reported on commission proceedings down at Guantanamo. We also filed friend-of-the-court briefs in the *Hamdan* case in the Supreme Court and in the Court of Appeals for the District of Columbia Circuit.

As we detailed in our recent report, Trials Under Military Order, we believe the commission system that was struck down by the Supreme Court failed to meet basic fair-trial standards. Our concerns about the commissions fell into five broad categories: overly broad jurisdiction, disincentives for civilian participation, secret evidence and secret trial proceedings, admissibility of evidence obtained through torture or other coercion, and lack of an independent appeal outside the chain of command. But an even more powerful indictment of the commission system than the rules and procedures that governed its operation is the way the ad hoc and constantly changing system looked, up close, in practice. From our vantage point as observers, one only needs to read some of the hearing transcripts from the commission proceedings to see these trials were not worthy of bearing the label "Made in America." While the system was staffed by many talented and honorable service personnel, it is abundantly clear from this commission experience why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by regularly constituted courts. The system in operation at Guantanamo did not come close to passing that test.

The challenge you now face is to look forward and develop a system for trying these cases. I'm not going to take more time today to critique the deficiencies of the failed military commission system. That system is so inherently flawed that we believe it should be set aside in its entirety.

The Hamdan decision presents you and the President with an important opportunity to turn the page and to take up, with renewed energy and improved tools, the critical task of trying those who have committed war crimes against the United States.

In order to meet that challenge and to avoid another round of litigation that would further delay the pursuit of justice, it's important to understand what the Supreme Court ruling in *Hamdan* requires.

Of course, as a preliminary matter, and the reason why we're here today, any future tribunals must be authorized by Congress and not simply decreed by the executive. Whether the tribunals end up being general courts-martial, some modified version of that, or properly constituted military commissions, they must derive their authority from the legislative powers of Congress.

Most importantly, any tribunal so authorized must provide for a fair process consistent with the requirements of Common Article 3 of the Geneva Conventions. Common Article 3 requires that those tried under the laws of war must not be sentenced or executed without "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Now, what are those judicial guarantees? As the majority opinion in *Hamdan* pointed out, "Common Article 3 obviously tolerates a great deal of flexibility in trying individuals captured during armed conflict. Its requirements are general ones crafted to accommodate a wide variety of legal systems, but requirements, they are, nonetheless."

While Common Article 3 does not enumerate these judicial guarantees, we know what they are. They have been a fundamental part of our democratic system, and they're present in any tribunal fairly constituted under our laws. They're reflected in our constitution and in the treaties that the United States has signed and ratified. They are the essence of the rule of law.

They can be boiled down, I think, to five basic principles:

First, trials have to be conducted by an independent and impartial court applying laws in existence at the time of the offense. This, I think, is one of the primary arguments for beginning and sticking very closely to the UCMJ, an existing body of law. This also means that we can't have rules permitting one person or branch of government to be the judge, jury, and prosecutor, and that there must be meaningful independent judicial review of convictions. It also means that if a person is prosecuted under the laws of war, the offense with which he's charged must be cognizable under that body of law.

Second, defendants must be presumed innocent prior to trial. In our system, that means more than just uttering the phrase "innocent until proven guilty." The presumption has to be reflected in both the structure and the rules of any tribunal. If we seek to construct a system that will guarantee convictions in all cases, which

some seem to have suggested we should do, that system will fall far short of fair-trial requirements, and it will fail to deliver justice.

Third, defendants must have the right to be present at trial. This means proceedings cannot be conducted in secret, outside the presence of an accused or his lawyers.

Fourth, a defendant must have the right to know the evidence being used against him, to respond to it, and to challenge its credibility or authenticity.

Fifth, testimony cannot be compelled either from the defendant or from other witnesses. This means not only that a person cannot be forced to testify, but that information or witness statements obtained through torture, cruelty, or other coercion cannot be used as evidence.

By reaffirming the applicability of Common Article 3 to the war with al Qaeda, the Supreme Court ruling in *Hamdan* also requires that detainees be treated humanely. This is consistent with, and reinforces, the law that you passed last year banning cruel, inhuman, or degrading treatment of any detainee in U.S. custody, regardless of their location or legal status under the Geneva Conventions. It vindicates the views, which you heard reiterated at the hearing last week, of the top military lawyers who had argued repeatedly for the continued embrace of that standard, but were overruled by the civilian leadership.

So, as you consider the way forward, in a nutshell, our recommendation is: start with the UCMJ, and end up as close to it as possible. The Supreme Court made it very clear that the burden is on the President, and those who would deviate from the UCMJ and the Manual for Courts-Martial, to demonstrate why it is impractical to adhere to that system. Thus far, those arguments have consisted mostly of fears about disclosure of classified evidence and the absurdity of having to read Miranda warnings to enemies captured on the battlefield. I know some of my colleagues on the panel will address those issues in detail, but I would say that few, if any, of those concerns expressed so far withstand scrutiny, and most of them reflect an incomplete understanding of the flexibility of the courts-martial system for dealing with those issues.

We would strongly urge that Congress not embark on a project to deviate from the UCMJ without clear evidence of real obstacles to prosecutions. Any such deviations must be in keeping with Common Article 3. The core feature of such a court, of course, is that it contemplates the possibility that persons tried before it may be acquitted. As you pointed out, Mr. Chairman, that does not mean that they would be released. But, if we seek to design a system that will ensure convictions in every case, it will likely be repudiated by the Supreme Court as inadequate.

Adopting the UCMJ as the starting framework for trials of detainees charged with war crimes makes the most sense from an efficient prosecutorial perspective, as well as from an international human rights standpoint. Courts-martial offer a fixed legal system that assures the trial's participants of a high degree of predictability and stability. These are hallmarks of the rule of law.

One factor in the fits and starts of the commissions at Guantanamo that we observed was the lack of clarity regarding what constituted commission law. The absence of time-tested and court-ad-

judicated rules there resulted in continual delays. Indeed, during our first mission to Guantanamo to monitor military commissions, a number of commission staff shared that view with us. One of them said, "It would have been better to try these guys in courts-martial. We know that now."

Congress can vitiate the perception in much of the rest of the world that the trials of detainees are rigged, and that the United States is willing to deviate from fair-trial requirements to convict those it has already concluded are guilty, by embracing our established military justice system, which provides full and fair-trial rights to an accused. Likewise, applying the UCMJ as the framework would help the United States regain its leadership mantle in advancing the rule of law in fragile democracies abroad, an unfortunate casualty of the detention and trial policies at Guantanamo.

Our courts-martial system is one that our uniformed men and women, and all Americans, are rightly proud of. It's the envy of every military in the world. Some have argued that terrorists are not deserving of such a highly developed justice system. But we should not shrink from applying the law to those who violate it. By prosecuting those who have committed war crimes within a legal system that provides fundamental protections, we bolster the laws governing armed conflict and human rights.

The hallmark of the rule of law as applied by civilized nations is a system that is impartial, that is made up of procedures and rules that are consistent, predictable, and transparent. As Senator McCain put it last year in the context of detainee treatment, "It's not about them. It's about us." How we treat suspected terrorists, including how we try them, speaks volumes about who we are as a Nation and about our confidence in the institutions and values that set us apart.

Some see this as a liability. They argue that adhering to these rules makes for an unfair fight, us with one hand tied behind our backs while the enemy does what it pleases. But that is because we are different from our enemy, and we must remain so. We do not employ their tactics, and we adamantly reject their goal, which is, as Will Taft, the former legal advisor to the State Department, described it as a "negation of law."

There is no question that we have a long haul ahead of us in combating the threat of terrorism. But adherence to the rule of law in a system that reflects our values will only add to our strength, not detract from it.

At least among military lawyers, there seems to be a strong consensus that the starting point for these trials should be the UCMJ. Much of the debate, going forward, therefore, will revolve around what, if any, deviations from the courts-martial procedures Congress should embrace. On this point, I want to sound a note of caution. There is a risk that some of the same mistakes made by the executive branch in turning away from the UCMJ framework in the first place could be repeated in this legislative process. Before rushing to amend the UCMJ procedures, Congress should satisfy itself that the amendments being sought are necessary, not just convenient or expedient, and do not undermine basic principles of fair trials. This will require much more discussion and debate than has been had so far.

We urge this committee to convene a third hearing to examine in detail the arguments and justification from the administration for proposals that would constrict the judicial and due-process guarantees included in the UCMJ and the Manual for Courts-Martial.

If there's any lesson we should have learned over the past 4 years, it is that obtaining information through the use of force, coercion, and torture is not only unnecessary, but counterproductive. To enforce that legal prohibition, we must draw a bright line against the introduction of evidence obtained through unlawful coercion.

In the hearing last week, we have heard a lot of concern from the administration and from some Members of Congress about the impact of the Supreme Court's decision on detainee treatment. In particular, about how the "vague" requirements of Common Article 3 concerning cruelty, inhumane treatment, humiliation, and degradation may put American personnel at risk of prosecution for war crimes. But these concerns seem not to have resonated with the military lawyers heard by this committee last week. To a person, as I heard it, they agreed, quite easily, that the requirements of Common Article 3 are well-known and well-understood by all military personnel.

Some have argued that we should not afford Common Article 3 protections to suspected terrorists because they have no respect for the rule of law. But the costs of such an approach have come into sharp relief over the last several years—a breakdown in discipline in the military, loss of moral authority and the ability to lead, and further endangerment of our own personnel deployed abroad. Once we start chipping away at the Geneva Conventions, we invite others to do the same. As Senator McCain reminded us, there will be more wars, and there will be Americans who will be taken captive. If we start to carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners. Congress should consider very carefully the actions it takes now and ensure that they do not lead to a day when one of our enemies uses our positions on the Geneva Conventions to argue that it's permissible to subject a U.S. servicemember to mock drowning.

One of the most striking things about the committee's hearing on these issues last week was the absence of any controversy about the appropriateness of Common Article 3 as the baseline standard for humane treatment. This simply is not in contention, as far as I can see. The recent memo from Deputy Secretary Gordon England which directed a review of all the defense policies to ensure compliance with Common Article 3 reinforces this point.

Further evidence that there's been a return to Common Article 3 as the controlling standard can be found in the new draft Counterinsurgency Manual. This manual reflects the wisdom and the experience of the U.S. military in its operations in Afghanistan and Iraq. It embraces established international legal standards, and was signed by Lieutenant General David Petraeus, of the U.S. Army, and Lieutenant General James Mattis, of the U.S. Marines, last month. That guidance is clear in its application of Common Article 3 to the most unconventional of battle scenarios and enemies,

"The Geneva Conventions, as well as the convention against torture and other cruel, inhuman, and degrading treatment or punishment, agree on what is unacceptable for interrogation. Torture and cruel, inhumane, and degrading treatment is never a morally permissible option, even in situations where lives depend on gaining information. No exceptional circumstances permit the use of torture or other cruel, inhuman, or degrading treatment." That's from the current draft Counterinsurgency Manual from last month. It lays out the full text of Common Article 3 and says these requirements are specifically intended to apply to internal armed conflict.

We continue to await the revised Manual on Intelligence Interrogations which, under the McCain amendment, will govern all military interrogations. We urge this committee to remain engaged in the development of that manual and of other legal and operational guidance.

Yesterday, Attorney General Gonzales testified that he was unaware of any revised guidance for nonmilitary personnel to ensure compliance with the Detainee Treatment Act's (DTA) interrogation provisions. We urge Congress to closely monitor compliance with the law, not only by the military, but also by other Government agencies involved in interrogation and detention of prisoners. When military and nonmilitary personnel participate in joint operations, a situation which is increasingly common in the current conflict, it is critical that a single lawful standard of conduct with respect to detainee treatment governs the actions of all U.S. personnel.

In conclusion, the Supreme Court's decision in the Hamdan case presents an opportunity not only for Congress, but for the country. We have struggled for nearly 5 years to reconcile our most deeply held values and democratic institutions with an effective strategy to combat the ongoing threat of terrorism. Military commissions have been a part of that struggle. Now the Supreme Court has reminded us that even in the face of extraordinary threats to our security, we should see these values and institutions not as liabilities, but as assets and tools in the struggle to combat terrorism. These values and institutions in particular here, the UCMJ and the Geneva Conventions, should again become the lodestar.

As you focus, in the near-term, on the appropriate military justice system to try suspected terrorists, I would also urge the committee to remember that in addition to a military justice system that is the envy of the world, our existing system of civilian courts has proven quite adept at delivering justice to those who would engage in terrorism here.

Thank you.

[The prepared statement of Ms. Massimino follows:]

PREPARED STATEMENT BY ELISA MASSIMINO

INTRODUCTION

Thank you, Chairman Warner and members of the committee, for inviting me to share the views of Human Rights First on these important issues. We are very grateful for your leadership, Mr. Chairman, and we have appreciated the opportunity to work with your office, with Senator McCain, and with other members of the committee on these and other issues related to the treatment of detainees. We appreciate also the committee's careful and deliberate approach to these difficult subjects. We share the committee's goal of identifying a system capable of bringing

those who have committed war crimes to justice in a manner that is fair, consistent with our values, and satisfies the requirements of domestic and international law.

My name is Elisa Massimino, and I am Washington Director of Human Rights First. For the past quarter century, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

Since the President issued the Military Order on November 13, 2001, authorizing trials by military commission,[1] Human Rights First has focused particular attention on the development and operation of the system that proceeded from that order. We submitted formal comments on the subsequent military orders and instructions that made up the frequently changing rules under which the commissions operated, published reports detailing the ongoing flaws in the commission system, and regularly monitored and reported on commission proceedings in Guantanamo. We also filed friend of the court briefs in *Hamdan* v. *Rumsfeld* in the United States Court of Appeals for the District of Columbia Circuit and in the Supreme Court of the United States.

In our recent report entitled Trials Under Military Order,[2] we outlined the ways in which the commissions failed to meet basic fair trial standards. Our concerns about the commissions fell into five broad categories: overly broad jurisdiction; disincentives for civilian participation; secret evidence and secret trial proceedings; admissibility of evidence obtained through torture or other coercion; and, lack of an independent appeal outside the chain of military command. But an even more powerful indictment of the commission system than the rules and procedures that governed its operation is the way the ad hoc and constantly-changing system looked up close, in practice. From our vantage point as observers—and one only needs to read some of the hearing transcripts from the commission proceedings to confirm this—these were trials unworthy of bearing the label "Made in America." While the system was staffed by many talented, dedicated and honorable service personnel, it is abundantly clear from this commission experience why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by a "regularly constituted court." The system in operation at Guantanamo did not come close to passing that test.

The challenge you now face is to look forward and develop a fair and appropriate system for trying these cases. I am not going to take time today to further critique the deficiencies of the failed military commission system. That system is so inherently flawed that we believe it should be set aside in its entirety. The *Hamdan* decision presents Congress and the President with an important opportunity to turn the page and to take up—with renewed energy and improved tools—the critical task of trying those who have committed war crimes against the United States.

I. WHAT THE *HAMDAN* RULING REQUIRES

In order to meet this challenge and to avoid further litigation, it is important to recognize what the Supreme Court ruling in *Hamdan* requires. As a preliminary matter, it is now clear that any future tribunals must be authorized by Congress, not simply decreed by the Executive. Whether these tribunals end up being general courts-martial, which Congress has already authorized, some modified version of courts-martial, or properly constituted military commissions, they must derive their authority from the legislative powers of Congress.

The tribunals must provide for a fair process, consistent with the requirements of Common Article 3 of the Geneva Conventions. Common Article 3 requires that those tried under the laws of war must be sentenced or executed pursuant to a "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[3]

---

[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

[2] Human Rights First, Trials Under Military Order, (2006) available at http://www.humanrightsfirst.org/us—law/PDF/detainees/trials—under—order0604.pdf.

[3] See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 31, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, entered

Continued

What are these judicial guarantees? As the majority opinion in *Hamdan* pointed out, "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless."[4] While Common Article 3 does not enumerate explicitly these judicial guarantees, they are a fundamental part of our democratic system and are present in any tribunal fairly constituted under our laws. These judicial guarantees are reflected in our own Constitution and in treaties signed and ratified by the United States, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Protocols to the Geneva Conventions, which the United States negotiated and signed.

They are the essence of the rule of law, and they can be boiled down to five basic principles:

- First, trials must be conducted by an independent and impartial court applying laws in existence at the time of the offense. This means that we cannot have rules permitting one person or branch of government to be the judge, jury and prosecutor, and that there must be meaningful, independent judicial review of convictions. It also means that, if a person is prosecuted under the laws of war, the offense with which he is charged must be cognizable under that body of law.
- Second, defendants must be presumed innocent prior to trial. In our system, that means more than just uttering the phrase "innocent until proven guilty." The presumption must be reflected in both the structure and the rules of any tribunal. If we seek to construct a system that will guarantee convictions in all cases, which some seem to have suggested we should do, that system will fall short of fair trial requirements and will fail to deliver justice.
- Third, defendants must have the right to be present at trial. This means proceedings cannot be conducted in secret outside the presence of an accused or of his lawyers.
- Fourth, a defendant must have the right to know the evidence being used against him, to respond to it, and to challenge its credibility or authenticity.
- Fifth, testimony cannot be compelled either from a defendant or from other witnesses. This means not only that a person cannot be forced to testify, but also that information or witness statements obtained through torture, cruelty or other coercion cannot be used as evidence.

By reaffirming the applicability of Common Article 3 to the conflict with al Qaeda, the Supreme Court ruling in *Hamdan* also requires that detainees be treated humanely. This is consistent with and reinforces the law Congress passed last year banning cruel, inhuman or degrading treatment of any detainee in U.S. custody, regardless of their location or legal status under the Geneva Conventions. It vindicates the views of the top military lawyers, reiterated here last week, for the continued embrace of this standard.

II. A WAY FORWARD

A. Start with the Uniform Code of Military Justice (UCMJ)

The Supreme Court made clear that the burden is on the President and those who advocate deviating from the UCMJ and Manual for Courts-Martial to demonstrate why it is impracticable to adhere to this system. Thus far, some administration officials have raised a litany of fears about following these procedures, including absurd assertions about the need to read Miranda warnings to enemies captured on the battlefield. In general, these concerns reflect an incomplete or inaccurate understanding of the flexibility of the court martial system for dealing with these issues. We strongly urge that Congress not embark on a project to deviate from the UCMJ without clear evidence of real obstacles to prosecutions; any such deviations must be in keeping with Common Article 3. The core feature of such a court, of course, is that it assumes the possibility that persons tried before it may be acquitted. If

---

into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force Oct. 21, 1950. 6 U.S.T. 3316, 75 U.N.T.S. 135, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5.

[4] *Hamdan* v. Rumsfeld, 548 U.S.—(2006) (slip op. at 72).

the system is designed to ensure convictions in every case, it will almost certainly be repudiated by the Supreme Court.

The UCMJ, together with the Manual for Courts-Martial, incorporates these fundamental trial rights. The UCMJ has been in effect since the Korean War. It includes a body of law that addresses both basic fair trial standards and national security concerns. But the understanding that courts-martial are an appropriate forum for trying those who violate the laws of war dates even farther back, to the Nation's founding. Congress first authorized courts-martial to try spies in 1776, predating the Constitution by more than a decade. General courts-martial were granted jurisdiction over all customary law of war violations in a 1913 amendment to the Articles of War. This language was subsequently reenacted in current UCMJ Article 18.[5]

Adopting the UCMJ as the starting framework for trials of detainees charged with war crimes makes the most sense both to carry out efficient prosecutions and to meet this country's human rights obligations. Courts-martial offer a fixed legal system that assures the trials' participants—judge, prosecutor and defense counsel—of a high degree of predictability and stability. One of the major deficiencies with the military commissions at Guantanamo was the lack of clarity as to what constituted "commission law." The absence of time-tested and court-adjudicated rules and procedures resulted in continual delays. Indeed, during Human Rights First's repeated visits to Guantanamo to monitor military commissions, a number of commissions staff shared these views, saying that "it would have been better to try these guys in courts-martial. We know it."

General courts-martial, by comparison, clearly meet the fundamental requirements of Common Article 3. They are the mechanisms for trying U.S. soldiers and are effectively sanctioned by the Geneva Conventions.[6]

On a broader level, adopting the UCMJ as the framework would be an important step in regaining U.S. moral authority in the struggle against terrorism. It would reassure allies who have grown increasingly reluctant to cooperate in these prosecutions. Adopting this established system of laws and rules, consistent with fair trial standards, also will reduce the threat of subjecting Americans abroad to unfair trials, including our soldiers and sailors. The Geneva Conventions system depends on the reciprocal adherence to the treaties. When the United States rejects protections that should be afforded to anyone captured by a "Detaining Power," it encourages other nations to do so as well, putting Americans in greater jeopardy, now and in the future. With troops in more than 100 countries, the U.S. military is the most forwardly deployed military in the world. No other nation's servicemembers have more to lose from a degradation of the Geneva Conventions.

By placing the military commissions at Guantanamo Bay under the exclusive control of the executive branch, the United States provided a rationale for repressive governments to defend their rejection of independent courts. The United States has historically criticized these governments, especially when they convened politically motivated military tribunals, in places like Burma, Colombia, Peru, Egypt, and Turkey, contending that such tribunals reflected political rather than legal norms.[7] The military commissions at Guantanamo have undermined U.S. diplomatic efforts to champion independent courts abroad.

Some of these governments have explicitly cited the establishment of U.S. military commissions to justify their own legal and military policies that contravene human rights protections.[8] Egyptian President Hosni Mubarak has said that the Guantanamo military commissions vindicated his choice of military tribunals to try domestic "terrorists." He emphasized that "the events of September 11 created a new concept of democracy that differs from the concept that western States defended before these events, especially in regard to the freedom of the individual."[9]

Our uniformed men and women are rightly proud of our courts-martial system; it is the envy of every military in the world. Some have argued that terrorists are not "deserving" of such a highly developed justice system. But we should not shrink from applying the law to those who violate it. Rather, by prosecuting those who

---

[5] 10 U.S.C. § 818.

[6] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force Oct. 21, 1950. 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 102, available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[7] Harold Hongju Koh, The Case Against Military Commissions, 96 AM. J. INT'L L. 337, 341 (2002).

[8] Lawyers Committee for Human Rights [now Human Rights First], Assessing the New Normal: Liberty and Security for the Post-September 11 United States, 92–95 (2003) available at http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf .

[9] Id. at 93 (quoting Joe Stork, The Human rights Crisis in the Middle East in the Aftermath of the September 11, Cairo Institute for Human Rights Studies 6).

have committed war crimes within a legal system that provides fundamental protections, we bolster the laws governing armed conflict and human rights.

The hallmark of the rule of law as applied by civilized nations is a system that is impartial and that is made up of procedures and rules that are consistent, predictable and transparent. As Senator McCain put it last year in the context of detainee treatment, "it's not about them, it's about us." [10] How we treat suspected terrorists—including how we try them—speaks volumes about who we are as a nation, and our confidence in the institutions and values that set us apart.

Some administration officials argue that this approach is a liability. They say that adhering to these rules makes for an unfair fight—we fight with one hand tied behind our backs while the enemies do as they please. But that is because we are different from our enemies and we must remain so: we do not employ their tactics and we adamantly reject their goal, which is, as William Taft, the former Legal Advisor to the Department of State described it, the "negation of law." [11] There is no question that we have a long and difficult road ahead of us in combating the threat of terrorism. But adherence to the rule of law, a system that serves as a shining example to the rest of the world, a system that reflects our values, will only add to our strength, not detract from it.

B. Carefully Evaluate Requested Deviations from the UCMJ

Among military lawyers and others, there is a strong consensus that the starting point for any future trials should be the UCMJ. Much of the debate going forward should consider what deviations, if any, are needed from the courts-martial procedures.

On this point, I would like to sound a note of caution. There is a risk that some of the same mistakes made by the executive branch in rejecting the UCMJ framework in the first place could be repeated in this legislative process. Before rushing to amend the UCMJ procedures, Congress should satisfy itself that the amendments being sought are necessary (not just convenient or expedient) and do not undermine basic principles of fair trials. This will require careful discussion and debate, including future hearings by this committee, to examine, in detail, the arguments and justification for any specific proposals that would constrict the judicial and due process guarantees included in the UCMJ and the Manual for Courts-Martial.

I'd like to address several of these issues briefly.

Conspiracy

Under the original Military Commission Instruction No. 2, an accused could be prosecuted for conspiracy as a stand-alone and substantive offense.[12] Seven Guantanamo detainees were, in fact, charged only with the crime of conspiracy.[13] But conspiracy to commit a war crime is not a crime under international law. The Military Commission's formulation of conspiracy did not, in any event, reflect U.S. law. Congress should be wary about permitting prosecutions for conspiracy. The offense of conspiracy is not accepted around the world—civil law jurisdictions do not generally recognize it—and is not therefore a part of the laws of war. Conspiracy to commit war crimes is not included as an offense in the Geneva Conventions. It has been excluded by every tribunal properly constituted to try war crimes, including Nuremberg, the International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) Statute. In the context of Nuremberg, then-U.S. Assistant Attorney General Herbert Wechsler explained that proof of the criminality of the defendants would be best accomplished "only by proof of personal participation in specific crimes."[14] For a similar reason, David Scheffer, the chief U.S. negotiator on the ICC, said that "in war something more is required than evidence that one might have agreed in some vague or ambiguous way, or inferentially by simply being in close proximity to the master planners and implementers, with a plan or design to violate the law of

---

[10] "CBS News' Face the Nation," Nov. 13, 2005 (transcripts of remarks by Senator John McCain (R–AZ)).

[11] William H. Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE J. INT'L L. 319 (2003).

[12] Military Commission Instruction No. 2, 32 CFR § 11.6(c)(6) (2005).

[13] The charge sheets are available at http://www.defenselink.mil/news/Nov2004/charge—sheets.html.

[14] Herbert Wechsler, Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler), in The American Road to Nuremberg: Documentary Record 1944–1945 (Bradley F. Smith ed., 1982) at 84, 89.

war."[15] Finally, conspiracy has been recognized as too broad a charge in times of war: unlike in peacetime, in a time of war, an offence of conspiring to commit a war crime may result in entire armies being brought before courts on the basis of "guilt by associations."[16]

This does not mean that those who assist those engaged in terrorist acts will escape prosecution. Under international law, prosecutors may charge an individual with the offense of aiding and abetting a war crime. So, for example, the ICTY and ICTR Statutes each provide that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 [includes war crimes] of the present Statute, shall be individually responsible for the crime."[17] The ICC Statute contains a similar provision.[18] In addition, a person may be found guilty of an underlying offense committed by others under the doctrine of joint criminal enterprise or common plan. Under the joint criminal enterprise theory, liability is imposed on an individual who (i) enters into an agreement with one or more others for the commission of a crime and (ii) takes criminal action in furtherance of that agreement.[19] Either of these approaches would comport with the laws of war and fair trial standards. Finally, if an individual cannot be prosecuted under the laws of war, prosecution is available under the civilian system for a plethora of crimes. Congress should hear from experts on these offenses and theories of liability before legislating new offenses that may not comport with the laws of war.

Confrontation of evidence

Secret trials are anathema to our system of laws. The original military commission regulations permitted trials to be closed based solely on the assertion of general national security reasons without any other standards or procedural protections.[20] We recognize the importance of protecting especially sensitive information, disclosure of which would interfere with the military efforts or compromise sensitive, important intelligence sources and methods. But the Supreme Court has made clear

---

[15] David Scheffer, Why *Hamdan* is Right about Conspiracy Liability, Jurist, Mar. 2006, available at http://jurist.law.pitt.edu/forumy/2006/03/why-hamdan-is-right-about-conspiracy.php.

[16] Cf. Scales v. United States, 367 U.S. 203, 209 (1961) (Court interpreted the Alien Registration Act of 1940 as requiring "not only knowing membership [in Communist Party], but active and purposive membership, purposive that is as to the organization's criminal ends." (emphasis added)).

[17] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Art. 7; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), Art. 6.

[18] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, entered into force 1 July 2002, Art. 25(d). Article 25(d) imposes liability if, inter alia, an individual[i]n any other way contributes to the commission or attempted commission of [a crime] by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime."

[19] The ICTY distinguishes between conspiracy and joint criminal enterprise. See e.g., Prosecutor v. Milutinovic, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72 (May 21, 2003) at para. 23, available at http://www.un.org/icty/milutinovic/appeal/decision-e/030521.pdf ("Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise."); Prosecutor v. Stakic, Case No. IT–97–24–T (July 31, 2003) at para. 433, available at http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf ("joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore [would] amount to a flagrant infringement of the principle nullum crimen sine lege.") The ICTY jurisprudence suggests that the joint criminal enterprise has a higher threshold than conspiracy in that it requires an additional proof that co-conspirators took action in furtherance of the conspiracy. However, in the United States, many state conspiracy statutes and the Federal conspiracy statute similarly require the commission of an overt act. It would seem that, at least as compared to those laws that require overt act, joint criminal enterprise and conspiracy provide the same basis of individual liability.

[20] Military Commission Order No. 1, 32 CFR § 9.6 (b)(3); (d)(5)(B) (2003). The Order was revised on August 31, 2005 to preclude admission of evidence withheld from the accused if the Presiding Officer determines admission of such evidence would result in "denial of a full and fair trial." Military Commission Order No. 1, 32 CFR § 9.6(d)(5)(B) (2005).

that our Constitution requires that individuals not be deprived of life or liberty without an opportunity to confront the evidence against them and to be apprised of exculpatory evidence in the hands of the government.[21] This should be our starting point. Then, in narrowly defined circumstances, with adequate procedural protections, truly sensitive evidence that the prosecution wants to introduce against a defendant could be kept secret from the public. But the rules need to reflect the fact that these are extraordinary measures, limited to cases involving highly sensitive information in which there would be significant, identifiable harm to military operations or secret intelligence sources or methods.

The same fundamental considerations would apply to rules for discovery: start from the principle of the due process right to confront and question evidence, and provide delineated and narrowly defined exceptions that permit flexibility.

No compelled testimony

If there is any lesson we should have learned over the past 4 years, it is that obtaining information through the use of force, coercion or intimidation, is not only unnecessary, but counter-productive. To enforce legal prohibitions, we must draw a bright line against the introduction of any evidence obtained through unlawful coercion. In the last week, we have heard a great deal of concern from the administration and from some Members of Congress about the impact of the Supreme Court's *Hamdan* decision on detainee treatment, and in particular, about the "vague requirements" of Common Article 3 prohibiting cruelty, inhuman treatment, humiliation and degradation. Some administration officials argue that this prohibition may put American personnel at risk of prosecution for war crimes. These concerns did not resonate with the military lawyers you heard last week. To a person, they agreed that the requirements of Common Article 3 are well-known and well-understood by all military personnel, and should be followed.

It is true, of course, that the administration had previously taken positions that blurred these rules and unfortunately resulted in confusion about what conduct was permissible.[22] That effort to narrow the obligations to refrain from cruel, inhuman and degrading treatment was remedied in part through the Detainee Treatment Act. The appropriate response now to ensure clarity about Common Article 3's standards is to provide sufficient guidance—including in the operations and field manuals—to ensure that all service members steer completely clear of conduct that would place them at risk of prosecution.

The same holds true for non-military personnel. In the words of General Rives who testified before this committee last week: "Speaking to a lot of folks in the Intelligence Community and having read a fair amount about it, I don't believe they need to cross the lines into violations of the Detainee Treatment Act or Common Article 3 to effectively gather intelligence. Sometimes we will gather intelligence knowing that we're not going to be able to use that evidence against an individual in a criminal court, and that's okay. Sometimes you can't have your cake and eat it too."[23]

As one U.S. court noted, "[i]t is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman, or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law."[24]

Guidance on what constitutes treatment prohibited by Common Article 3 can come from international tribunals, to which administration witnesses have referred as a source for guidance on procedure and rules. The ICTY, for example, has said that "cruel treatment constitutes an intentional act or omission, that is, an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[25] The ICTY similarly held that an outrage upon personal dignity is an act that causes "serious humiliation or degradation to the victim,"[26] and requires hu-

---

[21] Jencks v. United States, 353 U.S. 657 (1957); Roviaro v. United States, 353 U.S. 53 (1957).

[22] Memorandum for William J. Haynes II, General Counsel, Department of Defense from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, January 9, 2002.

[23] Transcript of the Hearing of the Senate Committee on Armed Services: Military Commissions in Light of the Supreme Court Decision in *Hamdan* v. Rumsfeld, July 13, 2006, Federal News Service, p. 41.

[24] Xuncax v. Gamajo, 886 F. Supp. 162, 187 (D. Mass. 1995).

[25] Prosecutor v. Delalic, Case No. IT–96–21–T (Nov. 16, 1998) at para. 552, available at http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf.

[26] Prosecutor v. Aleksovski, Case No. IT–95–14/1–T (June 25, 1999) at para. 56, available at http://www.un.org/icty/aleksovski/trialc/judgement/ale-tj990625e.pdf; see also Prosecutor v.

miliation to be "so intense that the reasonable person would be outraged."[27] According to that international tribunal, a perpetrator must have acted (or failed to act) deliberately and must have been able to perceive his suffering to be the "foreseeable and reasonable consequences of his actions."[28] These formulations are very similar to the way in which offenses are defined under U.S. criminal law.

Some administration officials continue to assert that the United States should not afford Common Article 3 protections to suspected terrorists because they have no respect for the rule of law. The costs of such an approach, however, have come into sharp relief over the last several years: a breakdown in discipline in the military, loss of moral authority and the ability to lead, and further endangerment of our own personnel deployed abroad. Once we start chipping away at the Geneva Conventions, we invite others to do the same. As Senator McCain remarked last week, "[W]e will have more wars, and there will be Americans who will be taken captive. If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners." Congress should consider carefully that the actions it takes now do not lead to a day when one of our enemies uses our positions on the Geneva Conventions to argue that it is permissible to subject a U.S. servicemember to mock drowning.

We have already witnessed repressive regimes justifying abusive treatment of their nationals by reference to our Nation's conduct in the "war on terror." We have already experienced the reluctance of our allies to cooperate with us in counterterrorism measures because of concern over our treatment of detainees. For example, Dutch and Canadian forces in Afghanistan agreed to turn over any captured persons to Afghanistan, but not to the United States, because of concerns over detainee treatment.[29] The support of our allies is crucial to our ability to combat terrorist acts. The more we break away from the rule of law, including Common Article 3, the more we will stand alone. That we simply cannot afford.

C. Ensure Humane Treatment for All Detainees in U.S. Custody

One of the most striking things about the committee's hearing on these issues last week was the absence of any controversy about the appropriateness of Common Article 3 as the baseline standard for all detainee treatment. This was evidenced by a recent memorandum of Deputy Secretary of Defense Gordon England directing a review of all policies and procedures to ensure compliance with Common Article 3.

Another welcome development evidencing a return to Common Article 3 as the controlling standard is the new draft counterinsurgency manual. This manual reflects the wisdom and experience of the U.S. military in its operations in Afghanistan and in Iraq. It embraces established international legal standards. Signed by Lieutenant General David Petraeus of the U.S. Army and Lieutenant General James Mattis of the U.S. Marines in June of this year, the new guidance is clear in its application of Common Article 3 to the most unconventional of battle scenarios and enemies:

> The Geneva Conventions as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment agree on what is unacceptable for interrogation. Torture and cruel, inhumane, and degrading treatment is never a morally permissible option, even in situations where lives depend on gaining information. No exceptional circumstances permit the use of torture and other cruel, inhuman or degrading treatment.

Counterinsurgency, FM 3–24, 7–42 (June 2006) (Final Draft).

The counterinsurgency manual also lays out the full text of Common Article 3, stating that its provisions are "specifically intended to apply to internal armed conflicts" and that insurgents, while not qualifying as prisoners of war, must be "accorded the minimum protections described in Common Article 3."[30] The manual reflects the military's assessment that not only is the application of Common Article

---

Kunarac, Case No. IT–96–23T& IT–96–23/1T (February 22, 2001) at para. 507, available at http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf.

[27] Prosecutor v. Aleksovski, Case No. IT–95–14/1–T (June 25, 1999) at para. 56.

[28] Prosecutor v. Aleksovski, id.

[29] Michael Byers, Legal Opinion on the December 18, 2005 Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, April 7, 2006, available at www.polarisinstitute.org/pdf/Attaran—7—April—2006.pdf.

[30] Counterinsurgency, FM 3–24, D–10, 11.(June 2006) (Final Draft).

3 necessary as a legal matter but that it is a workable standard that will inure to the safety and security of U.S. soldiers and to victory for U.S. interests.

We continue to await the revised manual on intelligence interrogations. Under the McCain Amendment, it will govern all military interrogations. We urge this committee to remain closely engaged in the development of that manual and of other legal and operational guidance. Yesterday, Attorney General Gonzales testified that he was unaware of any revised guidance for non-military personnel to ensure compliance with the Detainee Treatment Act's interrogation provisions. We urge Congress to closely monitor compliance with the law not only as it applies to the military but also to the Central Intelligence Agency and other Government agencies involved in interrogation and detention of prisoners. When military and non-military personnel participate in joint operations, a situation which is increasingly the case today, it is critical that they follow a single, lawful standard of conduct with respect to detainee treatment.

CONCLUSION

The Supreme Court's decision in the *Hamdan* case presents an opportunity not only for Congress but for the country. We have struggled for nearly 5 years to reconcile our most deeply held values and democratic institutions with a strategy to combat ongoing threats to our national security. The military commissions at Guantanamo have been a part of our response. Now the Supreme Court has reminded us that, even in the face of extraordinary threats to our security, our traditional values and institutions should be seen not as liabilities, but as assets—tools in the struggle to combat terrorism. These values and institutions—in particular here, the UCMJ and the Geneva Conventions—should again become the lodestar.

Finally, as you focus in the near term on the appropriate military justice mechanism to try those suspected of committing acts of terrorism, we should also remember that, in addition to a military justice system that is the envy of the world, our existing system of civilian courts has proven quite adept at delivering justice to those who would engage in acts of terrorist violence here.

Thank you.

Chairman WARNER. That was a very important statement that you've given us. If you'll make copies of that available to us, we didn't get it prior to the hearing.

At this time, I'd like to recognize our distinguished colleague from South Carolina, who is a colonel in the Reserve Judge Advocate General's Corps and whose wisdom and a little wit from time to time have been of great value to this committee, and he has taken the lead on this subject. I would like to recognize him for the purpose of asking his questions, given that he must preside over the United States Senate at 11 o'clock.

The distinguished Senator from South Carolina, Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. That kind of introduction, the "wisdom and wit" meter is pretty low this morning, but I'll try to rise to the occasion.

I appreciate that and I'm sorry to interrupt the opening statements.

One thing I would like to talk about is, I think, as a body, we're going to work through a military commission model that we can be proud of that will hopefully use the UCMJ as a model, and there will be substantial deviations at times to meet the needs of the war on terror.

My concern is how Common Article 3 applies to terrorist interrogations. I don't have a problem with teaching our military members to treat every detainee in terms of prisoner of war (POW) treatment standards, because that's easy for them to understand. But once we do the interrogation of a high-value target, I do have some concerns about how Common Article 3 might apply.

What is the norm? What is the norm, in the international community, in terms of, let's say, Great Britain, France, and Germany? Do they apply Common Article 3 interrogation standards to the interrogation of terrorist suspects? Does anyone know?

Mr. MERNIN. Senator, I don't know.

Senator GRAHAM. I think it would be important for the committee to understand what the norm is, because it's my understanding that Israel, France, Germany, and Great Britain, that when it comes to terrorist suspects being interrogated, they don't torture them, but Common Article 3 is not the test, either. So, I would like to know what the baseline, internationally, is.

Now, when it comes to Senator Inhofe's concerns about us criminalizing the war, every war crime involves criminal activity. Is that correct? Does anyone disagree with that?

Ms. MASSIMINO. No, sir.

Senator GRAHAM. The criminal activity is a violation of the law of armed conflict, which in and of itself is a series of criminal laws, as well as treatment regimes, is that correct?

Mr. FIDELL. That's not necessarily correct, Senator. You could have a classic war, where there are acts of violence.

Senator GRAHAM. Right.

Mr. FIDELL. "One breaks things and kills people." That's the difference between being a lawful combatant and an unlawful combatant.

Senator GRAHAM. Right.

Mr. FIDELL. So, if you had a lawful combatant, barring, "war crimes," a certain measure of violence, things that in normal society out on Constitution Avenue would be a crime, become lawful.

Senator GRAHAM. That's my point. War is inherently violent. It's the taking of life. We don't prosecute soldiers involved in war because they're fighting the enemy; we only prosecute solders in wars or illegal combatants when they violate the law of armed conflict. There's a lawful way to kill people, and there is an unlawful way to engage in military actions. One of those unlawful actions is to intentionally target and kill civilians. Military commissions come from the UCMJ, and it says they shall be governed by the law of armed conflict. So, I want the American public to know that probably 90 percent of the people who are enemy combatants will not be tried for war crimes. We do not want to confuse enemy combatants and war criminals. That is a huge problem that reoccurs over and over again. You can be an enemy combatant and not be a war criminal. A war crime is reserved for a very select class of people who have gone outside the norms of combat. In the case of Guantanamo Bay, I think there's less than 25 who are even subject to being tried for war crimes. But once you make that decision, does the panel agree, then it becomes criminal activity, that criminal law is applied—the criminal law of armed conflict?

Mr. FIDELL. Yes.

Senator GRAHAM. Yes.

Mr. FIDELL. Your question, Senator, is that you're dealing with unlawful combatants.

Senator GRAHAM. Right.

Mr. FIDELL. The answer is yes.

Senator GRAHAM. Okay. So, this idea that we're criminalizing the war is not true. What we're criminalizing, which has always been a crime, is the violation of law of armed conflict, and we're holding people accountable, and they can be put to death. Is it not true, in that setting, where a military commission is involved, that due process applies?

Mr. FIDELL. I certainly think so, yes.

Senator GRAHAM. Okay. That's what *Hamdan* is saying. So, we need to come up with due-process rights consistent with prosecuting criminal violations of the law of armed conflict. We're not talking about trying to criminalize the war. They're two different things.

Now, when it comes to coercion, is it not true that al Qaeda is trained to allege coercion?

Mr. FIDELL. It's certainly been said. I can't testify from personal experience as to their training manual. But that's certainly been repeatedly reported.

Senator GRAHAM. Does anyone disagree with that? [No response.]

Okay, it's a fact that our enemy is trained to allege violations of law. They are trained to allege coercion. So, would you agree with me that an accusation of coercion by a defendant in a military commission cannot bring the trial to a halt?

Mr. FIDELL. Senator, that would be one of the many issues that would come up. You might have an accused who would make an allegation like that, just as in any criminal court in this country, State or Federal. Somebody could come in and say, "My rights were trampled on," and then you'd have a little Article 39(a) session.

Senator GRAHAM. Right.

Mr. FIDELL. To use the court-martial terminology, you'd have a motions session, witnesses would be called, and the police or the interrogator would be called.

Senator GRAHAM. You would get to the bottom of the allegation, and you'd use some standard as to what would be unlawful coercion. War, by its nature, is coercive. But we're talking about coercive practices. It gets back to your statement. I don't want my country to benefit from coercive practice, from torture practices, but, by the same token, I don't want to let all of the evidence stop or being inquired into because someone alleges coercion. Under the DTA, we had a provision that said if an allegation of coercion is made regarding combat status, enemy combatant status, at the combat status review tribunal, it will be given appropriate probative value, it will be tested to see if it has any probative value. Does anyone disagree with that standard?

Mr. FIDELL. In the context of a Combatant Status Review Tribunal, that's a different kettle of fish; that's not a criminal proceeding, by any standard.

Senator GRAHAM. Right.

Mr. FIDELL. That is an administrative proceeding.

Senator GRAHAM. Do you agree there needs to be a balancing between the idea of a coercive environment and coercive practices?

Mr. FIDELL. Can you sharpen that question for me, Senator? I am struggling with it.

Senator GRAHAM. Basically the whole idea that you can't use anything that's coerced. We start with the idea of torture. That's

what we all agree upon. No one should benefit from tortured statements, because they're not reliable. Cruel, inhumane treatment, that's something we don't want to benefit from. But the point I'm trying to make is, this Congress needs to come up with some standard that will allow evidence to come into a criminal proceeding that would be from a coercive environment, because war, in and of itself, is coercive.

Mr. FIDELL. I'm not sure I can connect the dots between the assertion that war itself is coercive, it's violent. Whether that violence turns into coercion within the legal meaning for example, as it's currently used in Article 31(d) of the UCMJ is another matter. Congress has already spoken that we don't want coerced testimony in a court-martial under the UCMJ. I can't imagine that Congress would take a different position in a military commission.

Senator GRAHAM. The problem is, sir, that we're getting people off battlefields from all over the world that will be in the hands of other countries. We need to understand that coercion in the war on terror, because of its international scope. We are not talking about our own troops in our own hands, we're talking about gathering information about alleged war criminals from a variety of sources. I guess what I'm suggesting to this committee and to this body is that we need to have a rather sophisticated view of what coercion is, taking off torture, taking off cruel, inhumane treatment, but understanding that some degree of flexibility needs to be had in the war on terror.

I would like to establish what the norm is when it comes to terrorist suspects being interrogated by countries that we are friendly to, like Germany, France, Great Britain, Spain, and Israel. What kind of techniques do they use? Does it fall within Common Article 3? If it doesn't, why not? Why is it different? Is it something we should look at adopting?

[The information referred to follows:]

Other nations such as Great Britain, France, and Germany have not applied the standards of Common Article 3 because they have not detained terrorists in the context of an "armed conflict" triggering the treaty obligation. Conflicts not between states are covered by the laws of war to a lesser degree, as made more precise in the 1977 Protocols. Thus, for example, the campaign in Northern Ireland was not armed conflict, even when carried out by British armed forces, given the IRA's lack of any territorial base on British territory.

Senator GRAHAM. So, this idea that Common Article 3 is the norm when it comes to establishing interrogation of terrorist suspects, I doubt if that is the case, in terms of the international community. I would like to know more about that, and if you could help us, we would appreciate it.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator Graham.

As you can see from that colloquy, Senators have a number of questions they wish to ask. In order to accommodate two panels, I'm going to respectfully request of the witnesses, in their initial delivery, if they could put their opening statement into the confines of about 7 minutes. If you need to run over a minute or two, there's a reasonable generosity here in the chair, but that way we can move through this and allow Senators, many of whom have to come and go, to put the question to this important panel. Thank you very much.

We'll now have Katherine Newell Bierman, Counterterrorism Counsel, U.S. Program, Human Rights Watch. We welcome you.

STATEMENT OF KATHERINE NEWELL BIERMAN, COUNTERTERRORISM COUNSEL, U.S. PROGRAM, HUMAN RIGHTS WATCH

Ms. BIERMAN. Thank you, Mr. Chairman. I believe I can do 7 minutes. I will refer to my written statement throughout, so you can see what I've written there.

Senators, it is a great honor to be testifying before you here today, and I echo the gratitude I share with my co-panelists for your deliberation and your careful consideration of these matters before us.

I'm not a military lawyer, but I am an attorney with expertise on the laws of war and U.S. counterterrorism. I've attended multiple military commission hearings at Guantanamo Bay. I've had numerous formal and informal conversations with military commission personnel, the prosecution, and the defense. Some of them are here today, and I can guarantee you they will tell me what they think of what I said when we're done.

I am also a former U.S. military officer. I left the Air Force as a captain in 1996. As a young officer, I was asked to lead people much older and much more experienced than me, and they taught me something that I have never forgotten. When you're not sure what to do, stop, take a deep breath, and think about your bottom line. Ask questions. If the answers don't fit with the bottom line, ask more questions until the answers do. Then you make it happen. Today, I will talk about bottom lines and how to make it happen.

Mr. Chairman, the bottom line for me is this: the Supreme Court's decision in *Hamdan* presents Congress and the administration with an opportunity to start bringing accused terrorists to justice in a way that will both protect America's security and uphold its values. I hope that Congress seizes this opportunity by reaffirming the United States' longstanding commitment to Common Article 3 of the Geneva Conventions and ensuring that trials of terrorist suspects captured on the battlefield go forward in accordance with the standards of the UCMJ. If Congress and the administration choose that course, it would help to rebuild America's moral authority in the world, reaffirm America's commitment to the rule of law, and reclaim America's greatest tool in the war on terror: our integrity.

If, on the other hand, Congress and the administration try to find a way around *Hamdan* by shirking the Geneva Conventions or creating substandard tribunals, it is the tribunal system and American values that will remain on trial, as they have been for the past 4½ years, not the terrorists, who should be on trial.

Al Qaeda is an irregular force that does not abide by the rules of war, and it is not a signatory to the Geneva Conventions. As such, when its members are captured on the battlefield, they are not entitled to prisoner-of-war status. There are 143 articles in the third Geneva Convention on POWs; 110 address the requirements for the treatment of POWs. That is truly the gold standard. There's

only one Common Article 3, although it's repeated four times. Some say even that one may not apply to al Qaeda.

Common Article 3 is a narrow rule with the broadest application and establishes the barest minimum safeguards for humane treatment and fair justice. It was established as a minimum standard that would cover everyone involved in an armed conflict, regardless of their status, regardless of their behavior. It is specifically designed to apply to conflicts between a state that is a party to the Conventions, like the United States, and a nonstate force, like al Qaeda, that, by definition, cannot be a signatory. It ensures that no one caught up in an armed conflict is completely beyond the reach of law. Common Article 3 is the bottom line.

Some have suggested that Common Article 3 somehow confuses the U.S. military, but the Pentagon has been clear about the meaning of Common Article 3 and its obligations for decades, as you heard last week, from the JAGs. Deputy Secretary England said in his memo last week that the military orders, policies, directives, executive orders, and doctrine already comply with Common Article 3. The humane-treatment standard required by Common Article 3 is essentially the same standard that Congress already mandated when it passed the McCain amendment in the DTA last year. So, I don't understand how the administration can claim the military is confused by Common Article 3. If our troops are confused, it is because the administration decided to ignore the conventions, not because the Supreme Court says we must respect Geneva.

I would add, Mr. Chairman, that the United States Constitution gives us a lot of words that are hard to define, like "due process." Americans believe in these principles even though they feel mushy. We have worked out the meaning of these terms over the past 200 years. We don't say, "I can't define due process, in 10 words; therefore, we're not going to have any." If Congress thinks the troops need clarity, the best thing you can do is to reaffirm that Common Article 3 applies.

Were Congress to step back from Common Article 3, it would send a message that America's enemies would all too willingly amplify: the United States affirmatively seeks to treat people inhumanely, intends to try and execute people without fair trials, and willingly defies its own allies and history to do so.

Some have expressed concern that applying Common Article 3 to al Qaeda would leave American troops vulnerable to frivolous prosecutions under the War Crimes Act. Mr. Chairman, distinguished members, Human Rights Watch believes that the administration encouraged reluctant interrogators to adopt techniques that they knew were wrong by telling them that they would not be prosecuted. I think this speaks for itself. The truth is, no servicemember can be prosecuted for violations of the War Crimes Act unless military prosecutors decide to bring charges against them. Here's the bottom line. If we want an act that was committed against an American to be a crime, it also has to be a crime if it's committed by an American. I think it's hard to disagree with that.

People captured on the battlefield and suspected of having committed war crimes or other serious offenses should be brought to justice. Common Article 3, like much of the laws of war, is about good warfighting. The laws of war were not rooted in humanitarian

concerns; they were rooted in what made sense on the battlefield, what was in the military's interest to pursue. It's only recently in the history of the laws of war that human rights became an overlay. Common Article 3 is good warfighting, the military manuals that refer to this are in my written testimony.

Military commissions that prosecute these persons must meet international fair-trial standards. The rules and procedures for the military commissions should be based on those provided in general courts-martial. Every bogeyman raised by the administration is answered in the existing rules: hearsay, Miranda, classified evidence, chain of custody. Your JAGs have been dealing with these in a military environment for decades. The administration has some very clever civilian lawyers, but their attempts to wing it have been a disaster. Let Congress set the bottom line, and let the military lawyers make it happen using what they know best. The bottom line? Any departures from these standards must be exceptional, narrowly tailored to meet the interest of justice, and uniformly established before any proceedings begin, not just because that's fair, but because it's common sense.

The bottom line on coercion: Congress cannot effectively prohibit abusive interrogation techniques if rules for military commissions do not explicitly and effectively keep evidence obtained through those techniques out of judicial proceedings. Anything less than this will cut the heart out of the DTA. Upholding this rule provides the DTA with an enforcement mechanism we can definitely live with. Any rules and procedures must make such a prohibition on coerced evidence meaningful.

In my written statement, I touch upon how this works in the military justice system, in stark comparison with the virtually meaningless rules adopted by the failed military commissions.

What about hearsay evidence and Miranda warnings? Again, the U.S. courts-martial system has rules and procedures to address these concerns. It allows more evidence than has been suggested. To say the military lawyers haven't figured out how to deal with these challenges in the military environment, I think, is insulting to them. The bottom line concerning hearsay evidence: any rules or procedures that allow secondhand evidence, hearsay, should not allow the Government to convict people on the basis of secret interrogations without producing the witness either in person, by closed-circuit television or by deposition. The alternative is relying solely on an interrogator to tell you he didn't torture a confession out of someone, or relying upon one accused al Qaeda member to speak the truth about another. Use the witness to test the stories. The military knows how.

The bottom line in Miranda is this: no one should be forced to testify against themselves or to confess guilt. As with rules and procedures that give effect to the ban on abusive interrogations, Congress should look to the rules already in place, already tested, already used in training, and use the U.S. military's justice system to its best advantage. If the administration has a good reason to proceed differently, let the administration make the case. But concerns about getting in the evidence should not obscure what is most important here: the bottom line.

I will add a bogeyman to this panoply of bogeymen that the administration has put up. Here's my bogeyman, the civilian trial lawyers, the Department of Justice (DOJ), saying, "We have this great evidence from Ramzi bin al-Shibh and Khalid Sheikh Mohammed. Unfortunately, the only way to get it in is, to admit that we actually are holding them someplace, and we've tortured them. What kind of rules let us do that?" That's my bogeyman.

In closing, Senators, I want to see terrorists brought to justice. I was in a room when accused al Qaeda propaganda minister Ali Hamza al Bahlul called the proceedings illegitimate. Of course he said that. That's not the issue. That's not what's important about this. What killed me was the knowledge that an objective person like myself had to agree with him when he said that. Please make his statement untrue. Please do what's necessary to set the bottom line where it should be, and let's make it happen.

Thank you very much.

[The prepared statement of Ms. Bierman follows:]

PREPARED STATEMENT BY KATHERINE NEWELL BIERMAN

Senators, it is a great honor to testify before you here today.

I am not a judge advocate, but I am an attorney with expertise on the laws of war and U.S. counterterrorism law and policy and its practical effects on this nation's ability to fight a truly horrible enemy. I attended multiple military commission hearings at Guantanamo Bay as a human rights observer, and have had numerous formal and informal conversations with military commission officials, the prosecution, and the defense, military and civilian.

I am also a former U.S. military officer. I left the Air Force as a captain in 1996. As a young officer, I was asked to lead people much older and more experienced than me. They taught me something I have never forgotten: when you are not sure what to do, stop, take a deep breath, and think about your bottom line. Ask questions—and if the answer doesn't fit with the bottom line, you are asking the wrong questions. Keep asking, get an answer that fits, and then make it happen.

Today I will talk about the bottom line, and how to make it happen.

Mr. Chairman, for me, the bottom line is this: The Supreme Court's decision in *Hamdan* presents Congress and the administration with an opportunity—to start bringing accused terrorists to justice in a way that will both protect America's security and uphold its values. I hope that Congress seizes this opportunity, by reaffirming the United States' longstanding commitment to Common Article 3 of the Geneva Conventions, and ensuring that trials of terrorist suspects captured on the battlefield go forward in accordance with the standards of the Uniform Code of Military Justice (UCMJ), which have served this country so well for so long. If Congress and the administration choose that course, it will help to rebuild America's moral authority in the world, reaffirm America's commitment to the rule of law, and reclaim America's greatest tool in the war on terror: our integrity.

If, on the other hand, Congress and the administration try to find a way around *Hamdan*, by shirking the Geneva Conventions or creating substandard tribunals, the tribunal system will remain on trial, instead of the terrorists. That would be a profoundly unfortunate result, whether the goal is an effective fight against terrorism or upholding the rule of law.

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS APPLIED TO AL QAEDA

In *Hamdan*, the Supreme Court determined that Common Article 3 of the Geneva Conventions ("Common Article 3") applied to Mr. *Hamdan* as a member of al Qaeda captured on the battlefield.[1] The Court determined the military commissions established by the President to try Mr. Hamdan and other "enemy combatants" violated the requirements of Common Article 3.

In 2002, the administration had decided that no part of the Geneva Conventions, including Common Article 3, would apply in a legally binding way to the armed con-

[1] *Hamdan* v. Rumsfeld 548 U.S.—(2006).

flict with al Qaeda.[2] Since the *Hamdan* decision was announced, some have suggested that this ruling somehow imposes a new or alien requirement on the U.S. military, and that it is inappropriate to apply Common Article 3 to al Qaeda because it is not a signatory to the Geneva Conventions and because its members defy the laws of war and any fundamental regard for human rights.

This argument misrepresents the purpose and requirements of Common Article 3. It is true that al Qaeda is an irregular force that does not abide by the rules of war and is not a signatory to the Geneva Conventions. As such, its members are not entitled to prisoner of war status, or covered by many of the other provisions of the Third Geneva Convention concerning prisoners of war.[3]

But the framers of the Geneva Conventions intended to establish a minimal standard that would cover everyone involved in an armed conflict, regardless of the nature of the conflict or an individual's status or behavior. Common Article 3 is that standard. It is specifically designed to apply to conflicts between a state that is party to the Conventions (like the U.S.) and a non-state force, like al Qaeda, that, by definition, could not be a signatory. It is a narrow rule with the broadest application, and establishes the barest minimum safeguards for humane treatment and fair justice. It ensures that no one caught up in an armed conflict is completely beyond the reach of law.

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND HUMANE TREATMENT

The administration also argues that the terms of Common Article 3 are too vague. In particular, proponents point to the prohibition on "outrages against personal dignity," and say that the U.S. military would be unable to apply Common Article 3 in practice.

But the Pentagon has been clear about the meaning of Common Article 3 and its obligations for decades, as the standards it embodies are already part of U.S. military doctrine, policy, and training.[4] The U.S. military has long treated Common Article 3 and, in fact, the much higher standard for the treatment of prisoners of war (POWs), as standard operating procedure.[5] This committee heard testimony last week to this effect from Judge Advocates Generals (JAGs) from all the armed serv-

---

[2] George Bush. Memorandum on Humane Treatment of Taliban and al Qaeda Detainees. February 7, 2002. Available at http://www.justicescholars.org/pegc/archive/White—House/bush—memo—20020207—ed.pdf.

[3] Of 143 articles in the Third Geneva Convention, 110 address the requirements for the treatment of prisoners of war. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force with respect to the USA February 2, 1956), also available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68.

[4] As was discussed in testimony last week before this committee:

Senator McCain. You agree with that so that—General Black, do you believe that Deputy Secretary England did the right thing by, in light of the Supreme Court decision, issuing a directive to DOD to adhere to Common Article 3? In so doing, does that impair our ability to wage the war on terror?

General Black: I do agree with the reinforcement of the message that Common Article 3 is a baseline standard. I would say that at least in the United States Army, and I'm confident in the other Services, we've been training to that standard and living to that standard since the beginning of our Army. We continue to do so.

Admiral McPherson (?): It created no new requirements for us. As General Black had said, we have been training to and operating under that standard for a long, long time.

Senator McCain. General?

General Rives (?): Yes, I agree.

Senator McCain. (Inaudible.)

General Sandkulher (?): My opinion is that's been the baseline for a long time, sir.

General Romig (?): Yes, sir. That's the baseline. As General Black said, we train to it. We always have. I'm just glad to see we're taking credit for what we do now.

Admiral Hutson: I agree with what was said. But I'd point, I guess, that the President on February 7, 2002, said that Common Article 3 did not apply. So I think that this is—although we've been training to it and so forth, I think this is an important, if only perhaps symbolic, change of policy by the administration that I welcome.

Military Commissions in Light of the Supreme Court Decision in *Hamdan* v. Rumsfeld Before the U.S. Senate Committee on Armed Services, 109th Cong. (2006).

[5] In 1956, the United States Army codified in AFM 27–10 its position that unwritten or customary law is binding on all nations and that all U.S. forces must strictly observe it. U.S. Dep't of Army Field Manual, Field Manual 27–10, The Law of Land Warfare, para.7(c) (18 July 1956). AFM 27–10 restated Common Article 3 and Third Geneva Convention articles regarding trial of POWs. It also provided that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . killing without trial spies or other persons who have committed hostile acts." AFM 27–10 Sec 504(l).

ices.[6] Following the *Hamdan* decision, U.S. Deputy Secretary of Defense Gordon England issued a memorandum to all Department of Defense (DOD) units stating unequivocally that existing DOD orders, policies, directives, execute orders, and doctrine already comply with the standards of Common Article 3.[7] I sincerely doubt that the Deputy Secretary of Defense would make such a statement if the Pentagon was unclear about the meaning of the terms of Common Article 3.

The U.S. has been steadfast in applying the full protections of the Geneva Conventions (i.e., far more than just Common Article 3) to enemy fighters, even when not required to do so. U.S. adherence to the highest standards has improved treatment of captured American servicemembers, even when capturing governments claimed American service men were unprotected by Geneva.

The U.S. even applied the full protections of the Geneva Conventions to soldiers of governments who insisted the Conventions did not bind them, and when the Conventions technically did not apply. Examples include the conflict against the Viet-Cong in Vietnam, covert operations against the Soviet Union in Afghanistan, and against forces loyal to Somali warlords targeting international peacekeepers.[8]

The current conflict is not the last Americans will ever fight. It is only a matter of time before governments who might otherwise avoid the appearance of illegality will exploit America's efforts to carve out exceptions to the Geneva Conventions to justify poor treatment of captured Americans.

Were Congress to repudiate in some way the application of Common Article 3 to this or any conflict, it would be reversing decades of U.S. law and policy and sending a message to U.S. troops that is diametrically opposed to their training.

Congress has also set standards. The humane treatment standard required by Common Article 3 is essentially the same standard that Congress already mandated when it passed the McCain Amendment last year, which stated as law, "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[9]

For decades, the United States has accepted the substance of Common Article 3 as both an obligation under treaty and customary international law.[10] If Congress were to step back from that obligation, it would in effect be establishing a reservation to the Geneva Conventions. No country in the world has ever before formally renounced these obligations under Common Article 3. Such a step would send a message that America's enemies would all-too willingly amplify: the United States affirmatively seeks to treat people inhumanely (thus effectively repudiating the McCain Amendment), intends to try and execute people without fair trials, and willingly defies its own allies and history to do so.

Common Article 3 is not just a matter of human rights. Like many laws of war, it is good warfighting. The U.S. military knows this well:

> Insurgent captives are not guaranteed full protection under the articles of the Geneva Conventions relative to the handling of EPWs [enemy prisoners of war]. However, Article 3 of the Conventions requires that insurgent captives be humanely treated and forbids violence to life and person—in particular murder, mutilation, cruel treatment, and torture. It further forbids commitment of outrages upon personal dignity, taking of hostages, passing of sentences, and execution without prior judgment by a regularly constituted court.

---

[6] Id.

[7] "It is my understanding that, aside from the military commission procedures, existing DOD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DOD personnel that comply with such issuances would comply with the standards of Common Article 3." Memorandum from Gordon England to the Secretaries of the Military Departments, July 7, 2006, available at: http://www.defenselink.mil/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf.

[8] Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner (Geneva Conventions—Judicial Deference), 5–7, in *Hamdan* v Rumsfeld, 126 S.Ct. 2749 (2006).

[9] Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680 (2005).

[10] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force with respect to the USA February 2, 1956), also available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68. U.S., Remarks of Michael J. Matheson, Deputy Legal Adviser, U.S. Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, American Journal of International Law and Policy, Vol. 2, 1987, pp. 427–428 (iterating that Common Article 3 is customary international law).

> Humane treatment of insurgent captives should extend far beyond compliance with Article 3, if for no other reason than to render them more susceptible to interrogation. The insurgent is trained to expect brutal treatment upon capture. If, contrary to what he has been led to believe, this mistreatment is not forthcoming, he is apt to become psychologically softened for interrogation. Furthermore, brutality by either capturing troops or friendly interrogators will reduce defections and serve as grist for the insurgent's propaganda mill.[11]

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND WAR CRIMES

In the War Crimes Act of 1997, Congress made it a felony for any U.S. military personnel or U.S. national to engage in conduct that violates Common Article 3.[12] Reports indicate that the administration encouraged interrogators to adopt techniques that violated Common Article 3 by telling them they would be immune from prosecution.[13]

In the wake of the *Hamdan* decision, some have expressed concern that applying Common Article 3 to al Qaeda would leave American troops vulnerable to frivolous prosecution.

To accept such a proposition, one would have to believe that the likelihood of war crimes prosecutions by the United States has no relation to the reality of current or historical practice. No soldier can be prosecuted for violations of the War Crimes Act unless military prosecutors decide to bring charges against him. The military justice system is highly unlikely to take action against soldiers for trivial or ambiguous offenses under this act, especially since it has never done so even to prosecute even extremely serious crimes. To date, no U.S. servicemember has ever been prosecuted for any violation of the War Crimes Act, even in situations such as the war in Iraq, where everyone agrees the Geneva Conventions fully apply. Much less for violations of Common Article 3 occurring under less clear circumstances.

The fact is, American military prosecutors, and not anyone else, will make the decision to prosecute. It is hard to understand why we would suddenly not trust the Executive to judge whether a U.S. servicemember's suspected crime was sufficiently grave and substantiated to merit prosecution.

The administration also argues that, because Common Article 3 is an international standard interpreted by foreign courts, these courts will somehow create frivolous standards that U.S. courts will use to prosecute Americans. This proposition disregards the fact that foreign judicial opinions are not binding on U.S. courts,[14] and it is extremely unlikely that a U.S. prosecutor would pursue a case or a U.S. court would hold someone criminally responsible under a strained interpretation of this standard.

The provision of Common Article 3 concerning "outrages upon personal dignity" has always been interpreted as prohibiting very serious abuses. According to the official commentary on the Geneva Conventions, it was meant to prohibit acts "which world opinion finds particularly revolting—acts which were committed frequently during World War II." [15]

Judicial opinions from international criminal tribunal opinions reflect that level of severity. "Outrages upon personal dignity" as a criminal act are usually a form of violence, determined in part by severity and duration, and the intensity and duration of the resulting physical or mental suffering. Typically a crime of an "outrage against human dignity" is prosecuted alongside other egregious or violent acts to cover behavior outrageous precisely because it offends all sense of decency.[16]

For example, international criminal tribunal cases often prosecute outrages against human dignity alongside charges such as murder, rape, and torture—men

---

[11] Department of the Army, Field Manual (FM) 34–52, Intelligence Interrogation, May 8, 1987, Chapter 9.

[12] 18 U.S.C. § 2441(c) (2006). "(c) Definition.—As used in this section the term 'war crime' means any conduct—. . . (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".

[13] John H. Richardson, "Acts of Conscience," Esquire Magazine, Vol. 146, Issue 2, August 2006.

[14] Remarks of Justice Sandra Day O'Connor, Southern Center for International Studies (Oct. 28, 2003), available at http:// www.southerncenter.org/OConnor—transcript.pdf.

[15] Jean de Preux. III Geneva Convention: Relative to the Treatment of Prisoners of War. In Jean S. Pictet, The Geneva Conventions of 12 August 1949: Commentary, 39 (Geneva: International Committee of the Red Cross, 1960).

[16] Knut Dormann, Louise Doswald-Beck (contributor), Robert Kolb (contributor). Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary. (Cambridge, UK: Cambridge University Press, 2003). Pp. 314–324.

who forced women to dance naked on tables before they raped them,[17] murderers who forced women to strip naked in public before they were killed,[18] or interrogators who rubbed a knife on a woman's thigh and threatened to put it in her during torture.[19] Justice demanded those prosecutions address such humiliating treatment as separate outrages in their own right. While "outrages" do not have to take place only in the context of rape or murder, they have generally been prosecuted in the context of the most extreme situations of abuse.

I would add, Mr. Chairman, that the U.S. Constitution gives us a lot of words that are hard to define: for example, due process, free speech, cruel and unusual punishment, unreasonable searches. Americans believe in the principles embodied in these terms, even though their precise legal meaning is not self-evident. We don't say, "I can't define due process in 10 words or less, so let's not have any." Americans have worked out the meaning of these terms over 200 years. The precise meaning of the terms of the Geneva Conventions have also become broadly understood in the 50 years since the Conventions were drafted, and are well understood by the U.S. military. It was the administration's decision to ignore the Conventions that confused our troops, not the Supreme Court's decision to respect Geneva. If Congress wants clarity, the best thing it can do is to reaffirm that Common Article 3 applies.

Common Article 3 is actually much easier than you might think, because it isn't the gold standard, like granting prisoner-of-war rights. It's the barest minimum. The list of prohibited conduct is short precisely because the drafters of the Geneva Conventions agreed to apply it broadly.

Finally, Mr. Chairman, we should remember that the War Crimes Act not only permits prosecution of American troops who commit such crimes against others, but prosecution of foreign nationals who commit such crimes against Americans.[20] If we were to deny the application of Common Article 3 to this conflict, we would deny ourselves one avenue to try terrorists who perpetrate these offenses against Americans. If we want an act that was committed against an American to be a crime, it also has to be a crime when it is committed by an American. I think it is hard to disagree with that bottom line.

COMMON ARTICLE 3 AND FAIR TRIALS

People captured on the battlefield and suspected of having committed war crimes or other serious offenses should be brought to justice. Military commissions that prosecute these persons must meet international fair trial standards. The rules and procedures for the military commissions should be based upon those provided for general courts-martial.[21] Any departures from these standards must be exceptional, narrowly tailored to meet the interests of justice, and uniformly established before any proceedings begin. In particular, some principles must not be compromised.

MILITARY COMMISSIONS AND COERCED EVIDENCE

Through the adoption of the McCain Amendment to the Detainee Treatment Act (DTA), Congress established a prohibition on cruel, inhuman, or degrading treatment or punishment expressly to address abusive interrogation techniques.[22]

International and U.S. law have long recognized that one way to curb official abuses in gathering information is to prohibit the use of any evidence obtained through such actions in judicial proceedings. Otherwise, the goal of obtaining a conviction becomes an incentive to coerce confessions from suspects. This is the fundamental logic behind international rules against prosecuting people with evidence ob-

---

[17] The Prosecutor v. Kunarac, Kovac and Vukovic, Judgment of Trial Chamber II, ICTY, JL/P.I.S./566-e February 22, 2001.

[18] Prosecutor v. Nyiramasuhuko, Indictment, Case No. ICTR–97–21–I (Int'l Crim. Trib. for Rwanda May 26, 1997), case is ongoing.

[19] The Prosecutor v. Anto Furundzija, Statement of the trial chamber at the Judgment hearing, ICTY, Case No. IT–95–17/1–T December 10, 1998.

[20] 18 U.S.C. § 2441 (2006).

(a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act). (emphasis added).

[21] These rules and procedures are found in the Manual for Courts-Martial (MCM), which incorporates the Rules for Courts-Martial (RCM), the UCMJ, and the Military Rules of Evidence (MRE); and the body of jurisprudence that has developed from these standards.

[22] Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680 (2005).

tained through torture,[23] and behind rules in U.S. courts against the use of involuntary confessions or evidence obtained through other unlawful means.[24]

The bottom line: Congress cannot effectively prohibit abusive interrogation techniques if rules for military commissions do not explicitly and effectively keep evidence obtained through those techniques out of subsequent legal proceedings. Evidence obtained through interrogations that violate the DTA shouldn't be used in military commission hearings. Anything less than this will cut the heart out of the McCain amendment. Upholding this rule provides the McCain amendment with an enforcement mechanism.

Furthermore, any rules and procedures must make such a prohibition meaningful. For this reason, rather than starting from scratch, Congress should ensure that military commissions use the rules and procedures in the Manual for Courts-Martial and accompanying case law necessary to prohibit the use of coerced evidence.

In the U.S. military justice system, an involuntary statement obtained through the use of coercion generally may not be received in evidence against an accused who made the statement. The accused must move to suppress, or object to the evidence. If the military judge thinks there is sufficient doubt about the statement, the prosecution—the party with the best access to the story behind the statement—then has the burden of establishing the admissibility of the evidence. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Statements of witnesses not present before the court are presumptively inadmissible. The proponent must show the statement meets limited exceptions to this rule designed to weed out questionable evidence.

The failed military commission rules demonstrate a stark contrast. On March 24, 2006, the General Counsel of the DOD adopted a change to the military commission rules to prohibit the use of evidence obtained through torture.[25] However, the rule provided few safeguards to make the prohibition meaningful. It failed to indicate whether the commission on its own would make inquiries into the possible use of torture and whether the U.S. Government must provide the information the commission requests to determine whether a statement was extracted through torture. It also failed to provide guidance on whether the prosecution must make its own independent determination of whether interrogation methods constituted torture, or whether it must accept determinations made by others, e.g., those conducting the interrogations, or senior Pentagon or Department of Justice officials.[26]

THE USE OF HEARSAY EVIDENCE IN MILITARY COMMISSIONS

Opponents of the use of the U.S. military justice system's rules concerning hearsay evidence say that such rules will stymie prosecutions by limiting evidence essential to the prosecution of accused terrorists. They suggest that rules regarding hearsay—which admit "second hand" statements only in exceptional circumstances—will require military commanders to be called in from warfighting duties to testify at proceedings thousands of miles away; that key witnesses in Afghanistan and elsewhere will refuse to travel to testify; and that valuable and reliable evidence will be lost to logistics.

In fact, the U.S. courts-martial system has rules and procedures to address these concerns, and allows in more hearsay evidence that these arguments suggest. Hearsay exceptions in U.S. courts-martial are generally the same kinds used in U.S. Federal courts.[27] Summaries of statements made by witnesses in an excited state, at

---

[23] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 entered into force with regards to the United States June 26, 1994. Article 15.

[24] See, e.g. Mapp v. Ohio, 367 U.S. 643 (1961).

[25] "Military Commission Instruction No. 10, 'Certain Evidentiary Requirements," U.S. DOD, March 24, 2006, available at: http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf.

[26] See, e.g., "Q & A on Military Instruction Number 10: Will it Keep Evidence Obtained through Torture or Cruel Treatment out of Commission Trials?" Human Rights Watch Question and Answer, March 31, 2006, available at: http://hrw.org/english/docs/2006/03/31/usdom13109.htm.

[27] Article 36(a) of the UCMJ provides that trial procedures for courts-martial, military commissions and other tribunals may be prescribed by the President. It states that the regulations should as far as 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". The Manual for Courts-Martial (chapter three: "Military Rules of Evidence") was issued to set out the applicable rules of evidence for courts-martial, and was modeled on the Federal Rules of Evidence: See U.S. v. Diaz, 59 M.J. 79, U.S. Armed Forces, Sep 17, 2003; *Hamdan* v. Rumsfeld—S.Ct.—, 2006 WL 1764793; Manual for Courts-Martial, Military Rules of Evidence, Analysis of the Military Rules of Evidence, App. 22, M.R.E. 801.

a time of high stress, or just after perceiving an event are all admissible—and the actual witnesses who made the statements need not be present. In all of these cases, soldiers or arresting officers can simply describe what witnesses on the scene told them; the person making the battlefield utterance who wouldn't have to. In this sense, there is some modest burden on the military, but it's worth it given the alternative, which allows easy cover-up of coercive interrogation. In addition, there are many other ways to adhere to the existing rules against hearsay without imposing excessive travel burdens on witnesses who are located far away. Witnesses can testify by closed circuit television, or their depositions by both sides can be taped and played in court. Moreover, the Military Rules of Evidence allow a declarant to be determined "unavailable" by reason of military necessity, opening the door to a number of hearsay exceptions.

The bottom line concerning hearsay evidence should be this: Any rules or procedures that allow hearsay should not allow the government to convict people on the basis of secret interrogations without producing the witness, either in person, by closed-circuit television, or by deposition. Our concern is that such interrogations are likely to be described by only the interrogator, or possibly only the interrogator's supervisor or colleague, or a government official who spoke to an interrogator from a foreign country. This is fundamentally unfair for two reasons.

First, if you are listening to a report from an interrogator about a confession or admission, how do you test whether the statement was coerced or even tortured out of the declarant? You are deciding whether the interrogation used torture by asking the interrogator himself. If the declarant also testifies, at least then the factfinder can decide based on two sides to that story—the declarant and any interrogator who might refute claims of mistreatment.

The second reason does not relate to statements by interrogators, but statements made by one detainee implicating another. When the statement is second hand, you can't directly test its credibility. According to the administration, al Qaeda members are trained to lie during interrogation. No one should be convicted on the basis of the testimony of such allegedly unsavory characters without the opportunity to question the witness directly. An interrogator's hearsay account of what one detainee said about another deprives the suspect of this essential confrontation right.

Some advocate adopting the evidentiary rules and procedures of international criminal tribunals to accommodate hearsay evidence. However, to be effective and fair, such a step would need to do more than simply adopt an evidentiary standard. International criminal tribunals use a panoply of evidentiary and other rules to ensure fairness.

Generally, their rules allow the factfinder to admit any relevant evidence that he or she deems to have probative value. But, there are other rules that work with this standard. For example, the tribunal is made up of legally trained judges who have experience making fine distinctions on the reliability and value of different forms of evidence that a jury or even a panel of non-lawyer officers simply won't have. There is a clear prohibition on any evidence that is obtained by a violation of internationally recognized human rights norms if "the violation casts substantial doubt on the reliability of the evidence; or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."[28] The judges can decide this issue on their own; a party doesn't have to raise the matter. The judges are instructed to look at "indicia of [a statement's] reliability" such as its truthfulness and trustworthiness along with whether or not the statement was voluntarily given.[29] The judges can decide to disregard testimony after it has been given rather than keeping it out in the first place.[30] In ruling on admissibility, including the relevance or probative value of hearsay evidence, the court must give reasons that are placed in the record of the proceedings.[31]

Hearsay admissibility is one of the most misunderstood rules in the U.S. system, with many careful and complex rules interwoven over time, but the U.S. military judge advocate corps knows them well. If the administration has a good reason to proceed differently, let the administration make the case. But concerns about "getting in the evidence" should not obscure the bottom line: Any rules or procedures that allow hearsay should not allow the government to convict people on the basis of secret interrogations without producing the witness. The invitation to abuse is simply too great.

---

[28] Rome Statute of the International Criminal Court, Article 69(7) (2002).

[29] See., e.g., Prosecutor v. Tadic, Case No. IT–94–1, Decision on the Defense Motion on Hearsay, (Trial Chamber, Int'l Crim. Trib. Former Yugo., Aug. 5, 1996).

[30] Trial Transcript for IT–94–1–T, Greve Testimony, at page 923, line 8. Available at http://www.un.org/icty/transe1/960520ed.htm.

[31] Id. 64(2).

"MIRANDA WARNINGS" AND MILITARY COMMISSIONS

The administration witnesses before the Judiciary Committee say that using the U.S. military justice system's requirements for rights warnings and exclusion of evidence would compromise military operations—that U.S. troops in the field would face a choice between reciting Miranda warnings as they conducted urban warfare, and thereby potentially discouraging valuable intelligence information, or forgoing prosecution of suspected terrorists.[32]

But the rules and procedures for courts-martial have already dealt with this issue. The rights warning is not required when someone is interrogated for the purpose of gathering intelligence.[33] Moreover, the failure to give a rights warning does not keep evidence obtained through an intelligence interrogation out of court.

Only if an interrogation is begun for the purposes of law enforcement or disciplinary proceedings is a rights warning required for the resulting statements to be admissible. Whether the interrogation is disciplinary or law enforcement is determined by assessing all the facts and circumstances at the time of the interview to determine whether the questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity.[34]

Evidence obtained through intelligence interrogations is generally admissible. The other side can challenge that evidence for a number of reasons, the most relevant here being that it was coerced[35] (or that the interrogations were really for law enforcement). If the judge decides evidence from intelligence interrogations cannot be admitted, the next question is whether the evidence from the law enforcement interrogation was tainted by a coerced intelligence interrogation. Evidence from intelligence interrogations can in principle be given to law enforcement interrogators, but if the evidence from an intelligence interrogation was coerced, that may keep out evidence from both interrogations.

This issue typically comes up when U.S. servicemembers are questioned for intelligence-gathering purposes, which not unusual. For example, when troops return to base after combat, they are often debriefed by intelligence personnel—a form of intelligence interrogation. Should the debriefer determine that a U.S. service man may have been involved in a crime, the purpose of the questioning might shift, with the purpose determining the admissibility of unwarned statements that the service man might make. The classic legal opinion on this rule is *U.S.* v. *Lonetree,*[36] which dealt with a Marine Corps embassy guard stationed in Moscow who was charged, among other things, with committing espionage by passing confidential information to Soviet agents. He was debriefed for intelligence purposes and only later interrogated for prosecution. The court knew the difference, and unwarned statements made during the course of the intelligence debriefing came in.

That's the rule now, Senators. Again, if the administration has a good reason for changing the rules, let it make the case.

The bottom line regarding Miranda warnings is this: no one should be forced to testify against themselves or to confess guilt. This is another reason why statements which have been made as the result of torture may not be used as evidence in any proceedings. The protections in a general court-martial that prevent forced self-incrimination require that people be warned of their right to remain silent and their right to an attorney fairly early in a law enforcement or disciplinary process. As with rules and procedures that give effect to the ban on abusive interrogations, Congress should look to the rules already in place, already tested, already used in training, and use the U.S. military justice system to its best advantage.

In closing: Senators, I want to see terrorists brought to justice. I was in the room when accused al Qaeda propaganda minister Ali Hamza al Bahlul called the proceedings illegitimate. Of course he said that, but that's not what's important. What killed me was the knowledge that any objective observer would have to agree with him. Please do what's necessary to set the bottom line where it should be, and let's make it happen.

Chairman WARNER. We thank you. A very powerful statement. I must say, I'm greatly impressed, thus far, with the panel and

[32] The courts-martial system requires rights warnings through Article 31 of the UCMJ and the Miranda and Tempia line of cases.

[33] A rights warning is only required when the questioning is of a "law enforcement or disciplinary" nature: *U.S.* v. *Lonetree,* 35 MJ 396, CMA 1992; cert denied 113 S.Ct 1813; *U.S.* v. *Loukas,* 29 M.J. 385, 387 (CMA,1990). See also: *U.S.* v. *Moses,* 45 M.J. 132 (U.S. Armed Forces, 1996.); *U.S.* v. *Cohen,* 63 M.J. 45 (U.S. Armed Forces, 2006).

[34] *U.S.* v. *Cohen,* 63 M.J. 45, 49 (U.S. Armed Forces, 2006).

[35] Rule 304, Military Rules of Evidence.

[36] 35 MJ 396, CMA 1992; cert denied 113 S.Ct 1813.

their commitment to try and bring into closer perspective the problems that face Congress here. I thank you.

We'll now have Mr. Fidell, President of the National Institute of Military Justice (NIMJ).

STATEMENT OF EUGENE R. FIDELL, PRESIDENT, NATIONAL INSTITUTE OF MILITARY JUSTICE

Mr. FIDELL. Thank you, Mr. Chairman, Senator Levin, members of the committee.

Chairman WARNER. Tell me a little bit about the history of the Institute, just a word or two.

Mr. FIDELL. With great pleasure.

The NIMJ was founded in 1991 by myself and a number of other former military lawyers who felt there was a need for some outside body of people who were familiar with the system, who were essentially believers in the system, but who believed that a purpose would be served by having an outside organization monitoring developments, trying to make suggestions from time to time, and trying to make the system as good as it could be.

NIMJ is currently housed, Mr. Chairman, at Washington College of Law, and at American University. We have two overall objectives. One is to promote the fair administration of justice in the armed services, and, second, to foster improved public understanding of what used to be a fairly obscure area. Now, of course, every American, and a lot of people around the world, have become experts in it, by force of events.

Chairman WARNER. Thank you very much.

Mr. FIDELL. That's a little bit of the background.

The directors and advisors are typically former officers, either career officers, up to and including brigadier general in the Marine Corps, rear admiral in the U.S. Navy; others, like myself, were relatively short-term military personnel. We have an exception or two, including a person with no military experience, but a former Federal prosecutor who is an expert in constitutional and criminal law.

Chairman WARNER. We thank you, sir. Now, please proceed.

Mr. FIDELL. Thank you very much.

When I took off my uniform, 34 years ago, after 3 years, 7 months, and 8 days, little did I think that I would, this far in the future, find myself testifying before the Senate Armed Services Committee, much less testifying about military commissions, which, in 1972, were viewed essentially as a museum piece. Everybody knew the *Quirin* case, the German saboteurs. But basically it was something you'd expect to find in the legal section of the Smithsonian. Events, obviously, have taken a different tack.

Mr. Chairman, we circulated a discussion draft on July 6 with our thoughts on what ought to be done in the wake of the *Hamdan* decision. We don't believe that draft is the last word, but we do think it's a sound starting point for your consideration. The draft, which is essentially a quite conservative document, reflects our respect for the basic integrity of the UCMJ and also the traditional interplay between the executive and legislative branches.

We believe that the highest priority for military justice, what I'll call the classic military justice, dealing with good order and discipline in the force, or the particular subset that we're dealing with

today, is the achievement of public confidence in the administration of justice. That's not simply another way of saying that we have 100 percent assurance, a mathematical certainty, that every person who's charged is going to be convicted. Rather, it's a shorthand way of summarizing all of the deeply held values that you referred to I believe or perhaps Senator Levin at the beginning, that we believe in as a country.

It sounds like an obvious proposition, but it does bear repeating, because, frankly, there have been times, recently, when reviewing prior testimony taken here and in another body, when it has seemed that there are those who believe that the military commission system rules have to ensure convictions. I believe they have to ensure fairness.

The basic approach of our discussion draft is to strongly tilt military commissions in the direction of general courts-martial, which are the felony-level military court. This is consonant with the current Manual for Courts-Martial, which is an Executive order promulgated by the President. The preamble to the Manual for Courts-Martial states that military commission procedures will be "guided by" the rules for general courts-martial, while also recognizing the President's power to depart from that model.

Our proposal seeks to cabin that power in several ways. First, it requires that the President state with particularity, the facts that he believes render it impracticable to follow the general court-martial model on any particular point. This is consistent or consonant with the decision of the Supreme Court.

"With particularity" is a phrase that only a lawyer could love, but the words do have meaning. They send a message. They mean that the President will not have satisfied the requirements of the statute, as we envision it, if his justification is simply vague generalities that do not logically lead to the conclusion that a particular general court-martial rule or practice is impracticable. That, in fact, was a vice in the President's military order of November 13, 2001, which I strongly recommend people reread. The President made certain findings, but the findings did not logically lead to the conclusion that he drew; namely, that it was impracticable to follow the usual norm. In fact, the usual norm, I might add, under Article 36(a) of the UCMJ now, is to follow Federal District Court practice. So, we're already moving one step away from the norm that the Congress put in place when it passed the UCMJ in 1950.

In addition, our proposal doesn't contemplate a blanket presidential determination that general court-martial rules are impracticable across the board. You can't simply wave the wand over it and say "Impracticable. Can't do it. Now I'll start, give me a clean yellow pad." That's not our concept. The President would have to particularize the respects in which the general court-martial model cannot work in a military commission setting.

Our proposal also requires that Congress be notified of any determination of impracticability. That used to be a reporting requirement in Article 36(b) of the UCMJ. For better or worse there is no point in crying over spilled milk but Congress repealed the reporting requirement in 1990 on the theory that it was a paperwork reduction measure. That, I think, was unwise, and I hope that Congress will revisit that issue and require all changes to the Manual

for Courts-Martial, not only those that relate to military commissions, but also those that relate to good order and discipline, courts-martial per se, be reported to you.

We believe that a revived reporting requirement should be a reality, and that Congress should stand ready to review impracticability determinations and intervene, as necessary, with legislation, if that's what it takes.

NIMJ's proposal provides that the President's determination that some rule applicable to general courts-martial is impracticable in the military commission context is subject to judicial review, and we've particularized what kind of judicial review. We've proposed two standards. They're familiar standards under the Administrative Procedure Act. Is it an abuse of discretion, or is it contrary to law? These are very real requirements. They're familiar to practitioners of administrative law. They're familiar to Federal judges. They are not window dressing. Whether any particular impracticability determination violates either of those tests would be litigable in the course of review of a military commission case. By that I mean by the United States Court of Appeals for the Armed Forces.

The NIMJ proposal singles out one part of the UCMJ as inapplicable to military commissions. That's Article 32. That is the provision that prescribes a pretrial investigation as a precondition to any general court-martial.

We recognize that Congress may conclude that other parts of the statute may also be dispensed with. For example, Congress might conclude that the right to select your own uniformed lawyer, the so-called individual military counsel, or IMC under Article 38(b)(3)(B) could be viewed as a luxury that can wisely be dispensed with in the context of military commissions. Similarly, Congress might conclude that the first stage of appellate review—namely, review by the Army, Navy, Air Force, or Coast Guard Court of Criminal Appeals could be dispensed with. Instead of having the kind of layer cake that we currently have for general court-martial, you would go directly from the military commission up to the U.S. Court of Appeals for the Armed Forces over on E Street.

If Congress did that, I think that you would have to make some adjustments to the Court of Appeals' jurisdiction to make sure that they could review a sentence appropriateness, as well as to determine whether it's legal. There are certain limitations currently in Article 67 of the UCMJ that you might have to expand if you dispensed with the first tier of appellate review. I'd be happy to go over it. I don't want to get too much into the details now.

Now, this is important. Just as there are some court-martial-related provisions of the UCMJ and the Manual for Courts-Martial that Congress might be disposed to affirmatively direct not be applied to military commissions and then, of course, you'd never have to have an impracticability determination by the President. The committee might also conclude that there are some provisions that are so critical to public confidence in the administration of justice that they ought to be placed beyond the President's power to make exceptions on grounds of impracticability. For example, should there be an explicit ban on the use of coerced testimony, as Senator Graham and I were having a colloquy on before? There is an ex-

plicit ban currently in Article 31(d) for courts-martial. Should the right to see all the evidence the Government intends to put before the trier of fact be immortalized in the statute, or the right of self-representation, or the right to attend every session? We didn't include such a provision, a kind of military-commission due-process floor, in our discussion draft. However, I have to say that because some of the testimony that has been presented on behalf of the administration in the time since July 6 has seemed to reflect a measure of intransigence, the committee may not be disposed to leave the question of departures from the court-martial norm as much in the President's hands as our original proposal does, even with the substantial procedural protections we've recommended. The committee's in a better position than we are to make that determination, although I'm confident that it's going to have suggestions from a variety of sources. But it does seem fair to state that, to this extent, at least, the situation is somewhat different from what it was at the time that we framed our proposal.

The final comment that I'd like to make responds to one of the remarks that a fellow panelist made, and I think it's clearly on people's minds, having to do with Common Article 3. We haven't gotten into Common Article 3 in our presentation, but the suggestion that the terms of Common Article 3, which people should, it's always good to look back at the statute; so, too, it's always good to look back at the Geneva Conventions and see actually what it says. The suggestion that these terms are too amorphous to form a basis for conduct by our personnel, because that is the anxiety that people have expressed, I think, has to be taken with a grain of salt. Let me give the specifics why.

First of all, we have a very intelligent and well-trained and educated military force—better, stronger, smarter, better-read than probably at any time in our history. We currently impose on our military force a variety of criminally punishable prohibitions. For example, Article 88 of the UCMJ, which applies only to commissioned officers, punishes military officers if they speak contemptuously of the President, certain other high officials, and this body. Well, what is "contemptuous"? Is that a term that is too vague? Our legal system doesn't think so, and hasn't, for many, many decades. Our UCMJ prohibits, under criminal penalty, dereliction of duty. I'm referring to Article 92, paren 3. Is "dereliction of duty" any vaguer or more amorphous than the kinds of prohibitions that are found in Common Article 3?

Article 93 is particularly pertinent to this conversation. Article 93 is the punitive article dealing with cruelty and maltreatment. It provides any person subject to this chapter, which is to say our personnel, who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct. The Congress of the United States and the President, in approving the UCMJ and in promulgating the manual, have felt that that is a workable, comprehensible prohibition.

Article 133 prohibits, under penalty of criminal sanction, conduct unbecoming an officer and a gentleman. Is that too vague?

Article 134, which applies to every person in uniform, prohibits conduct that is prejudicial to good order and discipline. Is that too vague?

My point, obviously, is that before anyone leaps on the bandwagon that Common Article 3 lacks the precision that we associate with criminal sanctions, a proposition that all of us obviously respect, I think some very careful thought should be given to the matter.

Mr. Chairman, it is a privilege to have been able to speak to you this morning.

[The prepared statement of Mr. Fidell follows:]

PREPARED STATEMENT BY EUGENE R. FIDELL

Mr. Chairman, Senator Levin, and members of the committee: Thank you for affording the National Institute of Military Justice (NIMJ) an opportumty to testify this morning on the important subject of military commissions. I have a few points I would like to make in these opening remarks, but I will keep it brief in. order to maximize the time available for questions.

First, a word about NIMJ. NIMJ was founded in 1991. Our directors and advisors include professors of law at several nationally-known law schools as well as private practitioners. All but one—a former Federal prosecutor—has served on Active-Duty, up to and including brigadier general and rear admiral. We have two overall objectives: to foster the fair administration of justice in the armed services, and to improve public understanding of military justice. NIMJ circulated a discussion draft on July 6, 2006.

We do not feel that that draft is the last word, but we think it is a sound starting point for your consideration. The draft reflects our respect for the basic integrity of the Uniform Code of Military Justice (UCMJ) and the traditional interplay of the executive and legislative branch's shared responsibility for military matters.

NIMJ believes that the highest priority for military justice—either the subset that concerns good order and discipline within the armed services or the other subset with which we are dealing today that concerns how we prosecute crimes by an adversary—is the achievement of public confidence in the administration of justice. "Public confidence in the administration of justice" is not another way of saying we have 100 percent assurance—mathematical certainty—that every person who is charged will be convicted. Rather, it is a shorthand way of summarizing all of those deeply held values—values that reflect the commitment of the generation of the Founders to due process of law and fundamental fairness. This sounds like an obvious proposition, but it bears repeating because there have been times, reviewing prior testimony taken here and elsewhere, when it has seemed that there are those who believe the military commission system rules must ensure convictions. I believe they must ensure fairness. If that means some who are guilty may not ultimately be convicted, that is the price we pay for having a legal system.

The basic approach of NIMJ's discussion draft is to strongly tilt military commissions in the direction of general courts-martial, our felony-level military court. This is consonant with the current Manual for Courts-Martial, which provides that military commission procedures will be "guided by" the rules for general courts-martial, while also recognizing the President's power to depart from that model. Our proposal seeks to cabin that power in several ways.

First, it requires that the President state with particularity those facts that render it impracticable to follow the general court-martial model on any particular point. This is consonant with the decision of the Supreme Court in *Hamdan*. "With particularity" is a phrase only a lawyer could love. But those words do have meaning. They mean the President will not have satisfied the requirement of the statute if his justification is filled with vague generalities that do not logically lead to the conclusion of impracticability. That was a vice in the President's Military Order of November 13, 2001, which made findings that were nebulous and disconnected from the order's wholesale deviation from Federal district court practice (which is the overall default model under Article 36 of the UCMJ).

Moreover, the proposal does not contemplate a blanket presidential determination that general court-martial rules are impracticable across-the-board. These determinations must address specific provisions.

Second, our proposal requires that Congress be notified of any determination of impracticability. There used to be a reporting requirement for changes to the Man-

ual for Courts-Martial, but it was a dead letter. NIMJ believes this new, revived reporting requirement should be more of a reality, and that Congress should stand ready to review impracticability determinations and intervene as necessary with legislation.

Third, NIMJ's proposal provides that the President's determination that some rule applicable to general courts-martial is impracticable in the military commission context is subject to judicial review for abuse of discretion or on the ground that it is contrary to law. These are real requirements, familiar to practitioners of administrative law as well as to Federal judges. They are not window-dressing. Whether any particular impracticability determination violates either of those tests would be litigable in the course of direct review of any military commission conviction.

The NIMJ proposal singles out one part of the UCMJ as inapplicable to military commissions. That is Article 32, which deals with the pretrial investigation that is a precondition for a general court-martial. We recognize that Congress may conclude that other parts of the statute may similarly be dispensed with. For example, Congress might conclude that the right to individual military counsel-the right under Article 38(b)(3)(B) to select your own uniformed defense counsel—is part of the deluxe version of military justice that need not be extended to enemy combatants in the context of a military commission. Similarly, Congress might conclude that the fIrst stage of appellate review review in a service court of criminal appeals—is inessential in military commission cases, although if it did so, I would recommend giving the United States Court of Appeals for the Armed Forces authority to review military commission findings and sentences on the same broad grounds currently applicable to court of criminal appeals review of courts-martial. This would require an amendment to Article 67.

Just as there are some court-martial-related provisions of the UCMJ and the Manual for Courts-Martial that Congress might be disposed to affirmatively direct not be applied to military commissions (thus rendering an impracticability determination unnecessary), the committee might also conclude that some provisions are so critical to public confidence in the administration of justice that they should be placed beyond the President's power to make exceptions on grounds of impracticability. For example, should there be an explicit ban on the use of coerced testimony in military commissions (see Article 31(d), UCMJ), or should the right to see all evidence the government seeks to put before the trier of fact, or the right of self representation or the right to attend all sessions be stated in so many words?

NIMJ did not include such a provision—a kind of military commission due process floor—in our discussion draft. However, some of the testimony that has been presented on behalf of the administration has seemed to reflect such intransigence that the committee may not be disposed to leave the question of departures from the courts-martial norm as much in the President's hands as our proposal does, even with the substantial procedural protections we have recommended. The committee is in a better position than we are to make that determination, but it does seem fair to state that to this extent the situation is somewhat different from what it was at the time we framed our proposal.

My final remark has to do with the process by which determinations of impracticability are arrived at. I will leave it to others to discuss how the Defense Department conducts its internal deliberations, but I do believe public confidence in the end product would be directly served if any proposed departures from the general court″martial norm (and the supporting detailed justification) were made available in draft so the public can comment on them. The Department already does this when it recommends changes in the Manual for Courts-Martial, see DOD Directive 5500.17, MCM (2005 ed.), App. 26, at A26–8 (• E2.4), and its failure (with limited exceptions) to use notice-and-comment procedures when promulgating military commission rules has been a continuing disappointment. See Peter Raven-Hansen, Detaining Combatants by Law or By Order? The Rule of Lawmaking in the War on Terrorists, 64 La. L. Rev. 831 (2004); Eugene R. Fidell, Military Commissions and Administrative Law, 6 Green Bag 2d 379 (2003).

NIMJ appreciates the opportunity to participate in this hearing. I will be happy to respond to questions and to work with the committee as consideration of these important matters continues.

NATIONAL INSTITUTE OF MILITARY JUSTICE

MILITARY COMMISSIONS ACT OF 2006

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

Discussion Draft Rev. 2, September 1, 2006

A Note from NIMJ

On July 5, 2006, the National Institute of Military Justice ("NIMJ") circulated proposed amendments to the Uniform Code of Military Justice ("UCMJ"). The purpose was to stimulate discussion and help focus the issues for congressional consideration. We received a number of thoughtful and constructive suggestions, some of which were reflected in the July 6, 2006 Rev. 1. Others we decided did not need to be resolved in this legislation.

On July 19, 2006, the Senate Committee on Armed Services conducted a lengthy hearing on military commissions and related issues. NIMJ testified, as did the New York City Bar, Human Rights Watch, Human Rights First, and the Heritage Foundation. A second panel followed, with testimony from Professors Scott L. Silliman, Neal K. Katyal (who argued *Hamdan v. Rumsfeld*), and David A. Schleuter (formerly a member of NIMJ's Advisory Board). All of the witnesses'

prepared testimony is on the Committee's website, at http://armed-services.senate.gov/e_witnesslist.cfm?id=1812. A transcript is also available.

During the hearing, NIMJ was urged to revisit Revision 1 of its Discussion Draft, and all of the panelists were asked to develop suggestions for provisions that would guarantee due process in military commissions. The groups were encouraged to coordinate their lists as much as possible. NIMJ has offered to serve as a clearinghouse for this effort, and has appointed a Special Committee on Military Commissions for this purpose, under the chairmanship of our General Counsel, Professor Stephen A. Saltzburg, of The George Washington University Law School. We have received a number of suggestions both from within the United States and from as far away as Australia, and have studied a draft of the Administration's proposed military commissions legislation.

The Committee asked the July 19 witnesses to report back in approximately one month. This Revision 2 of NIMJ's Discussion Draft is our effort to respond to the Committee's request. While we have circulated it to the other witnesses with a view to narrowing the differences among us, we anticipate that differences will remain, and we will study with interest others' submissions, as well as their responses to the Committee's questions for the record.

As with Revision 1, this draft does not attempt to address every issue raised by *Hamdan*. Our focus remains the UCMJ, and our objective is still to pre-

serve the integrity of that statute and keep any surgery attributable to military commissions to the absolute minimum. As with Revision 1, we have not attempted to address detention-related issues, which we consider separate in important respects. We also have not attempted to prepare a list of substantive offenses that may be tried by a military commission. Obviously, Congress has an express grant of authority to "define . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 9. We believe that it would suffice to enact a single punitive article that would incorporate by reference the definition found in the War Crimes Act. 18 U.S.C. § 2441(c).

As will be apparent from the draft that follows, we do not agree with the thrust of the approach set forth in various drafts from the Administration that we have examined.

We applaud the Committee's expenditure of time and effort on this important matter. We encourage it to continue in that vein and resist any temptation to compromise on transparency despite the inevitable pressure arising from the legislative calendar.

In the following text, matter to be deleted from the UCMJ is ~~struck-through~~. Matter to be added is <u>double-underscored</u>.

For further information on NIMJ, please visit our website, www.nimj.org.

Text

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

In time of war or pursuant to an authorization for the use of military force, the President may establish military commissions and provost courts consistent with international law, including the law of war. No case shall be tried by a military commission other than in the field unless the Attorney General certifies in writing to the Secretary of Defense, with copies of the certification filed with the Committees on Armed Services of the United States House of Representatives and Senate, that the charge or charges cannot be tried in a United States district court. 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 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) Pretrial, trial, and post-trial procedures, including modes of proof, for military commissions and provost courts—

(1) may be prescribed by the President by regulations which shall, except as otherwise provided in subparagraph (2) of this paragraph, apply the principles of law and the rules of evidence prescribed for general courts-martial under paragraph (a) of this article;

(2) (A) shall, at a minimum, include the following rights as they apply in general courts-martial:

(i) to examine and respond to all evidence considered by the military commission;

(ii) to be present at all sessions of the military commission other than deliberations or voting;

(iii) to the assistance of counsel;

(iv) to self-representation;

(v) to the suppression of evidence obtained by self-incrimination without the warnings required by article 31(b) (except if obtained by interrogation con-

ducted primarily for intelligence or other operational purposes) or through the use of coercion, unlawful influence, or unlawful inducement; and

(vi) to the exclusion of inadmissible hearsay evidence. (B) shall not include the following rights:

(i) investigation (article 32);

(ii) forwarding of charges (article 33);

(iii) statute of limitations (article 43); and

(iv) review by a court of criminal appeals (article 66);

(C) need not apply any principle of law or rule of evidence which the President determines is impracticable, provided that .such determination must—

(i) be in writing;

(ii) state with particularity the basis forthereof;

(iii) be reported to Committees on Armed Services of the United States House of Representatives; and Senate

(iv) be subject to review for abuse of discretion or violation of law by the judge of any military commission and by the Court of Appeals for the Armed Forces as part of the review provided in section 867 (article 67); and

(3) may not be contrary to or inconsistent with any applicable rule of international law.

(~~b~~c) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to the Committees on Armed Services of the United States House of Representatives and Senate no less than 60 days before their effective date.

Sec. 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; ~~and~~

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review; and

(4) all military commission cases.

(b) (1) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(~~1~~A) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(~~2~~B) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(2) The accused may petition the Court of Appeals for the Armed Forces for review of a military commission case within 60 days from the date the sentence is adjudged.

(c) (1) In any court-martial case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of

review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(2) In any military commission case, the Court of Appeals for the Armed Forces shall have, in addition to the powers set forth in paragraph (1), and without regard to the adjudged sentence all powers of a court of criminal appeals under section 866 of this chapter (Article 66) with respect to the review of a court-martial.

(d) If the Court of Appeals for the Armed Forces 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) After it has acted on a court-martial case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

Comment

The first main purpose of the proposal 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 sentence of revised Article 21 is intended to reinforce the policy that military commissions should only be employed when there is no civilian judicial alternative.

The "time of war" clause is intended to be governed by the same standard as is currently found in Rule for Courts-Martial 103(19): "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists . . . ." The term "in the field" in the second sentence of revised Article 21 is drawn from and is intended to have the same meaning as in current Article 2(10).

The second main purpose of the proposal is to tie military commission procedures to general court-martial procedures except to the extent the President

determines that court-martial procedures are unworkable or as Congress otherwise provides. This has three aspects.

First, Congress may decide that some general court-martial procedures are unnecessary or unworkable as a matter of its own legislative judgment and in the exercise of its power under Article I, § 8 of the Constitution. We have included such provisions in proposed Article 36(b)(2)(B). For example, the proposal 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. Article 33, concerning the forwarding of charges, seems inapposite in the context of military commissions, since such cases are likely to require more prolonged investigation than conventional court-martial cases. We considered denying military commission defendants the right to specific uniformed defense counsel who may be available, but since that right is conferred under the current military commission rules, it is obviously workable even though it is not required by the Constitution or international law. Defendants of course retain the right to select private counsel of their choice at no expense to the government. The statute of limitations is dispensed with in keeping with international war crimes standards, and review by a service court of criminal appeals is omitted because military commission cases should proceed expeditiously.

Second, Congress should determine that some general court-martial procedures are so central to due process that they must be applied in military commissions. We refer to this as the due process "floor," and have included such provisions in proposed Article 36(b)(2)(A). For example, we have included the right of self-representation, *Faretta v. California*, 422 U.S. 806 (1975), which is barred under the current military commission rules. Congress could certainly include other rights, *see generally* 32 C.F.R. § 151.7 (2005) (Department of Defense listing of "fair trial guarantees" for Status of Forces Agreement purposes), but we believe this enumeration covers the core procedural shortcomings that have been identified in the *Hamdan* litigation, a number of which were not reached by the Supreme Court. No inference should be drawn from the absence of any right from this enumeration.

Third, for the remaining, interstitial aspects of general court-martial procedure, the President would have discretion to direct that general court-martial procedures not be followed because they are impracticable. This is provided for in proposed Article 36(b)(2)(C). We have adhered to this important element of our proposal, rather than depriving the President of the power to make exceptions from court-martial practice, for several reasons. The UCMJ gives him the power to make exceptions from district court practice for courts-martial, and it would destroy the overall harmony of the statute and distort settled inter-Branch relation-

ships to entirely deny him that power in the case of military commissions. Additionally, if the President lacked any power of dispensation, Congress would have to enact a massive law to cover all of the contingencies in military commissions, and would have to remain deeply involved as new questions inevitably arose in this evolving field. It would be anomalous indeed for Congress to take it upon itself to enact a detailed code of criminal procedure (for that is what the *Manual for Courts-Martial* is) for the mere handful of anticipated military commission cases while leaving in the President's hands the present broad power to make rules for the far more numerous courts-martial.

The hearsay rules in the *Manual for Courts-Martial* as construed by the Court of Appeals for the Armed Forces appropriately reconcile the government's needs and the exigencies of military operations with the demands of fundamental fairness. We do not believe there is a substantial basis for finding that it is impracticable to use those rules in trials by military commission.

At present, Article 36(a) addresses conformity with district court procedures, but leaves open what the rules may provide if and to the extent the President determines that district court procedures are unworkable. For military commissions, this 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 proposal establishes a strong presumption in favor of using general court-martial procedures, but permits the President to make exceptions based on a particularized statement of reasons and subject to reporting to Congress. General courts-martial are the highest level of trial court in the military justice system. Reference to their procedures is consistent with existing Article 18, which confers on general courts-martial jurisdiction over persons who are subject to the law of war.

Hamdan did not articulate precisely what level of deference applies to presidential determinations of impracticability. 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." The proposal seeks to clarify this with respect to presidential determinations not to apply general court-martial procedures in military commissions. Proposed Article 36(b)(2)(C) provides for abuse-of-discretion and contrary-to-law judicial review based on a required presidential statement of reasons. These standards of review are appropriate because the President is entitled to deference on matters committed to his discretion, while questions of law are typically freely reviewable in the courts.

Proposed Article 36(b)(3) forbids rules that are contrary to or inconsistent with any rule of international law. The President will thus not be permitted to establish rules that are inconsistent with treaty obligations. This is consistent with the current text of the *Manual for Courts-Martial.*

To the extent that it permits the President to apply different rules to courts-martial on the one hand and military commissions on the other, the proposal liberates the President from the constraints imposed by the uniformity clause in the present Article 36(b) as understood by the *Hamdan* majority. The effect of the uniformity clause in proposed Article 36(c) would be to require that rules for courts-martial be uniform, to the extent practicable, as among the armed services, and that rules for military commissions also be uniform, to the extent practicable, as among the armed services.

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 proposal restores the requirement and would apply to rules for military com-

missions and provost courts as well as those for courts-martial. It would also require reporting of Article 36(b) presidential determinations (including the reasons therefor) to depart from general court-martial procedures in military commissions. The proposal goes beyond earlier law by requiring that any rules or regulations made under Article 36 not take effect for at least 60 days from the date they are reported to Congress. This is a reasonable safeguard against improper or unwise Executive Branch action. It is consistent with (and indeed, considerably less restrictive than) the arrangements for submission of rules to Congress by the Supreme Court, *see* 28 U.S.C. § 2074(a) (six-month period).

Drawing directly on the current *Manual for Courts-Martial*, the proposal deletes obsolete references to "other military tribunals."

The third main purpose of the proposal 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. The proposal 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 House of Delegates of the American Bar Association this summer approved a resolution that would permit the Supreme Court to entertain petitions for certiorari in cases in which the Court of Appeals for the Armed Forces has denied either a petition for a grant of review or a petition for an extraordinary writ. These changes are long overdue, and NIMJ strongly believes Congress should enact them without delay in order to afford military personnel the same access to the Supreme Court as other Americans have long enjoyed. We owe them no less. Congress could accomplish this change while it is amending Article 67 to deal with military commissions, and we would be pleased to work with the Committee to develop suitable language. Since we recognize that this particular change does not directly relate to military commissions, we have not included such language in this proposal.

A suitable name for the proposed legislation would be "The Military Commissions Act of 2006."

Sources

1. *Manual for Courts-Martial, United States* (2005 ed.)

2. Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAW., December 2005, at 47

3. Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049 (1976)

4. Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003

5. David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003)

6. American Bar Association, House of Delegates Resolution 116 (2006)

7. Peter Katel & Kenneth Jost, *Treatment of Detainees*, 16 CQ RESEARCHER 673 (Aug. 25, 2006)

Chairman WARNER. We thank you for another series of excellent presentations.

At this time, we've been joined by Senator Saxby Chambliss. Thank you, Senator, for joining us. Senator Cornyn must depart. We are following the rule that as Senators come, they may ask their questions, Senator Chambliss and Senator Cornyn, would you like to ask your questions?

Senator CORNYN. I would. Thank you, Mr. Chairman, for letting me do so at this time.

Thanks to each of you for being here and sharing your expertise with us.

I recognize that some of you would advise against this, but let me just ask you, as a matter of Congress's authority—I read the *Hamdan* decision as saying that the Congress could, if it wished, ratify Military Order 1 and essentially address the authority concerns. The lack of participation by Congress, when it comes to creating the military commissions, and the conflict with the UCMJ, which Congress is also responsible for writing, which it could amend, as well. Assuming that's correct, I would like to hear from the witnesses what additional rights, what additional privileges, what additional guarantees, other than those already contained in Military Order 1, do you think are appropriate for unlawful combatants, like al Qaeda?

Mr. FIDELL. I'll keep talking if I have to.

Senator CORNYN. I want you to be specific here, if you can, because we're going to have to address this with some specificity.

Chairman WARNER. Let's make it clear, Senator, that your question is directed to the entire panel, and anyone who so desires to participate may do so.

Senator CORNYN. That's correct.

Senator LEVIN. Senator Cornyn, I'm wondering if I could just ask you if you are referring to those who are being charged with crimes so that we could keep our record clear.

Senator CORNYN. I'm asking if Congress saw fit to ratify Military Order 1 in response to the *Hamdan* decision, what, if any, additional rights, privileges, would you recommend that we provide for unlawful combatants, like al Qaeda, other than those presently included in Military Order 1, if you have any. If you don't have any, I'd like to know that, as well.

Mr. MERNIN. Senator, if I may, I could offer you some examples without purporting to give you an exhaustive list. But certainly with respect to rules of evidence, the Association would have no objection, in principle, to permitting more flexible rules of evidence, consistent with battlefield conditions and international standards, as compared to a strict UCMJ courts-martial recitation. But much more specificity is necessary than this wide-open concept of "all evidence of probative value." It should go without saying that the standard used—it should be easily understood and applied by the participants in the military commission process, that it serve the interests of justice, that it suggest that we want to adhere, as closely as possible, to the existing standards. The accused must have access, in some form, to evidence supporting the charges against him.

Senator CORNYN. I'm sorry, what existing standard are you referring to?

Mr. MERNIN. I would say the existing standard of the UCMJ and the Manual for Courts-Martial.

Senator CORNYN. Oh, so you're starting from an opposite perspective than what my question contemplated. I was asking, assuming we start from Military Order 1, how would you build out, or up, and expand the rights provided to unlawful combatants, other than those included there, not how would we carve out provisions in the UCMJ?

Mr. MERNIN. I understand your complaint about the way I prefaced my answer.

Senator CORNYN. Excuse me. It wasn't a complaint. I am trying to just clarify.

Mr. MERNIN. I was just trying to set up, really, what I would guess is a list. The accused ought to have access to evidence supporting the charges against him that's offered to the court or the commission; and civilian defense counsel, with the opportunity to obtain a security clearance, should have access to evidence admitted against the accused, and all potentially exculpatory evidence. Those are not provided for in the existing commission. There's a procedure in our Federal courts that allows for the redaction, for security purposes, of evidence. Everyone who needs to see the redacted evidence gets to see it. The court sees the same redacted evidence as the defendant. Evidentiary disputes would need to be

ruled on by the presiding legal judge before the evidence was made available to the members of the commission.

With respect to appeal, I would like to see the Court of Appeals for the Armed Forces, along the lines, perhaps, of what Mr. Fidell discussed, involved in hearing appeals from the military commissions.

Senator CORNYN. I have about 2 minutes remaining of my time, and I would ask you, please, to supplement your answer in writing, if you could, because I really do want to know.

Mr. MERNIN. Yes, sir.

[The information referred to follows:]

The Association endorses the use of the Uniform Code of Military Justice and the Manual for Courts Martial as the starting points of any legislation establishing commissions. Accepting Senator Cornyn's premise that is, Congress were to ratify Military Order 1, we refer to the detailed testimony of all members of the panel as to specific due process and fair trial concerns which ought to be addressed in any commissions which are adopted.

Senator CORNYN. But let me ask Dr. Carafano. The DOD has looked at the UCMJ as the starting point, and tried to evaluate how many revisions or amendments would have to be made to the UCMJ in order to make it appropriate for the military commission of an unlawful combatant to which the Geneva Conventions, broadly speaking, do not apply. A preliminary assessment is that 110 rules for court-martial would have to be changed, 73 rules of evidence, and 145 to 150 UCMJ articles. Without asking you to vouch for those particular figures, I know you believe that the UCMJ is not an appropriate starting point for our labors here, and would you please explain why?

Dr. CARAFANO. I could certainly understand why they would reach that conclusion. Obviously, the Government always has a dual responsibility, to provide security for the individual and to provide security for the state. Any legal system that you devise has to measure both those. Most legal systems, particularly the UCMJ, start with the notion that they've been created to look after the rights of the individual, and then national-security matters and military necessity are then layered over that. You could argue the UCMJ is actually a better legal system than many states in the world have in their regular judicial codes.

When you begin with the premise that you're in a war, and national security concerns are the start point of your concern, and then you want to add in what appropriate protections there are to make sure there's legitimate due process and you're in compliance with Common Article 3, you're obviously going to have enormous difficulties taking a system which was designed to do exactly the opposite of what you're trying to do, which is to make sure national security is taken care of first. So, I could understand that it would be a very complicated and difficult process.

Senator CORNYN. Let me, if I may, ask just one concluding question.

Chairman WARNER. Senator, feel free to take a minute or two. Yes, this is a very important colloquy.

Our distinguished colleague comes from the bar. He had a very distinguished career in his State, and now he's on the Judiciary Committee, which also is looking at this issue.

So, therefore, we value your contribution. Take such time as you need.

Senator CORNYN. Mr. Chairman, it's the State Bar of Texas, not just any bar. [Laughter.]

Chairman WARNER. Did you not join the Bar of the Supreme Court?

Senator CORNYN. I did as well.

Chairman WARNER. Well, then, you did get out of Texas and recognize some other institutions. [Laughter.]

Senator CORNYN. Thank you.

Chairman WARNER. Yes.

Senator CORNYN. Thank you for that point. It's entirely correct.

Now, clearly, no one is suggesting that these detainees, unlawful combatants, are entitled to anything less than humane treatment. But in 1970 President Reagan, I know, at one point, when the 1977 Protocol 1 was proposed that would have extended full Geneva protections in all respects to terrorists, rejected that adoption of the Geneva Convention, arguing that it would be the antithesis of humane and civilized outcome, because it would have actually encouraged more terrorism. In other words, the principle of reciprocity under the Geneva Conventions seems to me to be the most important one. If we treat their POWs in a certain way, they're more likely to treat our POWs in a certain way. But in the absence of the passage of the 1977 Protocol 1, which would have extended POW rights to terrorists, the way I read the Court's opinion is that we have to provide a regularly constituted court, rather than specify the particular procedures that needed to apply, other than they should afford the judicial guarantees that are recognized as indispensable to civilized people.

With that sort of predicate, let me just express the same concern that Senator Graham expressed. I know your focus has been, and it's been quite appropriate, on what rights and privileges are accorded to an unlawful combatant in a military commission. But there's also the essential concern of what impediments might we inadvertently create to our ability to gain actionable intelligence that will prevent, detect, and deter terrorist attacks or provide actionable intelligence that will save coalition lives on the battlefield.

That's my last question. I'd be glad to hear any comments.

Mr. FIDELL. I can comment briefly. I was a prosecutor as well as a defense counsel when I was in the Service. There are times when Government has to make some hard choices. For example, when granting immunity, I think you were the attorney general at one time, am I correct on that? So there are times when a prosecutor has to make some hard choices. There are times when the Government may be in a position to have to make choices, for example, between using somebody in custody as an intelligence source, as opposed to a potential defendant. That's at least the beginning, Senator. The current environment that we're talking about is not, I think, immune to that kind of analysis. There are simply going to be situations where if you need to do things for the purpose of gathering intelligence, that may impact on your ability to bring down the legal system on that particular individual.

Dr. CARAFANO. I would just like to return to your point, because I think it's germane to how we interpret Common Article 3. I think

what we have to realize is that Common Article 3 was framed intentionally the way it was. It wasn't because they didn't have a good editor and they were vague and evasive. They framed that because they realized that in the application of war, you have different countries, different legal systems, different requirements, that it had to be intentionally broad so states had the flexibility to implement judicial proceeding in the manner in which suited them, both to meet both their national security interests and the interests of the rule of law. That's why I think conceptually something like a military commission was written that way so things like military commissions would be applicable.

Senator CORNYN. Thank you, Mr. Chairman.

Senator LEVIN. Mr. Chairman?

Chairman WARNER. Yes.

Senator LEVIN. I would have a request. Senator Cornyn has raised a very, very significant point which I think would be helpful for us. Apparently, the DOD has identified and I forgot the exact numbers, John, but it was something like 171 changes that need to be made in the articles to bring it to the commission procedures.

Senator CORNYN. Mr. Dell'Orto, in response to Senator Levin's question, testified before the House Armed Services Committee. I asked this general question when the JAGs were here. But the numbers were a preliminary assessment. One hundred ten rules for court-martial would have to be changed, 73 rules of evidence, and 145 to 150 UCMJ articles.

Senator LEVIN. That is a very valuable effort on the part of the DOD. I would ask the chairman if we could get the list from the DOD of those items, because that would make an extremely valuable checklist for Congress to look at. I just checked with staff and I don't believe we have those three lists, I guess it would amount to. I'm wondering, Mr. Chairman, could we ask the DOD for those three lists.

Chairman WARNER. Unquestionably, we'll do that.

Could you leave a copy of that piece of paper with us today? You have referred to it twice now. It's very helpful.

Mr. FIDELL. Mr. Chairman?

Chairman WARNER. Yes.

Mr. FIDELL. Senator Levin's question, building on Senator Cornyn's comment, reminds me that there is another document that may also be helpful to the committee. It is my understanding that the DOD, some time ago, prepared a Manual for Military Commissions.

Chairman WARNER. Have they released it?

Mr. FIDELL. No, Mr. Chairman, as far as I know that has not been released.

Chairman WARNER. So, it is in existence?

Mr. FIDELL. I believe it is in existence.

Senator LEVIN. A draft manual?

Mr. FIDELL. Sir?

Senator LEVIN. A draft manual or what?

Mr. FIDELL. A manual for military commissions.

Senator LEVIN. Was it adopted?

Mr. FIDELL. Not that I know of.

Senator LEVIN. But it was in draft form or something?

Mr. FIDELL. That's what I imagine, Senator Levin.

Chairman WARNER. We'll probe that.

Mr. FIDELL. If I were a member of the committee, I would certainly be interested in seeing that.

Chairman WARNER. That is a very helpful reference point for us. We should look at it. I'm sure that they would share with us their preliminary work on the commission structure which they envisioned.

All right. Senator Chambliss, do you wish to ask your questions at this point time?

Senator CHAMBLISS. Thank you, Mr. Chairman. I just have a couple of questions.

Chairman WARNER. Yes.

Senator Dayton, if you so desire to ask some questions, at the appropriate time, we'll recognize you after Senator Chambliss.

Senator DAYTON. I'll have to find somewhere to leave to so that I can ask my questions.

Chairman WARNER. Good. Well, that's all right. Senator Levin and I are going to, of course, stay throughout the panels, but go ahead.

Senator CHAMBLISS. Thank you, Mr. Chairman. Let me thank our witnesses for being here today.

We had a very interesting hearing last week on this same subject, as I think all of you know, and very distinguished panelists, who come from primarily military backgrounds, that testified. In that hearing, we start from a basic premise, not one that I necessarily would hope we would have to start with but, as a lawyer, I believe in basic rights of all criminal defendants, irrespective of where they come from. The fact here is that even though we know how our prisoners are treated once they're captured, there is no rule of law that governs them other than to mutilate, behead, and torture them in every way possible by the enemy combatants that we face today, it's incumbent upon us to set forth certain standards that obviously comply with our rules and our laws. We have to treat the enemy in a much more humane way than, frankly, our soldiers are treated.

That having been said, there is going to be a fundamental issue for this committee to decide as to which road we go down. Do we look at taking our current criminal justice system and figuring out some way to make this particular type of situation mesh with it, or do we look to the military side? I think the military side is obviously more preferable. Once you get there, as some of you have already delineated, there are a couple of different paths down which we might go. One is taking the UCMJ and trying to determine whether or not we can use it as a basis and bring in some other advantageous measures on both sides that might make it fit the situation. Or, do we establish some sort of military commission or tribunal that is somewhat of a hybrid, but, at the same time, serves the valuable purpose for a very difficult situation? I tend to go down that road. I would hope, as was discussed last week, that we can take the best of laws and rules within the UCMJ, our current criminal system, and the international system to incorporate and come up with a system that is not complicated, does not rewrite military law, and does not rewrite the way in which we deal

with the enemy, both from an interrogation and a prosecution standpoint.

My question to you is this. I asked this question last week to the panel, and I will tell you that there are certain things that will jump out at you. As we look at trying to establish a military commission or military tribunal are there certain things within current military law that you can think are issues that will have to be addressed in a more significant way within some sort of criminal or combatant tribunal or commission that we establish?

The examples that I will give you are this. It was brought up that the issue of chain of custody has to be dealt with. There are some very good rules within the UCMJ that will allow us to deal with that. The exclusionary rule is an issue that's going to have to be dealt with. There was a recommendation that we consider the adoption of the hearsay rule from the international court, because it is a little more liberal, frankly. Our hearsay rules are much more restrictive in the United States, apparently, than anywhere else in the world.

Those are the types of issues that I have reference to, so I'd just throw that question open. Are there any issues that jump out at any of you relative to what we need to be thinking in terms of as we establish some sort of military commission or tribunal that we have to make sure that we deal with specifically?

Ms. BIERMAN. Senator, if I may address the issue of the use of hearsay evidence in international criminal tribunals (ICT), I think that it's okay and, in some ways, maybe advisable to look to those rules about how to use secondhand testimony, but I would caution you to understand the full range of the rules the criminal tribunals use, and how they interact. So, it's not simply that they use a probative standard to allow in statements. If that were the case, then the current military commissions, the failed military commissions, would not have been so offensive. The ICT have a number of other features that interact with that, such as, for example, the structure of the decisionmaking body.

The ICTs aren't a jury or a panel of military officers; they are judges, who are trained and have experience making fine evidentiary distinctions. There's a very clear prohibition on any evidence that's obtained by a violation of internationally recognized standards. The judges can decide the issue on their own about whether the evidence should come in or not. The party does not have to raise the motion. The judges can decide to disregard testimony after they've heard it. These are all very important features of that system that work with the way the ICTs allow in hearsay evidence that I think this body should consider to be an important part of that rule, if you go that direction.

Ms. MASSIMINO. Senator, if I could just add, your question underscores and in my written testimony I address some of these issues that you raised, but I would caution that just as when we first started down the road towards military commissions, there was a speculation, I think because we didn't know what kind of evidence we were going to have. There was some speculation about whether or not the rules would be too restrictive and what would we need to loosen in order to have trials of these kinds of individuals. We're beginning to engage, a little bit, in that kind of speculation again,

without the benefit of a careful examination of the instances that we have now in front of us, of these very cases. Is the court-martial system really so inflexible that it can't deal with many of the issues that you've raised and that others have raised?

I think it would be very useful for the committee to have a hearing that really addresses those issues, because they are the crux. Some of us say start from the UCMJ, because we think that's the most practical, for a number of reasons, others say start with the existing rules. One of the witnesses said it doesn't really matter where you start, it matters where you end up. We have to have a hundred-and-something changes to the UCMJ to then result in military commissions, but if those changes don't result in a system that's improved over the one we have, then I think we're going to end up in litigation instead of seeing terrorists brought to justice.

I think that whether you approach this from either one end of the spectrum or the other, what we need to really jump to quite quickly is an analysis in detail. We need the administration's knowledge and cooperation in understanding what it is that the UCMJ system contains that they believe stands in the way of effective prosecutions of the kinds of people that we actually have in custody now.

Mr. FIDELL. Mr. Chairman, if I can comment to Senator Chambliss. On the question of hearsay, I personally am very interested in comparative law. I'm working on a textbook, actually, on comparative military justice, so it's a preoccupation of mine, in fact. But if you look at the rules, I believe, for the International Criminal Tribunal for Former Yugoslavia (ICTY) they have a rule that is widely misunderstood as opening the door to hearsay, in general. In fact, I'm just going to read 92b(a). "A trial chamber," their trial court, "may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes," here is where it gets interesting, "to proof of a matter other than the acts and conduct of the accused as charged in the indictment." In other words, it's only on collateral matters that they've, by our standards, lowered the bar.

So, again, it's a cautionary note. I'm all for finding out how things are handled in other legal systems, how the various international tribunals handle these issues. But you have to really go in and root around a little bit sometime.

Also, this is a theme that I think a number of us have mentioned. I really hope that people will not shortchange the body of jurisprudence that the Court of Military Appeals, now the Court of Appeals for the Armed Forces, has generated in the last 55 years. That is a highly practical court. They are very aware of military exigencies. They have a system that has proven to be workable in some very forbidding environments. They're quite practical people. If you look at the way they've handled, for example, the need for Article 31 warnings, I'm sure that's one of the things that is on your list of concerns, they've distinguished between interrogations that are conducted for law enforcement or disciplinary reasons, on the one hand and interrogations for operational reasons, on the other. These are very practical people.

Chairman WARNER. I think you made a valid point there, and in the final product, should make reference, perhaps, that law has a

certain binding effect, because it is a body of law drawn that could be helpful.

Any further questions, Senator?

Senator CHAMBLISS. I have one.

Chairman WARNER. Yes.

Senator CHAMBLISS. I don't think it will require a lengthy answer. If it does, I'd be happy to take them in writing.

Does anybody have a problem with the appellate process that's taking place under something akin to the appellate processes set forth in the UCMJ?

Mr. FIDELL. Just the reverse I think.

Senator CHAMBLISS. Yes, I notice in your testimony you talked specifically about that.

Mr. FIDELL. Right. What I think, before you were here, Senator, I had testified, in my prepared statement, that you could probably consider dispensing with one tier of the appellate review, the one at the Court of Criminal Appeals level, and just go directly from the military commission to the Court of Appeals for the Armed Forces on E Street. You don't really need that additional tier in the middle, although you might have to tweak the powers of the Court of Appeals to make sure people are getting thorough review of things like sentences and whether the evidence added up to guilt, to proof beyond a reasonable doubt.

Senator CHAMBLISS. Okay.

Thank you very much, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator.

Senator Cornyn, had you finished, also?

Senator CORNYN. I did, thank you.

Chairman WARNER. Senator Dayton, do you wish to interject, at this time, a question?

Senator DAYTON. Thank you, Mr. Chairman. Maybe if I could we would hear from the last witness, and then I'd reserve my right to ask questions.

Chairman WARNER. Fine.

Senator DAYTON. After the two of you, I just want to say, this is an outstanding hearing. I thank you, Mr. Chairman, for holding it.

Chairman WARNER. Thank you.

I appreciate the indulgence of all members of the committee. This is somewhat of an unusual process, but we have just so much going on in the United States Senate this morning that our members are scattered many directions.

Now, you've been very patient there, Mr. Mernin, Chair, Committee on Military Affairs and Justice and the Association of the Bar of the City of New York. I'm delighted that the Bar has allocated a portion of its resources and talent to look after this subject.

STATEMENT OF MICHAEL MERNIN, CHAIR, COMMITTEE ON MILITARY AFFAIRS AND JUSTICE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. MERNIN. Senator, we're delighted to be here. Thank you for the opportunity—Senator Levin, also—to appear today on behalf of the New York City Bar Association.

The Association is an independent nongovernmental organization (NGO) with a membership of more than 22,000 lawyers, judges, law professors, and government officials, mostly from New York City, but also from around the country, and from 50 other nations, as well.

I'm here, because I'm chair of the Association's Committee on Military Affairs and Justice. We have, in the past, submitted reports and commentary to the committee's attention, and we hope that it's been helpful to you. My particular committee seeks to act as a bridge, to an extent, between the civilian and military legal establishments, to try to educate the civilian legal establishment about military law.

The military justice system of this Nation is a model for the world. With that in mind, I would like to focus my remarks on the straightforward recommendation that we presented in a letter to all the members of this committee and other Senators and Members of the House several weeks ago. The recommendation is born of the complexity of the issues, which I think has been evidenced by the series of probing questions we've been met with today. These are very sensitive issues.

With that in mind, I'd like to note that there's a great wealth of expertise available. Our proposal is that, in the wake of this *Hamdan* decision, that Congress ought to seek to formally empanel an advisory commission or panel with a mandate to advise Congress and its committees about the appropriate means to establish a military commission system that would respond in a very transparent, nonpartisan, depoliticized manner, consistent with our national values, to the Supreme Court's decision. We believe that legislation authorizing the creation of a 10- or 15-member advisory panel could be quickly passed, would be relatively simple to draft, and there are existing analogs, which we pointed out in our letter of a couple of weeks ago, in other areas.

Once authorized, it's not the sort of group that would require a great deal of staffing. They could begin their work immediately and, I think, without delay, provide immediate useful advice and drafting to Congress. Our idea is that this group would be composed of, for instance, the retired JAGs and law professors, the great many practitioners, such as Mr. Fidell and members of the NIMJ, who would be able to operate and draft commission legislation and present it for review, and the Senate and entire Congress would have the knowledge of knowing that great people with the wealth of experience and expertise had been working diligently on this.

As an alternative, even without legislation, I would suggest there might be a way for this committee to achieve that goal without that formality. To make a special effort to draw upon the available expertise across the country of practitioners and retired JAG officers who would be more than willing to serve their country in this fashion, by trying to make this the best piece of legislation possible.

Chairman WARNER. If I may comment, and then I would invite my colleague to have his views, Senator Levin and I have been privileged to serve our States as Senators for 28 years, and we have seen a good deal of history. I have to be honest with you. The current Congress is due to expire at the end of this calendar year.

We have but about 2½ weeks left before what we call the August recess. We resume in September for several weeks, and then we discontinue right at the 1st of October. While we may come back for tidying up a few details, we're looking at a very short period of time.

Now, that's Congress. The Supreme Court has directed the other two branches of the Government to turn to and solve this problem, because we have a lot of contentious viewpoints with regard to how the current system is operating, or not operating, in the case of the commission. I feel that we're going to do our best, as a committee, the Judiciary Committee is working on this, and the Intelligence Committee may work on a piece of this, because they want to make certain that our intelligence system can go forward.

I don't mean to be disrespectful, I do not see the opportunity to have what you have suggested. The situation has to be addressed as quickly it can. We have to rely on the manner in which Congress does its business and presently constituted. We're going into this hearing this morning to get outside advice. I appreciate the advice we've received. I don't think it's practical. We're going to have to do the best we can.

So, I do hope you will continue to participate, recognizing I don't think we can get a legislative panel of advisors set up, nor really extend much beyond what we're going to do here in the several hearings.

But, Senator Levin, do you have any comments?

Senator LEVIN. I think I know what I would do if I were by myself deciding this, and that would be to establish just a panel for this committee, ask them to report back to us within 30 days so that we could take it up in September. On the other hand, I'm not sure that's where the majority of the committee is, and I'm not sure such a panel could report back to us in 30 days.

Chairman WARNER. Well, it's the practicality. I wouldn't dismiss it out of hand, but we haven't discussed that. We often discuss, and we always do.

Senator LEVIN. Right. Right. Our chairman is doing a terrific job under a very difficult time constraint here.

We have a checklist, in effect, from the administration, apparently, that's been created. That's going to be useful. What I would like from our panelists, for the record, depending on what your starting point is, where would you change based on practicality and necessity the UCMJ and the court-martial rules? Give us the list of what you would acknowledge, in the case of some of you, are needed changes from that baseline for a commission to operate in the context that we're talking about. Or, should you prefer to start with the Executive Order 1, what do you believe would need to be changed or added to that Executive order specifically in order to meet the Supreme Court's requirements or the fundamental due-process rights?

We have such talent here and obviously there's a lot of other talent that's not represented on either of these panels that we could solicit. It seems to me, to give us specific recommendations, depending on your baseline, from that baseline that would be needed.

I'd leave it at that, and I'd ask our witnesses whether they'd be willing to do that, and then ask our chairman whether or not he

feels that soliciting that from these witnesses, our next panel, to get these specific lists, and others that might be interested in this subject, might help us design legislation. We know the administration's going to give us a proposal. Was it within the next couple of weeks we expect a proposal? Is that a fair statement?

Chairman WARNER. That is correct, yes.

Senator LEVIN. Those lists from these witnesses and others would be very helpful to me.

Chairman WARNER. I had planned to do something similar to what you've suggested at the end of the hearing. I would want them to try and collate the two things, put them together. Because I'm of the view we're going to end up with a mix of the UCMJ and the commission concept. So, you don't have to give us a polished statute in legal language, but, "This is what you should have" and that is an essential part. As Senator Levin said, we'll provide you with what the Department gives us by way of their thought process of what might have to be changed, and so you can have the benefit and save a little time to go into the work.

[The information referred to follows:]

FAIR TRIAL STANDARDS:
The Essential Components
of a Fair System of Justice

Submitted to the Senate Armed Services Committee
on behalf of Human Rights Watch and Human Rights First

Any tribunal established by this Congress should meet the minimum standards of fair trials. As the majority opinion in *Hamdan* pointed out, "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless."[1] The fair trial standards required by Common Article 3 can be boiled down to 10 basic principles, against which any Administration proposal must be judged:[2]

1. **Trials must be conducted publicly, by a regularly constituted, independent and impartial court.**

2. **The accused is entitled to a presumption of innocence.**

3. **The accused may not be tried for crimes that were not in existence at the time of the offense and may not be tried in violation against the prohibition on double jeopardy.**

4. **The accused has the right to information about the basis for detention or arrest in a language that he can understand.**

5. **The accused is entitled to be made aware of the evidence against him and to any exculpatory evidence in the government's possession.**

6. **The accused has the right to be present at trial and to be provided all of the evidence shared with the factfinder.**

7. **The accused has the right to prepare a defense and to call and examine witnesses, to be represented by independent counsel, and to a trial within a reasonable time.**

8. **The tribunal may not rely on testimony that violates the prohibitions against torture and cruel, inhuman, or degrading treatment.**

9. **The accused has the right to remain silent, and his silence cannot be used against him.**

10. **The accused has the right to a public judgment and to an appeal before an independent adjudicator.**

[1] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (2006).

[2] These fair trial standards are based on the U.S. Constitution and in treaties signed and ratified by the United States, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment and the Protocols to the Geneva Conventions, which the United States negotiated and signed. See Geneva Conventions I – IV 1949, 75 U.N.T.S. 31, 75 U.N.T.S. 85, 75 U.N.T.S. 135, 75 U.N.T.S. 287 respectively (all entered into force Oct. 21, 1950, ratified by the United States of America on August 2, 1955.; Protocol I and II Additional to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3, 1125 U.N.T.S. 609 respectively (both entered into force Dec. 7, 1978, signed by the United States of America on December 12, 1977); International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976, ratified by the United States of America June 8, 1992); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted 10 December 1984, G.A. Res. 39/46, U.N. Doc. A/39/51 (entered into force June 26, 1987, ratified by the United States of America October 21, 1994).

Chairman WARNER. We'll also see whether we can get that draft manual out, because I think it would extremely helpful. To the extent you can constitute among yourselves some sort of a working group, I mean, this is a nucleus. When I first walked into the room, one of the witnesses said, "This should not be the end. This should be the beginning of our participation. We want to help you."

So, I'd join you, Senator Levin. I'd just broaden the tasking.

Senator LEVIN. That would be fine.

Yes. I would share that. I'm not sure which groups would, on their own, get together to try to put together a consensus list, but if they can do it, that would be more helpful to this committee. I agree with our chairman rather than getting 20 different recommendations, if we could get two or three groupings of recommendations.

By the way, Mrs. Massimino, I disagree with you if you were implying that you agreed with the testimony of last week that it's not important what the baseline is. It is relevant, because where you end up may depend, to some extent, on where you start from and what your baseline is. So, I don't agree with last week's testimony and if you were agreeing with it, I disagree with that comment of yours.

However, it is still important where you end up. Obviously that is more important than where you begin. My point is that where you begin affects, probably, where you end up.

Whether you want to start with Executive Order 1 or whether you want to start with the UCMJ, to me, it would be most helpful if there could be groups that would come together, if possible, as our chairman suggests. Tell us what changes you acknowledge would be needed for practicality and necessity in this kind of circumstance, and needed changes in the UCMJ, or deviations, or variations from UCMJ for these circumstances. I guess, from the perspective of those who want to start with the Executive Order 1 as the basis, what changes would you concede, rather than acknowledge, depending on your baseline, would be needed to meet the requirements of due process or the Court's opinion.

I think what the chairman is suggesting, if we could get groups of interested parties here to come together on their own initiative and present specific lists to this committee so that we'd end up

with two or three representing perhaps different approaches, that would be extremely helpful to us.

Mr. FIDELL. Mr. Chairman and Senator Levin, I think that's the type of thing that these groups—although there's a range of opinion along this table and in this room; there are other people who probably have a different viewpoint—but I think all of us will huddle after today's hearing and see what we can do to assist the committee in that respect. NIMJ will be there and actively providing whatever service we can in that respect.

However, and here comes the bad part, and my fellow panelists will kill me when I say this, do you have a schedule in mind?

Chairman WARNER. Yes. It is anticipated that the work of this committee, and to the extent that other committees wish to make a contribution, should be in the hands of our leadership about the second week in September.

Mr. FIDELL. So, when do you need what I'll call the Warner-Levin list?

Chairman WARNER. Senator Levin and I are going to continue to work this situation through the month of August from time to time. Personally, I've foregone some of my plans, because of the importance of this issue. I think my good friend usually does the same. So, we're in business. The committee will continue. We do not discontinue simply for an extensive recessive period of August.

Senator LEVIN. How about 30 days? Could they try to get back to us then?

Chairman WARNER. Fine.

Mr. FIDELL. Thirty days from today.

Chairman WARNER. Whenever you can get to it. I would hope sometime in the middle of August, so that the two of us can disseminate this to our other colleagues and continue to work the problem. Then, don't think that's the end result.

Mr. FIDELL. Right.

Chairman WARNER. Between now and then, you'll obviously hear about what proposals the administration has in mind, and that would be, I think, important guideposts.

Senator LEVIN. I know our chairman, because he's such a wise and fair man, is going to extend this same suggestion to other groups that want to make contributions. The more groups can come together in some kind of coalescing, it would surely, I think, help the committee. Not just people in the sound of our voice. I know that our staff would be letting other groups know that we've solicited these kinds of lists, if they want to join.

Chairman WARNER. I think the word will spread, you're correct.

Mr. FIDELL. This is like one of those situations where the DC Circuit has 50 amici from a particular industry, and tries to kick people so that they can join in one another's briefs a little bit. We'll try, I'm sure.

Chairman WARNER. All right. I think there's a lot of initiative in this panel, and I somehow feel that you've been established as a band of brothers and sisters now to get a job done.

Senator LEVIN. I'll have a special request of you, Mr. Fidell, for your organization.

Mr. FIDELL. Here it comes. [Laughter.]

Senator LEVIN. I'll wait until my round of questions, I guess. I don't know when that draft was created.

Mr. FIDELL. July 6.

Senator LEVIN. July 6?

Mr. FIDELL. July 6 or 7, sir.

Senator LEVIN. Yes. What I would like your organization specifically to address that are left open on your testimony, specifically kind of suggest that under existing circumstances you may want to take another look at certain issues. I'm going to ask that your organization look at different issues, re-look at some of the issues you've addressed, and look specifically at some that you didn't address, regardless of what all the others do.

Mr. FIDELL. Understood.

Chairman WARNER. Good.

Now, you've been very patient. But you sort of started this.

Mr. MERNIN. That's right, Senator.

Chairman WARNER. We'll now restore part of your time.

Mr. MERNIN. I'll try to conclude it, as well.

Increasingly cognizant of the time constraints we've been discussing, I'm not going to belabor the point, but I would emphasize what I think you've already taken to heart, and that is to make use of the outside expertise that's available to try to get this done and get it, as you say, right.

Chairman WARNER. If I could just interject.

Mr. MERNIN. Yes.

Chairman WARNER. This Nation is at war, and we must turn to and get a job done. We don't have the ability to extend this thing over a year's time and go through many, many hearings, because it's not fair to the men and women of the Armed Forces. This thing should be resolved. Particularly, our intelligence system has to know the parameters in which they can continue to work and do the absolutely essential function of collecting realtime intelligence for our forces. So, we're under unusual constraints.

Mr. MERNIN. Absolutely. I completely understand.

I'm not going to discuss, at any length, Mr. Fidell's NIMJ proposal, other than to say the Bar Association has been looking at it. While we haven't done a full formal review of it, we applaud their efforts. In general, we approve the approach, and we believe the draft is the appropriate and good model for this committee to work from. We'll cooperate in that regard. Mr. Fidell's group and the Association have a good history of working together, so I know we'll work together.

While we await the opportunity to comment on whatever formal legislation ends up coming out of this expedited process, I would just want to emphasize the few points and areas that the Association is particularly concerned with. First and I won't belabor it, because it's been covered at length. But we filed an amicus brief in the *Hamdan* case arguing for the application of Common Article 3, so we obviously are pleased to see the Court recognize that application.

Chairman WARNER. Do you have a copy of that brief with you today?

Mr. MERNIN. I do not, Senator, but we'll send one.

Chairman WARNER. Would you, at the earliest opportunity? I think it would be very helpful if we had the chance to look at that.

[The information referred to follows:]

No. 05-184

In The
Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Appointing Authority for Military Commissions, Department of Defense; THOMAS L. HEMINGWAY, Brigadier General, Legal Advisor to the Appointing Authority for Military Commissions; JAY HOOD, Brigadier General, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER [GENEVA - COMMON ART. 3]

JAMES J. BENJAMIN, JR.
Counsel of Record
NANCY CHUNG
AMIT KURLEKAR
LAURA S. LUCAS
STEVEN M. PESNER
SHANNON SHAH
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for Amici Curiae Association of the Bar of the City of New York and Human Rights Institute of the International Bar Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 2

ARGUMENT 4

I. COMMON ARTICLE 3 PROTECTS PETITIONER AND OTHERS CAPTURED DURING THE CONFLICT IN AFGHANISTAN 4

A. Common Article 3 Of The Geneva Conventions Of 1949 5

B. Common Article 3 Applies To The Conflict In Afghanistan 7

II. THE MILITARY COMMISSION CONVENED AGAINST PETITIONER VIOLATES COMMON ARTICLE 3 11

A. The Military Commission Convened To Try Petitioner Is Not A "Regularly Constituted Court" As Required By Common Article 3 11

B. Common Article 3 Entitles Petitioner To Basic Judicial Safeguards Recognized In International Law And This Court's Longstanding Precedents 14

1. Right To Be Present At Trial 17

2. Right To Cross-Examine Adverse Witnesses 18

3. Right To Prompt Judicial Proceedings . 19

4. Right To Be Tried By An Independent And Impartial Tribunal 19

TABLE OF CONTENTS – Continued

Page

III. PETITIONER'S RIGHTS UNDER COMMON ARTICLE 3 ARE ENFORCEABLE IN FEDERAL COURT 21

A. This Court Has Consistently Enforced Treaties That Protect Individual Rights And Are Self-Executing 22

B. Common Article 3 Protects Individual Rights And Is Self-Executing 26

C. In The Decision Below, The Court Of Appeals Misread *Eisentrager* 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Application of Yamashita, 327 U.S. 1 (1946) 6, 19, 24, 29

Asakura v. City of Seattle, 265 U.S. 332 (1924) 10, 24, 27

Bacardi Corp. of Am. v. Domenech, 311 U.S. 150 (1940) 10

Brady v. Maryland, 373 U.S. 83 (1963) 16

Breard v. Greene, 523 U.S. 371 (1998) 10

Chew Heong v. United States, 112 U.S. 536 (1884) 23, 24, 27

Coy v. Iowa, 487 U.S. 1012 (1988) 17

Crawford v. Washington, 541 U.S. 36 (2004) 15, 18

Doggett v. United States, 505 U.S. 647 (1992) 19

Ex parte Quirin, 317 U.S. 1 (1942) 19

Fok Young Yo v. United States, 185 U.S. 296 (1902) 28

Foster v. Neilson, 27 U.S. 253 (1829) 22, 26

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) 2, 17, 18

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) 7, 8, 9, 28

Hauenstein v. Lynham, 100 U.S. 483 (1879) 10, 25

Head Money Cases, 112 U.S. 580 (1884) 26, 27

Johnson v. Browne, 205 U.S. 309 (1907) 25

Johnson v. Eisentrager, 339 U.S. 763 (1950) 21, 28, 29

TABLE OF AUTHORITIES – Continued

Page

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 16

Jordan v. Tashiro, 278 U.S. 123 (1928) 25

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 10

Kolovrat v. Oregon, 366 U.S. 187 (1961) 25

Lewis v. United States, 146 U.S. 370 (1892) 16

Madsen v. Kinsella, 343 U.S. 341 (1952) 18, 19

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) 10

Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) 10, 11

Nielsen v. Johnson, 279 U.S. 47 (1929) 10, 25

Prosecutor v. Delalic, Case No. IT-96-21, Judgment (ICTFY Appeals Chamber Feb. 20, 2001) 11

Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (ICTFY Trial Chamber Dec. 10, 1998) 11

Prosecutor v. Tadic, Case No. IT-94-1, Defence Motion for Interlocutory Appeal on Jurisdiction (ICTFY Appeals Chamber Oct. 2, 1995) 11

Rasul v. Bush, 542 U.S. 466 (2004) 29

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 28

United States v. Daulton, 45 M.J. 212 (C.A.A.F. 1996) 18

United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) 6

United States v. Percheman, 32 U.S. 51 (1833) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Rauscher, 119 U.S. 407 (1886)..... 22, 23

United States v. Schooner Peggy, 5 U.S. 103 (1801)..... 22

United States v. Stuart, 489 U.S. 353 (1989)..... 10

Ware v. Hylton, 3 U.S. 199 (1796)..... 25, 27

Whitney v. Robertson, 124 U.S. 190 (1888)..... 22

Windsor v. McVeigh, 93 U.S. 274 (1876)..... 16

STATUTES AND REGULATIONS

10 U.S.C. § 818..... 12

10 U.S.C. § 839(b)..... 18

18 U.S.C. § 2441(c)(3)..... 6, 27

32 C.F.R. § 9..... 12

66 Fed. Reg. 57,833..... 12

66 Fed. Reg. 57,834..... 12, 13

138 Cong. Rec. S4784 (Apr. 2, 1992)..... 28

Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf..... 7

H.R. Con. Res. 1815 (2005) (enacted)..... 20

Military Commission Order No. 1 (Dep't of Def. Aug. 31, 2005).....*passim*

S. Exec. Rep. No. 84-9 (1955)..... 27

U.S. Const. art. VI, cl. 2..... 22

TABLE OF AUTHORITIES – Continued

Page

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

The European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 ..... 16, 17, 18, 19

Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021 25

Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ..... *passim*

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 12

International Covenant on Civil and Political Rights, Mar. 23 1976, 999 U.N.T.S. 171 ..... 15, 17, 18, 19

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 75, 1125 U.N.T.S. 3 ..... 14, 15, 17, 19

Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg. at 6, U.N. Doc. S/RES/827 (May 27, 1993) 16, 17, 18, 19

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg. at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) 16, 17, 18, 19

Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3, U.N. Doc. A/810 (1948) 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Conference, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 Am. J. Int'l L. & Pol'y 415 (1987) 15

International Committee of the Red Cross, *Commentaries to the Convention (I) For the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* (1949) 6

International Committee of the Red Cross, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (1949) ..... *passim*

International Committee of the Red Cross, *Commentaries to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977) 14, 18, 19

Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees is Focus of Bush Security Team's Meeting*, Wall St. J., Jan. 28, 2002, at A16 21

Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (Burns and Hart eds. 1970) 8

Louis Fisher, *Nazi Saboteurs on Trial* (Univ. Press of Kan. 2003) 21

Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914* (Oxford University Press 2004) 8

TABLE OF AUTHORITIES – Continued

Page

Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html 20

Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987) 26, 28

Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm 21

U.S. Dep't of State Statement on Human Rights, http://www.state.gov/g/drl/hr/ 15

William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319 (2003) 14

INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE[1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

The Human Rights Institute of the International Bar Association ("IBA"), headquartered in London, England, helps to promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide. Founded in 1995, the Institute now has more than 7,000 members. The Institute was established by the IBA, which was created in 1947 to support the establishment of law and the administration of justice worldwide, and is composed today of 20,000 individual lawyers and over 195 Bar Associations and Law Societies.

While they embrace the necessity of apprehending and punishing those responsible for terrorist acts and preventing future acts of terrorism, *amici* believe that the Administration's cramped interpretation of the four Geneva Conventions of 1949 ("the Conventions") is incompatible with the United States' treaty obligations. *Amici* submit this brief to present the Court with authority regarding the proper application of Common Article 3 of the Conventions in the context of this case.[2]

---

[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* express no view with respect to the merits of petitioner's case, including his alleged membership in al Qaeda and his guilt or innocence on the charges that have been filed against him.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a half-century, the Geneva Conventions have stood as bulwarks, safeguarding minimum standards of humanity against wartime abuses. Common Article 3, so called because it is common to all four Conventions, establishes minimum protections that must be afforded to all persons captured in a military conflict in a contracting party's territory. Among those protections is the requirement that a detainee may be punished only after a trial before a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 ("Geneva III"), art. 3, 6 U.S.T. 3316 (same text in other three 1949 Conventions).

Strict adherence to Common Article 3 is imperative not only to ensure that the United States government refrains from inflicting unjust punishments on enemy detainees (punishments which can include the death penalty or life imprisonment), but also to protect United States servicemembers from mistreatment when *they* fall into the hands of hostile forces. As the District Court astutely observed, when the government makes novel arguments that the Conventions do not apply to the war on terror, its conduct "can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad." *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 163 (D.D.C. 2004). To reduce the peril faced by our Nation's soldiers and sailors who fall into enemy hands, and to vindicate the rule of law against overreaching by the Executive Branch, we urge this Court to hold that the proposed trial of petitioner before a Military Commission violates Common Article 3. Our argument incorporates three points.

First, as recognized by Judge Williams in his concurring opinion below, the protections of Common Article 3 extend to all persons, including petitioner, who are captured during hostilities in Afghanistan. By its terms, Common Article 3 applies to any "armed conflict not of an international character." Geneva III, art. 3, 6 U.S.T. 3316.

Although the other articles of the Conventions apply, more narrowly, only in *international* conflicts "between two or more of the High Contracting Parties," *see* Geneva III, art. 2, 6 U.S.T. 3316 (same text in other three 1949 Conventions), Common Article 3 was intended as a "gap filler" for all other conflicts. Common Article 3's expansive language thus extends to *all* conflicts on the territory of signatory nations other than those between sovereign nations who have signed the Conventions. Contrary to the conclusion reached by the majority of the D.C. Circuit panel below, there is no "carve-out" for conflicts between signatories and non-state actors such as al Qaeda.

Second, the Military Commission convened to try petitioner violates Common Article 3. Notwithstanding the enormous power that the Military Commission wields – including the power to sentence petitioner to imprisonment for any term up to life or even death – the Commission is not a "regularly constituted court" as required by Common Article 3. It was created by the Executive Branch alone, is part of a regime of "special tribunals" targeted against alleged terrorists, vests extraordinarily broad discretion in the hands of the Commission members and their Executive Branch superiors, and can be changed or abolished at the Executive's whim. In addition, the procedural rules governing Military Commissions fail to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Some of the rules are nothing less than shocking to any observer familiar with the justice system in the United States. Under the rules:

- A prisoner can be excluded from the courtroom, during trial, based on anything the presiding officer or the Secretary of Defense deems to be a matter of national security. His assigned military defense counsel is prohibited from sharing with him any evidence that is received in his absence. As a result, a prisoner could be sentenced to prison, or even executed, without knowing on what grounds he had been found guilty.

- A Military Commission may receive anonymous unsworn statements, including statements embodying multiple levels of hearsay, whose sources a defendant cannot confront or impeach.
- Prisoners may be detained indefinitely before being charged or tried.
- The Military Commission's judgment may be finalized only after approval by the President or the Secretary of Defense, both of whom have already made clear their view that the guilt of the Guantanamo detainees is a foregone conclusion.

Third, petitioner may invoke the protections of Common Article 3 in this habeas corpus proceeding. As made clear by this Court's precedents dating back to the late eighteenth century, treaties – which are part of the "supreme Law of the Land" under our Constitution – must be judicially applied as the rule of decision in a case with a proper jurisdictional foundation as long as two conditions are met: (1) the treaty is "self-executing" (*i.e.*, it is judicially enforceable without the need for any implementing legislation); and (2) the treaty protects individual rights. Here, because both conditions are satisfied, petitioner is entitled to judicial enforcement of his rights under Common Article 3.

ARGUMENT

I. COMMON ARTICLE 3 PROTECTS PETITIONER AND OTHERS CAPTURED DURING THE CONFLICT IN AFGHANISTAN

As made clear by the plain language of the Geneva Conventions, the Conventions' overall structure, the authoritative Red Cross drafting history, and relevant decisions from lower courts and international tribunals, Common Article 3 applies to the conflict in Afghanistan. Before discussing the universal applicability of Common Article 3, we provide background on the Geneva Conventions of 1949.

A. Common Article 3 Of The Geneva Conventions Of 1949

In 1949, soon after the horrors of World War II, representatives of 61 nations met in Switzerland to consider revisions to the existing 1929 Geneva Conventions. The delegates drafted four separate treaties guaranteeing protections to (1) wounded and sick soldiers in the field; (2) wounded, sick and shipwrecked sailors; (3) prisoners of war; and (4) civilians. The four 1949 Conventions are commonly referred to by number; *i.e.,* the "First Geneva Convention" and so forth. The United States ratified all four of the 1949 Conventions in 1955. As of December 2005, almost 200 states, including Afghanistan, had ratified the Conventions.

Common Article 3 of the 1949 Conventions provides in relevant part as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

> (d) 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.
>
> (2) The wounded and sick shall be collected and cared for.

Geneva III, art. 3, 6 U.S.T. 3316.

Common Article 3, which is described in the official Red Cross Commentaries as "one of [the] most important Articles" in the Conventions, *see* International Committee of the Red Cross, *Commentaries to the Convention (I) For the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* 38 (1949), represented a dramatic innovation over the prior 1929 Conventions. *See id.* (Common Article 3 "marks a new step forward" and is "an almost unhoped for extension" of the prior Conventions).[3] For the first time, Common Article 3 established rules governing the humane treatment of persons captured in non-international conflicts. *See generally id.* at 38-48. Further, in contrast to the 1929 Conventions, which only guaranteed regularized court process before punishment for misconduct occurring while in captivity, *see Application of Yamashita*, 327 U.S. 1, 21-23 (1946), Common Article 3 guarantees adequate legal process before a detainee may be subjected to *any* punishment, including for misconduct occurring before his capture.

In 1997, the terms of Common Article 3 were incorporated into federal criminal law by the War Crimes Act, which makes it a felony for U.S. military personnel or U.S. nationals to engage in conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949." 18 U.S.C. § 2441(c)(3). Additionally, the Third and Fourth Geneva Conventions (each of

[3] These Commentaries are "widely recognized as a respected authority on interpretation of the Geneva Conventions. The authors of the Commentary were primarily individuals intimately involved with the revision of the Convention of 1929 and the drafting of the present Conventions." *United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992).

which includes Common Article 3) were incorporated as required conduct for the Armed Services by Army Regulation 190-8 (and identical regulations for the other Services) adopted on October 1, 1997. That regulation provides in Section 1-5(a)(3) that punishment of detainees "known to have, or suspected of having, committed serious offenses will be administered [in accordance with] GPW [the Third Geneva Convention], GC [the Fourth Geneva Convention], the Uniform Code of Military Justice and the Manual for Courts Martial." Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf, at § 1-5(a)(3) (1997) ("AR 190-8").

B. Common Article 3 Applies To The Conflict In Afghanistan

In the decision below, two judges on the D.C. Circuit panel held that the 1949 Conventions are inapplicable to this case because they do "not apply to al Qaeda and its members." *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005). The panel majority reasoned that the "Convention appears to contemplate only two types of armed conflicts," "international conflicts" (to which the broad panoply of Geneva Convention protections apply) and "civil war[s]" (to which only the more limited protections of Common Article 3 apply). *Id.* Accepting the government's argument that the war against al Qaeda in Afghanistan does not fit within either of these categories, the panel majority concluded that the Geneva Conventions do not apply to petitioner's case. *Id.* at 41-42.

The panel majority's decision departs from the plain language of Common Article 3 and is at odds with that provision's negotiating history and with the way it has been interpreted by lower courts and international tribunals. In addition, as explained by Judge Williams in his separate opinion, the panel majority's interpretation cannot be squared with the structure and purpose of the 1949 Conventions, which make it clear that Common Article 3 was intended to apply to all conflicts "between a

signatory and a non-state actor" such as al Qaeda. *Id.* at 44 (Williams, J., concurring).

As the majority itself acknowledged, the bulk of the Conventions, conferring protections surpassing those of Common Article 3, apply to "international" conflicts. As the majority also recognized, Common Article 2 of the Conventions assigns that term a specific meaning: conflicts "'between two or more of the High Contracting Parties.'" *Id.* at 41 (quoting Conventions at art. 2). Accordingly, as Judge Williams reasoned (and the majority failed to apprehend), the phrase "conflict not of an international character" refers simply to conflicts involving non-signatories to the Conventions.[4] If, as the D.C. Circuit majority concluded, the conflict with al Qaeda is not "international" because it is separate from the conflict with the Taliban in Afghanistan, then it clearly falls within this expansive definition of "conflict[s] not of an international character." *Id.* at 44 (Williams, J., concurring). Any other reading of Common Article 3 would require inexplicably different conceptions of the term "international" in Articles 2 and 3.

This reading is confirmed by the negotiating history of Common Article 3. As its Commentaries explain, the Red Cross initiated consideration of Common Article 3 by submitting draft language that would have extended the full protection of the Conventions to "all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion. . . ." International Committee of the Red Cross, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (hereinafter

[4] The philosopher Jeremy Bentham, credited with coining the term "international," defined it to encompass "mutual transactions between sovereigns as such," meaning that a non-"international" conflict would be any conflict not between sovereign states. Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914* 13-14 (Oxford University Press 2004) (quoting Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* 296 (Burns and Hart eds. 1970)).

"ICRC Commentaries (IV)") 30 (1949). There was, however, "almost universal opposition to the application of the Convention, with all its provisions," to non-international conflicts, even when the Conference delegates proposed compromises "limiting the number of cases in which the Convention was to be applicable." *Id.* at 32. A solution was found, however, when the French delegation suggested drafting Common Article 3 so that its substantive protections would be limited, rather than the types of conflicts to which they applied. *Id.* Thus, the deliberations over the Article were based on the understanding that its provisions "were to be equally applicable to civil and to international wars." *Id.* at 33.

Given this text and history, it is clear that Common Article 3 was intended to serve as a baseline for *all* armed conflicts. Since the rest of the Conventions, with their stronger protections, cover international conflicts, all conflicts are governed at a minimum by the protections of this Article. *Id.* at 38 ("Representing, as [Common Article 3] does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable").

As Judge Williams recognized in his concurring opinion, the structure of the Conventions does not allow for the gap in coverage envisioned by the D.C. Circuit majority. A non-state actor cannot sign a treaty, and therefore cannot be party to an "international" conflict under Article 2. *Hamdan*, 415 F.3d at 44 (Williams, J., concurring). Common Article 3 was drafted to provide minimal protection for those who had no protection before: stateless combatants. *Id.* "Thus the words 'not of an international character' are sensibly understood to refer to a conflict between a signatory nation and a non-state actor." *Id.* Although a civil war is one example of a conflict involving a non-state actor, it does not follow that Common Article 3 is confined *only* to civil wars, as the panel majority mistakenly concluded. Moreover, even if Common Article 3 is deemed ambiguous in this regard, the panel majority's construction should be rejected under the longstanding canon that treaties must be interpreted liberally to protect

individual rights. *See United States v. Stuart*, 489 U.S. 353, 368 (1989) ("'[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred'") (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940) (alteration in original)); *see also Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879).

Lower courts have recognized Common Article 3's universal applicability. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), a case against a former Bosnian Serb police officer who perpetrated acts of torture during the Yugoslav conflict, the district court found the defendant liable, under the Alien Tort Claims Act, for violating Common Article 3. The court noted that the conflict in the former Yugoslavia had been recognized as international in character, but nevertheless held that the standards of Common Article 3 are broadly applicable "to any armed conflict, whether it is of an internal or international character." *Id.* at 1351 n.39 (internal quotations omitted); *see also Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (under Common Article 3, "all 'parties' to a conflict . . . are obliged to adhere to these most fundamental requirements of the law of war").

International tribunals have also embraced the universal application of Common Article 3.[5] In *Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) ("*Nicaragua*"), the International Court of Justice considered claims arising from the conflict in Nicaragua. Noting the difficulty of characterizing the underlying conflict as internal (as a Nicaraguan civil war) or

[5] Although international jurisprudence is not binding upon this Court, we respectfully submit that the international decisions in favor of Common Article 3's applicability are persuasive authority, especially in light of this Court's statement that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard v. Greene*, 523 U.S. 371, 375 (1998).

international (because of the allegation of U.S. involvement), the I.C.J. concluded that "[b]ecause the minimum rules applicable to international and to non-international conflicts are identical . . . [t]he relevant principles are to be looked for in the provisions of Article 3." *Id.* at ¶ 219. More recently, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTFY") considered whether the Yugoslavian conflict was international or non-international, and concluded, citing *Nicaragua*, that the "character of the conflict is irrelevant" because Common Article 3 reflects "'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character." *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTFY Appeals Chamber Oct. 2, 1995) ("*Tadic*"). The ICTFY subsequently reaffirmed this ruling in *Prosecutor v. Delalic*, Case No. IT-96-21, Judgement, ¶ 140-50 (ICTFY Appeals Chamber Feb. 20, 2001); *see also Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgement, ¶ 138 (ICTFY Trial Chamber Dec. 10, 1998) (Common Article 3 "is applicable both to international and internal armed conflicts").

II. THE MILITARY COMMISSION CONVENED AGAINST PETITIONER VIOLATES COMMON ARTICLE 3

A. The Military Commission Convened To Try Petitioner Is Not A "Regularly Constituted Court" As Required By Common Article 3

Common Article 3 mandates that prisoners may be punished only after trial by a "regularly constituted court." The Commentaries provide little insight into this provision, stating only that Common Article 3 was intended to ban "'summary' justice" while leaving "intact the right of the State to prosecute, sentence and punish according to the law." ICRC Commentaries (IV) at 39. In a somewhat different context, however, the Commentaries make clear

that the requirement of a "regularly constituted" court "definitely excludes all special tribunals." *Id.* at 340 (discussing Article 66 of the Fourth Convention, which mandates that civilians be punished by "properly constituted, non-political military courts"). Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 66, 6 U.S.T. 3516. The Commentary to Article 66 further states that "it is the ordinary military courts of the Occupying Power which will be competent. Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice." ICRC Commentaries (IV) at 340.

In this case, the Military Commissions were established pursuant to the President's Military Order dated November 13, 2001 (the "November 13 Order"), *see* 66 Fed. Reg. 57,833, as well as the Defense Department's Military Commission Order No. 1 ("MCO 1"), as amended most recently on August 31, 2005, *see* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.[6] The November 13 Order makes clear that the Military Commissions are "special tribunals" set up to punish individuals specifically identified by the President. Indeed, § 2(a) of the November 13 Order mandates that an individual may be tried by Military Commission only if the President personally determines that there is reason to believe that the individual is a member of al Qaeda, has participated in terrorism, or has harbored a terrorist. *See* 66 Fed. Reg. 57,834. Because the Military Commissions are thus vested with jurisdiction only in cases that are specially designated on an *ad hoc* basis, they stand in contrast to regularized tribunals, such as general courts-martial, which possess jurisdiction over a broad class of persons, including detainees who are not prisoners of war. *See* 10 U.S.C. § 818 (jurisdiction of general courts-martial).

Further, although the Military Commissions are cloaked in the forms of legality, drawing their authority from orders listed in the Federal Register and the Code of

[6] An earlier version of MCO 1 was codified at 32 C.F.R. § 9.

Federal Regulations, in fact they vest members of the Executive Branch with breathtaking discretion. Under the Military Commission rules, the President and/or his subordinates enjoy power to decide:

- Which individuals should be tried by a Military Commission, *see* 66 Fed. Reg. 57,834 and MCO 1 § 3(A);
- Whether to exclude members of the public, the press, civilian defense counsel, or even the defendant himself from a trial based on "national security interests," MCO 1 § 6(B)(3);
- Whether to receive evidence at trial, provided only that it must be deemed to "have probative value to a reasonable person" in order to be admitted, *id.* at § 6(D)(1);
- Whether to issue protective orders that preclude the defendant and civilian defense counsel from seeing certain of the prosecution's evidence, *see id.* at § 6(D)(5)(b); and
- What sentence to impose upon conviction, including "death, imprisonment for life or for any lesser term," or other sentences, 66 Fed. Reg. 57,834; MCO 1 §§ 6(G), 6(H)(6).

Further, the rules governing Military Commissions are subject to change at the sole discretion of the Executive Branch either by way of formal amendment, *see, e.g.,* MCO 1 § 11 ("The Secretary of Defense may amend this Order from time to time"), or if the Secretary of Defense exercises an open-ended power to circumvent the rules, *see id.* § 1 ("Unless otherwise directed by the Secretary of Defense . . . the procedures prescribed herein shall and no others shall govern" trials before Military Commissions). Taken together, these provisions amount to a massive and unilateral assertion of authority by the Executive Branch to select, try, and punish prisoners under Military Commissions. As such, the Commissions are not a "regularly

constituted court" and thus fail to satisfy the basic requirement of Common Article 3.[7]

B. Common Article 3 Entitles Petitioner To Basic Judicial Safeguards Recognized In International Law And This Court's Longstanding Precedents

Even if the Military Commissions are deemed "regularly constituted courts," their highly irregular procedural rules fail to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples" as separately required by Common Article 3. This latter provision was inserted with the intention that signatory nations should "surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors." ICRC Commentaries (IV) at 39. The precise contours of the Common Article 3 safeguards were delineated in Article 75 of Protocol I to the Conventions, which was adopted in 1977 ("Article 75"). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 75, 1125 U.N.T.S. 3; *see also* ICRC, *Commentaries to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 878 (1977) ("Protocol I Commentaries"). Although the United States did not adopt Protocol I because of objections to other provisions, "it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003); *see also* Conference, *The*

[7] We do not argue that *all* military commissions would fail to satisfy the "regularly constituted court" requirement of Common Article 3. Rather, we argue only that *these* Military Commissions fail to do so because they are focused selectively on cases chosen by the Executive and because the formation, structure, and operation of these Military Commissions rests on such an enormous assertion of authority by the Executive Branch.

Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 Am. J. Int'l L. & Pol'y 415, 427 (1987) (remarks of U.S. Dep't of State Legal Adviser Michael J. Matheson that the U.S. supports "the fundamental guarantees contained in article 75"). Therefore, to comport with Common Article 3, the Military Commissions must satisfy the provisions of Article 75, which include:

(1) prompt judicial proceedings;

(2) the right to be tried in one's presence;

(3) the right to not be compelled to testify against himself;

(4) the right to cross-examine witnesses against him and to provide witnesses on his behalf; and

(5) release from detention with the minimum delay possible as soon as the circumstances justifying the arrest have ceased to exist.

Article 75 at ¶ 4.[8]

These guarantees are deeply rooted in our own Constitutional traditions. For example, in *Crawford v. Washington*, 541 U.S. 36, 49 (2004), this Court admonished that the rights enshrined in the Sixth Amendment's Confrontation Clause have historically been considered "indispensable conditions" and "founded on natural justice" (internal quotations omitted). Another "principle of natural justice" is the right

[8] The requirements of Article 75 are also embodied in subsequent international covenants respecting human rights, such as Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Mar. 23, 1976, 999 U.N.T.S. 171. In 1992, the U.S. ratified the ICCPR. In addition to encompassing the specific protections listed in Article 75, the ICCPR incorporates a general guarantee of an "independent and impartial tribunal." *Id.* at art. 14. This last provision echoes Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3, U.N. Doc. A/810 at 73 (1948) ("UDHR"), which the U.S. government has recognized as a charter of inalienable human rights. *See, e.g.*, U.S. Dep't of State Statement on Human Rights, http://www.state.gov/g/drl/hr/ ("a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights").

of the accused to be present at his trial. *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *see also Lewis v. United States*, 146 U.S. 370, 372 (1892) (absence of defendant at his own trial is "contrary to the dictates of humanity") (internal quotations omitted). This Court has also declared that keeping evidence, favorable or not, from the eyes of the accused violates fundamental precepts of fairness. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (withholding of favorable evidence from an accused "does not comport with standards of justice"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-71 n.17 (1951) ("[t]he plea that evidence of guilt must be secret is abhorrent to free men") (internal quotations omitted).

Because the safeguards demanded by Common Article 3 (as spelled out in Article 75) are universally recognized as bedrock requirements of any civilized justice system, it is hardly surprising that they have been incorporated into the international tribunals established since the passage of Protocol I. These tribunals have tried defendants, including ex-Serbian president Slobodan Milosevic, accused of the most heinous crimes, including genocide. *See generally* Statute of the ICTFY, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (May 25, 1993) ("ICTFY Statute") at art. 20-21; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) ("ICTR Statute") at art. 19-20; The European Convention on Human Rights, Nov. 4, 1950, art. 5-6, 213 U.N.T.S. 221 ("ECHR").

MCO 1 fails to meet the requirements of Common Article 3 in four respects: (1) it allows petitioner to be unwillingly excluded from his trial; (2) it permits the tribunal to eviscerate petitioner's ability to cross-examine adverse witnesses; (3) it has permitted petitioner to be detained for years before trial; and (4) it fails to provide an impartial and independent tribunal. We address each of these points in turn.

1. Right To Be Present At Trial

Although the Commission rules nominally recognize petitioner's right to be present at his tribunal, MCO 1 at § 5(K), that right yields if the Commission closes the proceedings to petitioner and his Civilian Defense Counsel based on anything the Presiding Officer or Secretary of Defense deems to be a matter of national security. *Id.* at § 6(B)(3). The Presiding Officer may exclude petitioner upon an *ex parte* presentation by the prosecution. *Id.* This rule violates petitioner's "right to be tried in his presence." Article 75 at ¶ 4(e); *see also* ICCPR art. 14 at ¶ 3(d); ICTFY Statute art. 21 at ¶ 4(d); ICTR Statute art. 20 at ¶ 4(d). Petitioner's exclusion also neutralizes his right to cross-examine witnesses by preventing him from observing them and conferring with his counsel. Article 75 at ¶ 4(g); *see also* ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d).

Compounding this violation is the Commission's ability to offer evidence, under the rubric of "Protected Information," against petitioner without his ever knowing about it. *See* MCO 1 at § 6(D)(5). Although any admitted evidence must be seen by Detailed Defense Counsel, *id.* at § 6(D)(5)(b)(iii), Detailed Defense Counsel is not permitted to share the content of that evidence with petitioner or Civilian Defense Counsel. "Thus, for example, testimony may be received from a confidential informant, and petitioner will not be permitted to hear the testimony, see the witness's face, or learn his name." *Hamdan*, 344 F. Supp. 2d at 168. The consequences of such secret evidence are dire: petitioner could be sentenced to a lengthy prison term, or even executed, without ever knowing on what grounds he has been found guilty.

The fact that Detailed Defense Counsel can be present at all stages of the trial does not cure the problem of petitioner's exclusion. "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). The District Court's ruling adhered to this principle, noting the need for counsel to be able to

turn to his client and ask, "Did that really happen? Is that what happened?" *Hamdan*, 344 F. Supp. 2d at 168 (internal quotations omitted). *See also* Protocol I Commentaries at 883 ("the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts [and] to ask questions himself"). The government has not provided a single instance of a past tribunal, whether court proceeding or military commission, that has allowed for the involuntary exclusion of a defendant for any reason other than disruption of proceedings. The Uniform Code of Military Justice does not allow for such measures. 10 U.S.C. § 839(b); *United States v. Daulton*, 45 M.J. 212, 219 (C.A.A.F. 1996).

2. Right To Cross-Examine Adverse Witnesses

The Commissions' rules compromise petitioner's confrontation and cross-examination rights beyond excluding him unwillingly from the courtroom. *See* Article 75 at ¶ 4(g); *see also* ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d). The Commission is allowed to consider any evidence it deems probative "including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." MCO 1 at § 6(D)(3). Thus, even if petitioner is present, the Commission may receive anonymous unsworn statements whose sources petitioner cannot confront or impeach. This is exactly the situation this Court found an affront to historical concepts of natural justice in *Crawford*, 541 U.S. at 49. Furthermore, the military commissions in *Madsen v. Kinsella*, 343 U.S. 341 (1952), on which the government has often relied, explicitly guaranteed the defendant the rights to be present at her proceeding and to cross-examine adverse witnesses without qualification. *Id.* at 358 n.24.

3. Right To Prompt Judicial Proceedings

Petitioner has endured an unconscionably lengthy pre-trial detention. He was brought to Guantanamo in June 2002, and the decision to try him by military commission was made over a year later in July 2003, but he was not charged until after another full year, in July 2004. Common Article 3's promptness requirement does not countenance such delays. Indeed, the Protocol I Commentaries establish a *10 day* time limit for being informed of charges. Protocol I Commentaries at 876-77.

International law entitles the accused to be "promptly informed of any charges against him" and "to trial within a reasonable time." ICCPR art. 9 at ¶ 2, 3; *see also* Article 75 at ¶ 3, 4(a); ICTFY Statute art. 21 at ¶ 4(a), 4(c); ICTR Statute art. 20 at ¶ 4(a), 4(c); ECHR art. 6 at ¶ 1, 3(a). As this Court has emphasized, unreasonable delay in proceedings not only subjects an accused to the harm of a lengthy pretrial confinement, but impairs the accused's defense "by dimming memories and loss of exculpatory evidence." *Doggett v. United States*, 505 U.S. 647, 654 (1992). None of the military tribunals previously encountered by this Court involved detention as prolonged as petitioner's. *Madsen*, 343 U.S. at 343-44 (defendant charged a day after arrest and tried six months later); *Yamashita*, 327 U.S. at 5 (defendant charged within a month of capture and tried two weeks later); *Ex parte Quirin*, 317 U.S. 1, 7-8 (1942) (defendants charged within three weeks of capture and tried less than a week later).

4. Right To Be Tried By An Independent And Impartial Tribunal

Finally, the Commissions are not an "independent and impartial tribunal" as required by Common Article 3. ICCPR art. 14 at ¶ 1; UDHR art. 10; ECHR art. 6 at ¶ 1. The Commission members are appointed by the Secretary of Defense, and can be removed at any time for "good cause." MCO 1 at § 4(A)(1)-(3). Once the Commission renders a decision, the case passes automatically to a Review Panel, which either recommends a disposition to

the Secretary of Defense or remands the case to the Commission for further proceedings. *Id.* at § 6(H)(4). The Secretary of Defense, in turn, either forwards the case to the President with a recommended disposition or remands the case to the Commission for further proceedings. *Id.* at § 6(H)(5). The President may approve or disapprove the recommendation; change the conviction to one of a lesser included offense; mitigate, commute, defer or suspend the sentence imposed; or delegate his final authority to the Secretary of Defense. *Id.* at § 6(H)(6). Although the President or Secretary of Defense cannot change a "Not Guilty" finding to "Guilty," a "Not Guilty" disposition will not take effect until it is finalized by the President or Secretary of Defense. *Id.* at § 6(H)(2).[9]

As the foregoing structure makes clear, the Commissions are under the control of the President and Secretary of Defense. But these two individuals have already asserted that the Guantanamo detainees are guilty. For example, the President has unequivocally said of the Guantanamo detainees: "these are killers." Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/

[9] On December 31, 2005, shortly before the deadline for filing this brief, the President signed into law the National Defense Authorization Act for Fiscal Year 2006, H.R. Con. Res. 1815 (2005) (enacted) ("NDAA"). Section 1092 of the NDAA establishes limited jurisdiction in the D.C. Circuit to review final decisions of Military Commissions. *See id.* at § 1092(d)(3). The practical effect of this new statute is uncertain. It is unknown, for example, what standards the D.C. Circuit will employ in choosing to exercise its discretionary jurisdiction in cases in which the defendant has been sentenced to a term of imprisonment of less than 10 years, *see id.* at § 1092(d)(3)(B)(ii), or what standard of review will be used in cases where the D.C. Circuit does exercise jurisdiction. Given the government's consistent effort to "push the envelope" by asserting Executive authority as aggressively as possible, we anticipate that the government will seek to resist substantive judicial review of Military Commission decisions under the new statute. In any case no judicial review is triggered until the Executive gives final approval to the Commission's judgment, meaning that the timing of review is ultimately at the discretion of the Executive.

2002/01/20020128-13.html. The Secretary of Defense, meanwhile, has called the Guantanamo detainees "among the most dangerous, best-trained, vicious killers on the face of the Earth." Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team's Meeting*, Wall St. J., Jan. 28, 2002, at A16; *see also* Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm (quoting Secretary of Defense as calling Guantanamo detainees "committed terrorists" who "have been found to be engaging on behalf of the al Qaeda"). The government can offer no precedent for a military tribunal operating under such an overt bias. To the contrary, the later German saboteur tribunals in World War II were modified so that they would be *more* independent than earlier tribunals had been. *See* Louis Fisher, *Nazi Saboteurs on Trial* 140-43 (Univ. Press of Kansas 2003).

III. PETITIONER'S RIGHTS UNDER COMMON ARTICLE 3 ARE ENFORCEABLE IN FEDERAL COURT

In the decision below, the Court of Appeals erroneously concluded that petitioner's rights under the Geneva Conventions cannot be enforced in federal court. The Court of Appeals reached this decision based largely upon its reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In doing so, the Court of Appeals mistakenly conflated two distinct questions: (1) whether the Conventions provide a private right of action (*i.e.*, whether a private litigant can gain federal jurisdiction solely by claiming a violation of the Conventions), and (2) whether the rights guaranteed by the Conventions are judicially enforceable (*i.e.*, whether a litigant can invoke the Conventions as the rule of decision in a case with an independent jurisdictional foundation). The first of these questions, which was addressed in *Eisentrager*, is not relevant here. Petitioner does not rely on the Conventions for a "private right of action," as he has independently gained

access to the federal courts by way of his habeas petition. The answer to the second question, informed by numerous decisions of this Court dating back to the 1700s, is plainly "yes." Because Common Article 3 protects individual rights and is self-executing (*i.e.*, it is judicially enforceable without the need for any implementing legislation), it can and should supply the rule of decision in petitioner's case.

A. This Court Has Consistently Enforced Treaties That Protect Individual Rights And Are Self-Executing

As the Supremacy Clause of the Constitution declares in relevant part, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In the early days of our nation's history, Chief Justice Marshall proclaimed that "where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress." *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). He later explained, in *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled in part by United States v. Percheman*, 32 U.S. 51 (1833), that this tenet of American law enshrined "a different principle" than that followed in Great Britain. In Britain, a treaty was considered "*not* a legislative act," and was therefore "carried into execution by the sovereign power of the respective parties to the instrument." *Foster*, 27 U.S. at 314 (emphasis added). In the United States, in contrast, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Id.*; *accord United States v. Rauscher*, 119 U.S. 407, 417-18 (1886). Over the years, this Court has enforced treaty provisions if those provisions require no implementing legislation to make them effective, and has used the term "self-executing" to describe such provisions. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them

operative, to that extent they have the force and effect of a legislative enactment").

This Court has a long history of finding treaty provisions self-executing, and therefore judicially enforceable in favor of individual litigants, when those provisions confer rights upon individuals. For example, in *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), a Chinese laborer was detained by the Executive Branch when he attempted to re-enter the U.S. after traveling to Hawaii. The alien in *Chew Heong* (who accessed the federal courts by means of a habeas petition) argued that his detention violated an 1880 treaty between China and the United States declaring that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord." *Id.* at 538, 542. The Court observed that the 1880 treaty "operate[d] of itself without the aid of legislation," and therefore "while in force constitute[d] a part of the supreme law of the land." *Id.* at 540. Accordingly, the Court enforced the alien's "right to go from and return to the United States at pleasure" as "secured by [the] treaty." *Id.* at 539-40.

Two years later, this Court similarly enforced a treaty as providing the rule of decision in *Rauscher*. There, the United States prosecuted a defendant on a charge of "cruel and unusual punishment" after extraditing him from Great Britain on a murder charge. 119 U.S. at 409. The defendant appealed on the grounds that the governing extradition treaty required that he be tried only for the crime for which he was extradited. *Id.* The *Rauscher* Court noted that the Constitution had departed from the British norm of exclusive diplomatic enforcement of treaties. *Id.* at 417-18. The Court then concluded that because the extradition treaty was "the supreme law of the land," the Court was "bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty." *Id.* at 419. Based on this reasoning, the Court held that the treaty conferred upon the defendant the right to be tried only for the charge underlying his extradition. *Id.* at 433.

The turn of the century brought no change to the Court's view on judicial enforcement of treaty provisions protecting individual rights. In *Asakura*, 265 U.S. at 339-40, a Japanese national challenged a city ordinance restricting pawn-brokering to U.S. citizens, relying on a 1911 treaty between Japan and the U.S. guaranteeing each country's citizens the "liberty to enter, travel and reside in the territories of the other to carry on trade . . . upon the same terms as native citizens and subjects." The Court unanimously held that the 1911 treaty "operates of itself without the aid of any legislation, state or national," and would therefore "be applied and given authoritative effect by the courts." *Id.* at 341. After interpreting the term "trade" to encompass pawn-brokering, the Court vindicated the petitioner's rights under the treaty and enjoined the city from enforcing the ordinance against him. *Id.* at 343-44.

Shortly after World War II, in a decision that is highly probative here, this Court treated the 1949 Conventions' predecessors, the 1929 Geneva Conventions, as judicially enforceable. In *Yamashita*, which arose out of the trial of a top Japanese general by a military commission following the Japanese surrender, the defendant challenged the tribunal's procedural rules, which permitted it to receive into evidence depositions, affidavits, hearsay, and opinion evidence in a manner that would not be permitted in a criminal trial in a U.S. court. *See* 327 U.S. at 6. Although the Court rejected the defendant's argument on the merits, it gave full consideration to his contention that the procedures used by the military commission were impermissible under the 1929 Geneva Conventions. *See id.* at 23.[10]

[10] On the merits, finding that the 1929 Conventions only regulated procedures before imposing punishment for offenses committed during a prisoner's period of captivity, the Court concluded that the receipt of hearsay and opinion evidence at Yamashita's trial did not violate the treaty. *Id.* at 23. *Yamashita*'s holding on the merits became obsolete with the passage of the 1949 Conventions, which as noted above extended procedural protections far beyond the now-defunct 1929 Conventions. In particular, in contrast to the 1929 Conventions, Common Article 3 regulates the procedures that must be observed before a prisoner may be

(Continued on following page)

The foregoing decisions stand alongside many other precedents in which this Court has enforced the treaty rights of private litigants. None of these precedents dealt with treaties containing specific language regarding self-execution or judicial enforcement, and all of them belie the contention that enforcement of treaties is exclusively a matter for sovereign negotiation. *See, e.g.*, *Ware v. Hylton*, 3 U.S. 199, 239 (1796) (enforcing British citizens' right to collect a debt under peace treaty provision stating that "creditors, on either [the American or British] side . . . shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts, heretofore contracted"); *Hauenstein*, 100 U.S. at 486 (enforcing Swiss national's right to proceeds from property of Virginian decedent under treaty provision giving Swiss nationals the right to sell inherited property and "the liberty at all times to withdraw and export the proceeds thereof"); *Johnson v. Browne*, 205 U.S. 309, 319 n.† (1907) (granting writ of habeas corpus to prisoner extradited from Canada for different crime than the one he was sentenced for, because extradition treaty stated that no extradited defendant "shall be triable or be tried for any crime or offense . . . other than the offense for which he was surrendered"); *Jordan v. Tashiro*, 278 U.S. 123, 126 n.1 (1928) (enforcing Japanese national's right to set up corporation under same treaty provisions as in *Asakura*); *Nielsen*, 279 U.S. at 50 (enforcing Danish national's right to succeed to property without paying inheritance tax imposed on nonresident aliens under treaty provision guaranteeing that a Danish person's property within the U.S. would be taxed no more heavily than if it were owned by an American citizen); *Kolovrat v. Oregon*, 366 U.S. 187, 191 n.6 (1961) (enforcing Yugoslavian national's right to inherit from American decedent under treaty provision

---

punished for *any* offense, not merely for offenses committed during the time of captivity. *Compare, e.g.*, Geneva III, art. 3, 6 U.S.T. 3316 *with* Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021.

giving Serbian citizens the right to acquire property in the U.S. as if they were American citizens).

In each of these cases, the Court enforced treaty provisions in order to vindicate the individual rights conferred by the respective treaties. Additionally, in each case, those individual rights were conferred in terms that could be given effect without additional legislative action (*i.e.*, in "self-executing" provisions). In the *Head Money Cases*, 112 U.S. 580 (1884), this Court recognized that treaties bearing both of these characteristics should be judicially enforced. Specifically, the Court noted that a treaty may:

> contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

112 U.S. at 598-99; *see also Foster*, 27 U.S. at 307 (observing that the judiciary should not resolve disputes purely between sovereigns, but that "its duty commonly is to decide upon individual rights"); Restatement (Third) of the Foreign Relations Law of the United States § 111, Rep. n.5 (1987) ("Restatement") ("agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest").

B. Common Article 3 Protects Individual Rights And Is Self-Executing

In this case, Common Article 3 bears both characteristics that were identified in the *Head Money Cases* as the

criteria for judicial enforcement: it protects individual rights and is capable of stand-alone implementation by a court.

First, by its own terms Common Article 3 explicitly confers rights upon individuals, including prohibitions against discrimination based on "race, colour, religion or faith, birth or wealth, or any other similar criteria"; against "murder of all kinds, mutilation, cruel treatment and torture"; and, most relevant here, "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 at cl. 1, 1(a), 1(d). Common Article 3 employs mandatory language, stipulating that detainees "*shall* in all instances be treated humanely" and mandating that signatory nations "*shall be prohibited*" from engaging in specified types of misconduct. *Id.* at cl. 1 (emphasis added). This Court has repeatedly enforced treaties with this sort of mandatory language. *See, e.g.*, *Ware*, 3 U.S. at 239; *Chew Heong*, 112 U.S. at 538; *Asakura*, 265 U.S. at 340.

Second, the rights conferred by Common Article 3 are judicially enforceable without additional legislation. As an initial matter, courts plainly are competent to enforce Common Article 3. Congress recognized this proposition as recently as 1997, when it incorporated Common Article 3 into federal criminal law in the War Crimes Act. *See* 18 U.S.C. § 2441(c)(3) (making it unlawful for U.S. nationals to engage in conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949"). Furthermore, the ratification process compellingly demonstrates that Common Article 3 is capable of enforcement without implementing legislation.

The Senate Report accompanying the ratification of the Conventions in 1955 stated broadly that "it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four [Geneva] conventions." S. Exec. Rep. No. 84-9, at 30-31 (1955). The Senate Report selected a handful of articles from the Conventions – Common Article 3 not among them – and

designated those articles in need of implementing legislation. *Id.* As the Restatement of Foreign Relations makes clear, the Senate's conclusion is powerful evidence that the provision is self-executing. *See* Restatement at § 111 Rep. n.5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.)"). Indeed, if the Senate had wished to render the Conventions non-self-executing, it would have done so explicitly, as it did with the more recently enacted ICCPR. *See* 138 Cong. Rec. S4784 (Apr. 2, 1992) (ratifying the ICCPR subject to the declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing"); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Furthermore, the fact that a scant minority of the provisions in the 1949 Conventions were viewed as non-self-executing can hardly support an argument that the Conventions are non-self-executing *in toto*, especially when the Senate took affirmative steps to enact implementing legislation for the 1949 Conventions where it understood such legislation to be required. *See* Restatement at § 111 cmt. h ("[s]ome provisions of an international agreement may be self-executing and others non-self-executing"); *see also Fok Young Yo v. United States*, 185 U.S. 296, 303 (1902) (finding one provision of 1880 treaty between China and the U.S. to be self-executing and another provision non-self-executing).

C. In The Decision Below, The Court Of Appeals Misread *Eisentrager*

In holding that the Geneva Conventions are not judicially enforceable, the D.C. Circuit misread this Court's decision in *Eisentrager*. *See Hamdan*, 415 F.3d at 39-40 (discussing *Eisentrager*). *Eisentrager* was a putative habeas corpus action brought by German partisans who were captured during hostilities in China, convicted by a military commission in China, and repatriated to Germany to serve their sentences. *See* 339 U.S. at 765-67.

Noting the lack of any precedent for a habeas petition brought by an alien enemy who was not present, at any relevant time, on United States territory, the Court held that the petitioners could not bring an action in federal court. *Id.* at 790-91.

Toward the end of *Eisentrager*, the Court addressed the prisoners' arguments that their convictions by the military commission in China were invalid under the 1929 Geneva Conventions. On the merits, the Court rejected the argument. *Id.* at 789-90.[11] In footnote 14, the Court noted that the prisoners did retain "right[s] which the military authorities are bound to respect" under the 1929 Conventions; *i.e.*, proper treatment as captives, but stated that the prisoners lacked the ability to enforce their treaty rights in federal court because "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. In the decision below, the Court of Appeals placed great reliance on footnote 14, holding that it "leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced." *Hamdan*, 415 F.3d at 39.

But the Court of Appeals failed to recognize that footnote 14 followed inexorably from the holding in *Eisentrager* that the prisoners lacked the ability to *bring any challenge* in U.S. courts to their trial or punishment. With no independent right of action to justify their presence in federal court, the *Eisentrager* petitioners were not permitted to rely on the treaty as their sole basis for filing suit. This holding has no application here, where petitioner has an independent basis for filing his claim in federal court: his statutory right, recognized in *Rasul v. Bush*, 542 U.S. 466 (2004), to seek a petition for a writ of habeas corpus. Far more germane than the *Eisentrager* footnote is *Yamashita*, which the Court of Appeals did not discuss or even cite in its discussion of treaty enforceability. As *Yamashita*

[11] As was the case in *Yamashita*, *Eisentrager* applied the now-obsolete 1929 Geneva Conventions, so the Court's substantive analysis is not relevant to the instant case. *See supra* n.10.

makes clear, and as this Court's treaty jurisprudence establishes, the Geneva Conventions can and should serve as the rule of decision in a properly filed habeas corpus action such as this one. *See supra* at 21-28.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

JAMES J. BENJAMIN, JR.
NANCY CHUNG
AMIT KURLEKAR
LAURA S. LUCAS
STEVEN M. PESNER
SHANNON SHAH
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for Amici Curiae Association of the Bar of the City of New York and Human Rights Institute of the International Bar Association

Mr. MERNIN. We think it's clear the rules for the so-called non-international conflicts refer to conflicts not between state parties, as distinct from conflicts between state parties, to which the entire Conventions apply. We just don't think that this is a point that should be in further dispute.

Our customary international law and the past practice of our State Department and the DOD, the Armed Forces have long recognized the applicability of Common Article 3 as a minimum safety net for all armed conflict.

So, it would be unfortunate, and almost inconceivable, I think, for the United States to be the first country in history to publicly turn away from a bedrock piece of the law of war, this fundamental part of the Geneva Conventions.

Chairman WARNER. I wouldn't want anyone to depart from this hearing thinking that, certainly in the context of what this committee's been doing, that we've manifested any indication that that would be the direction in which this committee is likely to go.

Mr. MERNIN. Absolutely.

We also have particular concerns that there be transparency to the process, going forward. After the President issued the military order, of the 10 or so follow-on directives establishing the rules for commissions, we believe, only 1 was released for public commentary. We offered comments on that. It had to do with elements of the offenses. After the comments were received, the DOD declined to make the public comments available for review. So, we don't know what other public comments were ever received. Any sort of process of further rulemaking, we suggest, needs to be manifestly more transparent in order to guarantee that this gets done right.

I think we talked a great deal about the Court of Appeals of the Armed Forces, so I won't reiterate, other than to say we understand that Congress has the flexibility on this point, that it probably would not, for instance, be an abridgment of Common Article 3 to deny military commission defendants the right to have a case heard at an intermediate appellate level with what Mr. Fidell referred to earlier. I would agree with that.

I think, in response to Senator Cornyn, earlier, I discussed some particularly salient evidentiary issues that we have concerns about, so I'm not going to repeat those now. I'll refer to my prior remarks.

On that note, I think I can conclude and thank you for considering our views. Any further help we can be, we will cooperate with other groups.

[The prepared statement of Mr. Mernin follows:]

PREPARED STATEMENT BY MICHAEL MERNIN

Thank you for the opportunity to appear today on behalf of the New York City Bar Association. The Association is an independent nongovernmental organization with a membership of more than 22,000 lawyers, judges, law professors, and government officials, principally from New York City, but also from around the United States and from 50 other countries. I am here today as chair of the Association's Committee on Military Affairs and Justice, which has in the past submitted reports and correspondence to your attention on a variety of issues related to military law.

I would like to focus on our straightforward recommendation which is born of the complexity of the matter at hand. In the wake of the *Hamdan* decision, we want to urge Congress to act quickly to establish an expert panel with a mandate to advise Congress and its committees about the appropriate means to establish a military commission system that would respond—in a transparent non-partisan manner—to the Supreme Court's decision. Legislation authorizing the panel's creation and the method of selecting its members would be relatively simple to draft, and there are existing analogs, in other areas, which we have highlighted in a recent letter to you. Once authorized, such a panel could begin its work without delay, and provide immediate useful advice and drafting assistance to Congress.

On November 13, 2001, the President issued an Executive order establishing military commissions. The Military Order was adopted in haste without the active participation of the Judge Advocates General (JAG), consultation with Congress or public comment. The Association's Committee on Military Affairs and Justice issued one of the first reports studying that order. In our report, we offered criticism and advice as to how the commissions might better be structured to satisfy the competing goals of security, credibility and fairness, and we suggested that, instead of the proposed commissions, a forum based instead on the Uniform Code of Military Justice (UCMJ) would be a reasonable starting point. Over time, the rules for military commissions were ameliorated, though many of its procedures remain controversial. Despite the initial haste, the commissions have yet to try a single case.

Now, almost 5 years later, Congress has been given a fresh opportunity to be heard on this front. We are mindful that the impulse to "get it done" is strong, and not without merit. But having witnessed the results of haste flowing from the November 2001 Executive Order, it should be Congress' goal here not just to get it done, but to "get it right." We firmly believe that a useful tool in getting it right

would be to establish an expert panel of former JAGS, practitioners, scholars, and other attorneys who have devoted their careers to these important issues, whose expertise and insight would be the best guarantee that due consideration were given to the security issues, the due process issues, and the human rights issues. This process would serve the twin goals of establishing a workable system to prosecute and punish our enemies who have committed breaches of the law of war, and establishing a system which reaffirms the United States' role as a pre-eminent guarantor of the rule of law and human rights.

We are aware of the National Institute of Military Justice's (NIMJ) proposed amendment to the UCMJ to address this matter. Although the Association has not yet performed a full review of the proposal, we applaud NIMJ's efforts and, in general, approve its approach. Within the context of the NIMJ proposal, we suggest that an advisory panel, similar to what we propose, could also prove useful to advise both Congress and the President about the modifications to the UCMJ which could form the foundation of the new military commission system.

Any consideration of proposed legislation will require a thorough review at the time of introduction. While we await such opportunity, the Association has specific concerns about certain issues which will likely be relevant to Congress' consideration and debate, which I will summarize below:

GENEVA CONVENTION—COMMON ARTICLE 3

Our Association filed an amicus brief in *Hamdan* arguing for the application of Common Article 3. We could not be more pleased to see the Court recognize that application. Reading the Geneva Conventions in context it is clear that the rules for so called "non-international" conflicts refer to conflicts not between nations, as distinct from conflicts between states party to which the entire Conventions apply. Moreover, customary international law and the practice of our State Department and our Armed Forces have long recognized that Common Article 3 is the minimum safety net for all armed conflict. Whenever and wherever Americans, military or civilian, become captives in armed conflict, we will want to be able to count on those rights. It should be inconceivable for the United States to be the first country in history to turn away from the Geneva Conventions, the bedrock of the law of war.

TRANSPARENCY

After the President issued the Military Order, of the 10 or so follow-on directives establishing the detailed rules for Military Commissions, only 1 was released for public commentary. That directive concerned establishing the elements of offenses, and we offered comments as requested. The Department of Defense subsequently refused to make public the comments it received.

PROCEDURES

Procedural issues tend to either be results-oriented or security-oriented. Some procedures do involve tough questions of balancing security interests with reasonable due process and fairness. Certain procedures will obviously require modification to accommodate the realities of the situation. For example, Miranda warnings are on their face inapplicable.

Appeals

There is no imaginably better appellate tribunal to hear appeals from military commissions than the Court of Appeals for the Armed Forces (CAAF), a well respected article I court of civilian justices appointed for 15 year terms. Clearly this court could hear military commission appeals without breach of security. Barring only tribunals held in a theater of operations, we would favor using the CAAF and the intermediate service courts of appeals as recommended by NIMJ.

Evidence

We have no objection, in principle, to permitting more flexible rules of evidence consistent with battlefield conditions and international standards. However, much more specificity is necessary than the wide open concept of "all evidence of probative value." The use of secret evidence, to which the defendant is denied any access, should not be permitted. The accused must ultimately have access in some form to evidence supporting the charges against him, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence. As with the procedure used in our Federal courts, we believe security redactions, where both court and defendant see only the redacted document, is a reasonable procedure. Any evidentiary disputes should be

ruled on by the presiding legal judge before being made available to the members of the commission.

Thank you for considering our views. If you have the need for drafting assistance or further information in your consideration of this important matter, we would be glad to provide assistance to this committee or to any other panel convened.

Chairman WARNER. Good. Just out of curiosity, does your amicus curiae brief go into the history of the development of that article?

Mr. MERNIN. I believe it did, Senator.

Chairman WARNER. I am fascinated researching the history of that period, when it was developed.

Mr. MERNIN. What I find particularly fascinating, Senators, and if you look at the entire panoply of the conventions, they were negotiated in the aftermath of World War II, with Josef Stalin's Soviet Union. Yet, even Joe Stalin saw fit, in the ravaged Europe, to be part of setting up a system which put in place a guaranteed baselines for treatment. Now, there were some carve-outs that he got as to security detainees and things like that, but it says something.

Chairman WARNER. That speaks to a lot. I'm quite interested in the history. If anybody else can direct me to a resource of how this was developed, I would appreciate it very much. Just forward it to me directly, here to the Senate.

Thank you.

Now, we have you, sir. Thank you.

STATEMENT OF JAMES J. CARAFANO, SENIOR RESEARCH FELLOW, THE HERITAGE FOUNDATION

Dr. CARAFANO. Mr. Chairman and Senator Levin, first I'd like to say that we, on behalf of The Heritage Foundation, would be more than willing to take on the task that you laid out and to partner with others, where we can, in looking at that. So we'll aggressively pursue that.

I hope you'll indulge me for just a minute. I'm not a lawyer, and I think it's a different perspective that I think this panel needs to hear.

My assessment comes from 25 years as a soldier who has lived under UCMJ and as a military scholar, who's written books on how real wars are fought, and as a strategist who genuflects every time he walks by George Marshall's desk at the Pentagon.

I think, quite frankly, my assessment is that the focus of this debate has been largely wrong.

Chairman WARNER. Been largely what?

Dr. CARAFANO. Wrong.

Chairman WARNER. Wrong.

Dr. CARAFANO. Because it's been primarily about legal issues. While I would, of course, argue that it's essential that what Congress does and what the administration does pass constitutional muster, that that's not the only issue at stake here. What is equally important is that the solution supports the strategy for the war on terrorism. That's why I think this hearing is absolutely essential. Each branch has a specific responsibility. In wartime, it's the Court's job to interpret the law. It's the President's job to fight the war. It is essentially Congress's job to provide the President the right kinds of instruments to do that. So I think these hearings are

absolutely essential, because this really gets to the bedrock of what kind of instruments are you going to provide the President.

I would argue that strategy needs to be front and center of the discussion; because you fight long wars differently. I think that's an essential element that people often miss. In a long war, you're as concerned about protecting and nurturing the competitive power of the state to compete over the long-term as you are with getting the enemy. It's the difference between running a sprint and running a marathon. So long wars call for different kinds of strategies. What we've argued, and what we've used to assess every element of what the Government has done, from homeland security to legal issues to Guantanamo Bay, arguably, there are four elements of a good long-war strategy. They are: security—getting the enemy, and protecting yourself; economic growth, because, at the end of the day, economic growth is what both sustains the security and meets the vital needs of the state; the protection of civil liberties and privacies, because that's the essential glue that gives the people the will to prevail, that is what keeps the civil society together; and winning the war of ideas, because all wars are won in the minds of men and women.

What I have argued is that if you have a strategy that doesn't equally support each four of those pillars, then you don't compete well over the long-term. I'd argue, as a historian, if you go back and you look at the Cold War, which is actually one of the few long wars in history where a state actually got stronger over the course of the conflict, where it was a stronger, more powerful, and just as free nation at the end as it was at the beginning, it's because that largely in the Cold War we adhered to trying to do all four of those things simultaneously, and we did them all sufficiently well.

So with regards to this issue, I think I have concerns on three of the components: security, civil society, and the war of ideas. I'd just like to share those with you very quickly, and then I'll conclude my remarks.

In terms of security, I think there's really two issues at stake. One, as I mentioned, is Government has the dual purpose of the security of the individual and the security of the people, and legal systems are designed to deal with both of those. Most of our legal systems and the UCMJ is a prime example of starting with the premise of defending and protecting the rights of the individual, and then it builds in the requirements for national security and the requirements for military success, and is essential.

I think the legal system that we demand here is something very, very different. It should start with satisfying the national security issues of the Nation, and then we should build into that the minimum due-process requirements that are required.

My second concern is the system that we come up with. We have to preserve the flexibility of the executive power. The Presidents fight the wars, and Clausewitz, the famous Prussian military philosopher, said, "Everything in war is simple, but even the simple is very difficult." The reason why he said that is, he talked about the friction of war, the unpredictability, the changing nature of war. So we've bound our executive to the minimum possible to allow him or her the flexibility to adjust for the changing face of war.

How we apply military commissions today or next year may be different. The threat may present itself differently 5 or 10 years from now. So, we really want to be cautious in how we bound the executive in this.

I think there is a civil society issue at stake here. I think it's a fundamental mistake to begin with UCMJ as the start and in a sense, creating the notion, even if it's not completely accurate, that you are rewarding unlawful combatants by placing them under a legal system which is designed for people that live in the light. I mean, even criminals, in a sense, live in the light and respect.

Chairman WARNER. Designed for people who live in what?

Dr. CARAFANO. To live in the light. In a sense, even criminals live under the legal system under which this is a system that you're combating an enemy who actually wants to destroy the legal system. I do think that any perception that you're rewarding them for operating under a system which they're trying to destroy is incorrect. I do think that creating a separate legal system, even if, at the end of the day, they look fairly similar, is an essential component of maintaining the notion of what makes for a healthy civil society to make a distinction between those who respect the rule of law and those who want to destroy the rule of law.

I'll just end on my third point, which is where this fits in the war of ideas. I do believe that the discussion we have here, and how Congress rules on this, or acts on this, is going to have an immense implication on how the United States is portrayed to the world. I think what we have to recognize is how do you contribute to winning the war of ideas? It's not about doing something that is very popular. It's not about doing something that gets a broad consensus of lots of people. It's really about doing the right thing.

The most essential component is to demonstrate two things. One, that you have the will to prevail, that you're going to prevail against the terrorists no matter what they do, no matter what they try, that the Nation's going to keep fighting until it wins, until people are free. Two, that you respect the rule of law and you're never going to sacrifice the rule of law in how you fight that war.

At the end of the day what really is going to advance the cause of the United States in the war of ideas is that you have a Supreme Court and a Congress and an administration that speak with one voice. That, I think, is the most essential component. At the end of the day, I think what's really required for a solution that just doesn't respect the rule of law, but it helps win the long war. Really, both of those have to be paramount and equally weighed as you move towards your final recommendations.

Thank you, sir.

[The prepared statement of Dr. Carafano follows:]

PREPARED STATEMENT BY DR. JAMES JAY CARAFANO [1]

Mr. Chairman and other distinguished members of the committee, thank you for the opportunity to testify before you today on the U.S. Government's proposal to try

[1] The Heritage Foundation is a public policy, research, and educational organization operating under section 501(C)(3). It is privately supported, and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2005, it had more

Continued

unlawful combatants by military commissions in light of the Supreme Court decision in *Hamdan* v. *Rumsfeld*.[2] What I would like to do in my testimony is: (1) describe how this decision fits in the context of how America ought to fight the war on terrorism; (2) make the case that Congress ought to ratify the president's discretion to use military commissions to try these types of unlawful combatants and the offenses charged, and grant the greatest discretion to this and future presidents to establish just rules for such tribunals consistent with national security; and, (3) suggest how the Bush administration's proposal for commissions could be amended to satisfy legitimate congressional concerns.

WINNING THE LONG WAR

My view of what Congress should do is tempered by a 25-year military career as a soldier and strategist. In deciding how to move forward after *Hamdan* v. *Rumsfeld*, strategy matters. While Congress and the Bush administration must a find a remedy that is consistent with the demands of the Constitution, satisfying the rule of law is not enough.

The best solution is one that is consistent with how the law in free societies should be used in wartime, and an approach that supports the national strategy.

President Bush was right to argue that the concerted effort to destroy the capacity of transnational groups who seek to turn terrorism into a global corporate enterprise ought to be viewed as a long war. Identifying the war on global terrorism as a long war is important, because long wars call for a particular kind of strategy—one that pays as much attention to protecting and nurturing the power of the state for competing over the long term as it does to getting the enemy. Long war strategies that ignore the imperative of preserving strength for the fight in a protracted conflict devolve into wars of attrition. Desperate to prevail, nations become over-centralized, authoritarian "garrison" states that lose the freedoms and flexibility that made them competitive to begin with.[3] In contrast, in prolonged conflicts such as the Cold War, in which the United States adapted a strategy that gave equal weight to preserving the Nation's competitive advantages and standing fast against an enduring threat, the U.S. not only prevailed, but thrived emerging more powerful and just as free as when the stand-off with the Soviet Union began.

The lessons of the Cold war suggest that there are four elements to a good long war strategy:[4]

(1) providing security, including offensive measures to go after the enemy, as well as defensive efforts to protect the Nation;

(2) economic growth, which allows states to compete over the long term;

(3) safeguarding civil society and preserving the liberties that sustain the will of the Nation; and

(4) winning the war of ideas, championing the cause of justice that, in the end, provides the basis for an enduring peace.

The greatest lesson of the Cold War is that the best long war strategy is one that performs all of these tasks equally well.

---

than 275,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2005 income came from the following sources:

Individuals - 63 percent
Foundations - 21 percent
Corporations - 4 percent
Investment Income - 9 percent
Publication Sales and Other - 3 percent

The top five corporate givers provided The Heritage Foundation with 2 percent of its 2005 income. The Heritage Foundation's books are audited annually by the National accounting firm of Deloitte & Touche. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

[2] Salim Ahmed Hamdan, an al Qaeda suspect held at the facility for terrorist combatants at the U.S. military base in Guantanamo Bay, Cuba, challenged the government's right to try him by the military commissions established by President George W. Bush's November 13, 2001 order governing the detention, treatment, and trial of non-citizens in the war against terrorism. The Supreme Court ruled in Hamdan's favor, declaring that the commissions have to be explicitly authorized by Congress.

[3] See, Aaron L. Friedberg, In the Shadow of the Garrison State (Princeton: Princeton University Press, 2000).

[4] See James Jay Carafano and Paul Rosenzweig, Winning the Long War: Lessons from the Cold War for Defeating Terrorism and Preserving Freedom (Washington, DC: The Heritage Foundation, 2005).

I want to highlight the elements of long war strategy, because the successful prosecution of three of them—providing security, protecting civil society, and winning the war of ideas—will depend in part on well Congress moves forward after in *Hamdan* v. *Rumsfeld.* Congress should authorize military commissions in a manner that respects equally all three of these aspects of fighting the long war.

SATISFYING NATIONAL SECURITY

There are three issues at stake in ensuring the Nation has the right instruments for fighting the long war. First, military commissions must be conducted in a manner that optimizes meeting national security interests. Second, the principle of law that protects both U.S. soldiers and civilians on the battlefield must be preserved. Third, the power of the executive branch to adapt and innovate to meet the challenges of war should not be encumbered.

In order to optimize national security interests, I would argue against using the Uniform Code of Military Justice (UCMJ) as a basis for authorizing military commissions for trying unlawful combatants. The UCMJ is structured as a traditional legal system that puts the protection of the right of the individual foremost, and then adds in accommodations for national security and military necessity. Such a system is not at all appropriate for the long war. For example, Article 31(b) requires of the UCMJ requires informing service men suspected of a crime of their Miranda Rights. The exercise of Miranda Rights in impractical on the battlefield. Hearsay evidence is prohibited in court martial. On the battlefield, much of the collected intelligence that the military acts on is hearsay. In fact, reliable hearsay may be the only kind of evidence that can be obtained about the specific activities of combatants. Likewise, overly lenient evidentiary rules make sense when trying a U.S. soldier for a theft committed on base, but not when someone is captured on the battlefield and is being tried for war crimes committed prior to capture, perhaps in another part of the world.

Rather than seek to amend courts-martial procedures to address security concerns, I believe it would be preferable to draft military commissions that put the interests of national security first, and then amend them to ensure that equitable elements of due process are included in the procedures.

I also believe that for the protection of both soldiers and civilians, the distinction between lawful and unlawful combatants be preserved as much as possible. If we respect the purposes of the Geneva Conventions and want to encourage rogue nations and terrorists to follow the laws of war, we must give humane treatment to unlawful combatants. However, we ought not to reward them with the exact same treatment we give our own honorable soldiers. Mimicking the UCMJ sends exactly the wrong signal.

Finally, the executive branch's power to wage war ought not to be unduly encumbered. If there is one truism in war, it is that conflict is unpredictable. Carl von Clausewitz, the great 19th century Prussian military theorist called it the "friction of battle." Clausewitz also said that "everything in war is simple, but in war even the simple is difficult." That is why in drafting the Constitution, the framers gave wide latitude to the executive branch in the conduct of war. They recognized that the president needed maximum flexibility in adapting the instruments of power to the demands of war. In bounding the president's traditional war powers, Congress should take a minimalist approach.

RESPECTING THE RULE OF LAW

After September 11, the Bush administration's critics framed a false debate that indicated that citizens had a choice between being safe and being free, arguing that virtually every exercise of executive power is an infringement on liberties and human rights. The issue of the treatment of detainees at Guantanamo Bay has been framed in this manner. It is a false debate. Government has a dual responsibility to protect the individual and to protect the Nation. The equitable exercise of both is guaranteed when the government exercises power in accordance with the rule of law.

In the case of the military tribunals, the Supreme Court has outlined a rather narrow agenda for Congress to ensure that the rule of law is preserved. As legal scholars David Rivkin and Lee Casey rightly pointed out in a June 30, 2006, Wall Street Journal editorial: "All eight of the justices participating in this case agreed that military commissions are a legitimate part of the American legal tradition that can, in appropriate circumstances, be used to try and punish individuals captured in the war on terror[ism]. Moreover, nothing in the decision suggests that the deten-

tion facility at Guantanamo Bay must, or should, be closed."[5] No detainee was ordered to be released. Nor was their designated status as unlawful combatants (who are not entitled to the same privileges as legitimate prisoners of war who abide by the Geneva Conventions) called into question. The Supreme Court did not so much as suggest that the non-citizen combatants held at Guantanamo must be tried as civilians in American civilian courts. Nor did it require that detainees be tried by courts martial constituted under the UCMJ.

In addition, while the Court held that the basic standards contained in Common Article 3 of the Geneva Conventions[6] apply, it should be pointed out that the Geneva Conventions have been honored, except—according to the Supreme Court—in the way the military commissions were established. Common Article 3 requires a floor of humane treatment for all detainees. Granted, some of the language in Common Article 3 is vague and subject to varying interpretations. For the purposes of this discussion the most relevant issue is the interpretation of the phrase that treatment should include "judicial guarantees which are recognized as indispensable by civilized peoples." This requires some due process, such as the type of due process the status review boards and military commissions provide. If Congress explicitly ratifies the military commissions, then a majority of the Court would uphold them as consistent with the Geneva Conventions. This should satisfy U.S. obligations under the treaty.

Thus there is no reason for Congress to require courts-martial under the UCMJ, to draft guidelines for new commission procedures, or to partially overrule or repeal our ratification of the Geneva Conventions. Congress also appears to have approved the president's military commissions in the Detainee Treatment Act in December 2005, although the Court has ruled this authorization is not sufficiently specific. I would suggest that nothing has changed in the past few months that should alter the sense of Congress.

It should also be understood that military commissions are intended for limited use. We should not try most detainees. We should simply detain most of them until hostilities are concluded or they are no longer a threat. A separate administrative review process is used to determine whether further detention is warranted, or for example, whether the detainee is an innocent non-combatant.[7] The Court never said detention was improper. We should only try those who are war criminals, and we have bent over backward to give them due process—perhaps too much. It might even be best to delay their war criminal trials, as we have in many wars, until the end of hostilities. That, however, is something that traditionally has been, and should be, left to the president's discretion.

WINNING THE WAR OF IDEAS

By explicitly authorizing military commissions, Congress can also make a useful contribution to winning the war of ideas. The Court's decision has been portrayed across much of the world as a huge defeat for the Bush administration and a repudiation of its decision to hold unlawful combatants. The ruling will, no doubt, be used by al Qaeda and its affiliates as a major propaganda tool. It will also give ammunition to America's harshest critics on the international stage. In particular, the decision is likely to exacerbate tensions in the trans-Atlantic relationship. Washington has been increasingly under fire from European Union (EU) officials and legislators about Guantanamo. The EU's External Relations Commissioner, Austria's Benita Ferrero-Waldner, has called for the Guantanamo detention facility to be closed, and the European Parliament passed a resolution urging the same. The EU's condemnation of the Guantanamo facility has echoed those of the United Nations (U.N.) Com-

[5] David B. Rivkin, Jr. and Lee A. Casey, "Hamdan: What the Ruling Says and What it Doesn't Say," Wall Street Journal, July 3, 2006, at www.opinionjournal.com/extra/?id=110008599 (July 18, 2006).

[6] Common Article 3 was signed in Geneva on August 12, 1949. It applies to the treatment of persons waken in a conflict that is not of an international character. It mandates that persons who have laid down their arms and are no longer taking active part in hostilities shall be treated humanely without adverse distinction based on race, color, religion, faith, sex, birth, or wealth, or any similar criteria. It also prohibits using violence against such people, particularly murder, mutilation, cruel treatment, and torture; taking of hostages; and outrages upon personal dignity. Finally, it prohibits the passing of sentences and carrying out of executions without a judgment by a regularly constituted court that affords the judicial guarantees recognized by all civilized peoples, and mandates that the sick and wounded by cared for. See "Convention (III) Relative to the Treatment of Prisoners of War," August 12, 1949, at www.icrc.org/ihl.nsf/0/e160550475c4b133c12563cd0051aa66?OpenDocument (July 18, 2006).

[7] Hundreds of detainees have been released from Guantanamo for one reason or another. Not all were innocent or harmless, however. By some estimates, approximately 25 of those released have been recaptured or killed when they took up arms again.

mittee Against Torture and the U.N.'s hugely discredited Commission on Human Rights, which condemned the detention facility without even inspecting it. Now, these groups are trumpeting the Supreme Court's decision.

However, these critics have largely ignored what the Court's decision actually says. The approval of Congress and affirmation by the Court that the commissions represent the will of the American people demonstrate our resolve both to take the threat of transnational terrorism seriously and to respect the rule of law.

WHAT MUST BE DONE

Also unchanged is the government's obligation to devise an equitable long-term solution that fairly executes justice while fully satisfying our national security interests. What is needed is a process that does not treat unlawful combatants as regular criminals or traditional prisoners of war. That would simply reward individuals for breaking the rules of the civilized world. Most Guantanamo detainees are not currently set to be tried for war crimes, and they may continue to be detained with only minor changes to the administration's status determination proceedings. For those scheduled to be tried for war crimes, the Bush administration must follow existing courts-martial rules or seek explicit congressional approval for the planned military commissions.

Congress can satisfy its legal and national security obligations explicitly by authorizing the proposed military commission process. What is critical is that the Bush administration move forward expeditiously, demonstrating once again its unswerving commitment to fight the long war according to the rule of law.

Chairman WARNER. I find those to be very valuable guideposts.

This concludes the presentation by panel members. We'll proceed to the second panel shortly, but we'll first go to a round of questions. I, myself, am going to forebear any lengthy questions, because I am anxious to allow the second panel an opportunity.

Senator Levin.

Senator LEVIN. Mr. Chairman, I'm going to not ask questions about specific provisions of either the manual or of the order and as to how they would need to be modified in order to be both practical and to represent the necessity of the circumstances we're in. There needs to be some changes from the UCMJ, if we use that as the baseline. I think everybody acknowledges that. The argument or discussion or debate would be over what those specifics need to be. For those who believe that we should use the order number 1 as the baseline, I think they would acknowledge there need to be changes following the Supreme Court in that. For me, what the Supreme Court suggested, it seems to me, quite clearly, is that the rules of court-martial should apply unless there's a showing of necessity of impracticability.

That's where I'm coming from. But that's one Senator. I'm not going to ask a lot of the specific questions which I would ordinarily ask if I had more time. Also, given the fact that there are so many specifics that need to be addressed, I think you could just barely skim the surface here this morning, regardless of what your starting point is. I would rather, I think, see not just the witnesses in these two panels, but other people who aren't here, work and make recommendations to us to list the specific changes from whatever baseline is begun with that ought to be considered by Congress.

But I do have a couple of other questions, beside the items that I'm not going to ask about.

Let me start with you, Mr. Carafano. In terms of Common Article 3, you believe that we should acknowledge that is going to be followed by us?

Dr. CARAFANO. Yes, I don't think it's a relevant issue for discussion. The Supreme Court has ruled that Common Article 3 is ap-

propriate, that Common Article 3 is part of the U.S. law. I would caution against trying to revise U.S. law to somehow reinterpret Common Article 3. I don't necessarily see that as an enormous obstacle in moving forward with implementing military commissions.

Senator LEVIN. You believe the Supreme Court requires us to continue to abide by it, and you have no problem?

Dr. CARAFANO. Well, whether I believe the Supreme Court made the right decision or not is really irrelevant. They have, and that's the rule of the land.

Senator LEVIN. All right.

Mr. Fidell, just in terms of your organization, one of the issues which we are going to need to address is whether or not Congress is going to have to approve whatever the product is, or whether we just basically delegate this to the President under some kind of more general rubric. It seems to me it is essential, if we are going to have the kind of credibility that we all want in this product, that Congress be involved in the adoption of a product, and not simply delegating the product to the executive branch and them simply say, "Notify us of what you're doing."

Your organization, subject to your qualifications, which I listened to very carefully this morning and frankly welcomed—suggested there be a notice to us of what, basically, the deviations are from whatever the baseline is. I think that would put us right back in the soup that we were in or could lead to the same problem that the Supreme Court had to say was not a satisfactory outcome.

So, I'm wondering if your organization could follow what you suggested might be the order of the day here. Namely, to review that recommendation, that there simply be notice, and, in any event, whatever of you or the next panel or others that know about our invitation provide to us. If you would address that specific issue in those comments that you submit to us about what role Congress should have, in terms of legislating the deviations from whatever baseline it is we start from.

Mr. FIDELL. Right. There's no question, Senator Levin, that Congress could take certain things off the table. On the other hand, I also think there's no question that Congress cannot legislate every jot and title of the system, because, otherwise, this is what I'll call the Military Commissions Act of 2006, or whatever it's going to be called, is going to be the size of the Manual for Courts-Martial, which I think would be preposterous.

I believe that the sense of our organization is, there's always going to be some presidential rulemaking. It may be interstitial. The question is, How much? Which is going to be the tail here, and which is going to be the dog? You're suggesting that maybe what we thought of as the dog ought to be the tail.

Senator LEVIN. No, I'm suggesting there was no dog in your recommendation.

Mr. FIDELL. On that, I'm going to respectfully disagree, because we wrote it with a view to build some teeth in, while, at the same time, being respectful for the traditional sphere that Congress has recognized for presidential decisionmaking in the military justice area.

Senator LEVIN. Well, no. As I remember, the teeth were that there would be judicial review of any deviation, and that that

would be a matter which could be raised on an appeal. But that just would seem to me to be endless litigation instead of trying to resolve some of that in advance.

In any event, rather than pressing you further, if you could ask your organization to reconsider what the role of Congress should be, upfront, in terms of approval of whatever part of the dog you think should be legislated, it would be helpful. I would ask the same for anyone who submits recommendations to us. What needs, in your view, to be legislated, upfront, as part of whatever the general rules are, the fairly specific rules are, the very specific rules are? If you could make that part of our recommendations. In your case, if you would, Mr. Fidell, particularly see if your organization has anything further. I would invite, as one Senator, a review of what was in that July draft and to see whether you want to implement that further. But, I must tell you, I react to the suggestion that this be judicially reviewable, where there is a deviation from the manual as really an invitation to endless litigation. We'd be in a much stronger position if Congress put an imprimatur on items rather than simply saying they would be judicially reviewable without that imprimatur.

Mr. FIDELL. You make a good point. I do believe in the substance of judicial review of agency action. That's how I make my living. That's what I do for a living. I think the Federal courts, the Court of Appeals for the DC Circuit, when you go there, and you say that the Widget Commission has done something that's arbitrary and capricious, you'll get heard. You may not always get any traction with it, but you can certainly get heard.

Senator LEVIN. I agree with that. Do you agree with the second part of what I said, though, that in terms of any review which is sought, that the deviation would be in better position if we had congressional imprimatur.

Mr. FIDELL. Oh, absolutely. Of course, of course. There's no question about that. The question is striking a balance. If I can wax philosophical here for 1 second, the subtext for this colloquy right now, and, really, in a way, for this morning's panel testimony as a whole, is how the relationship between the executive branch and Congress plays out. The result of your efforts in this committee, with this legislation, will be an index of those relationships. They've very elusive, but they're going to come to earth in this context. Where the balance is going to be struck in this context, where we're no longer acting on a clean slate or engaging in head games. We're talking about real cases, we have a decision on the merits by the Supreme Court of the United States, it's not something where somebody sat down with a clean yellow pad in 2001 and created a set of rules. It's going to be a manifestation of the substantiality of Congress's power and how that power meets and interacts with the power of the President of the United States. Where that line is going to be, you all will work out. There will be a vote on it someday. But I think I'll call it a friendly amendment, your friendly suggestion is one that NIMJ will take very seriously. Frankly, we're flattered that you think it's worth asking for our views on this.

Senator LEVIN. I want to thank all of you for your testimony. It's really been a very helpful panel. We thank your organizations for the efforts that they make to help us sort this all out.

Chairman WARNER. Thank you, Senator Levin. Thank you very much.

We'll go from one side to the other, in our tradition. Senator Talent, then Senator Dayton.

Senator TALENT. Thank you, Mr. Chairman. I'll try and be brief. I know you have another panel.

Mr. Mernin, you mentioned that in the development of the Geneva Conventions, even Josef Stalin participated in the negotiation of it.

Mr. MERNIN. Senator, I didn't mean to speak as a historian on it, but it strikes me that the era was a particularly interesting era for the development, and that the Soviet Union were signatories, and we did end up with the Article 3. All that leads me to just draw an inference that there was something.

Senator TALENT. You're not suggesting that Marshal Stalin actually followed the Geneva Conventions in his affairs, are you?

Mr. MERNIN. No. Again, I'm not a student of history, and I wasn't trying to suggest that we model ourselves after him.

Senator TALENT. I don't think we have to be too good a student of history to understand that he didn't. Is it possible that he agreed to the Convention thinking that we would follow it and he would be free to do whatever he wanted?

Mr. MERNIN. Senator, I've met with this response, myself, when I've asked, "Is it possible?" Anything's possible. I wasn't trying to give a history lesson.

Senator TALENT. Yes, I think it bears on it, because one of the sentiments I've heard expressed is that if we do things, and you're not fully saying this, but I want to bring this to light. The suggestion that if we do things a particular way, and are particularly careful, that, therefore, our enemies in this war are going to be particularly careful with our prisoners. Do you think it's going to influence what the terrorists do with our prisoners?

Mr. MERNIN. Senator, you make an interesting point. But I really think that, to the extent we've made a corollary argument on that, we're talking about the next war, and not necessarily what these particular terrorists are going to do tomorrow. It's about doing what's right, and it's about protecting the future.

Senator TALENT. Yes, I certainly agree that the conflict is, in part, between narratives of the world, and we want to be faithful to our narrative of the world to influence, in the longer-term, the direction of the world. I do also think, however, there is such a thing as deep evil in the world, and I don't think that people who are possessed of that evil, or believe in it, are necessarily going to be influenced by what we do. I think we have to keep that in mind.

We had testimony the other day from a number of JAGs who were pretty much of the opinion that they didn't know what process ought to be applied in these cases.

Now, Ms. Bierman, as I recall, you were saying that, "Well, the law of due process is pretty well-developed, and we all know what it is." In fact, we really don't know what it is, as applied to particular cases, do we? There is a considerable amount of uncertainty,

even in the application of due-process concepts in American law, much less in this context.

Ms. BIERMAN. With all due respect, Senator, I said, "We really don't know what due process is, but we keep trying." We can't sum it up quickly, but people still believe in it, and they keep working it out. So, I was not saying we know what due process is.

Senator TALENT. Right. But I understood you to say that there were these concepts that had been around for a long time, we had a very substantial body of law, and that we knew what it was. Isn't it maybe whether you said it or didn't say it, mightn't it be more accurate to say that sometimes we know what it isn't, and sometimes we know what it is, and then there's a big gray area? Would you agree with that?

Ms. BIERMAN. I would agree with that, Senator, with the caveat that we still have to work our way through the gray area and can't toss up our hands.

Senator TALENT. Now, there are other considerations involved in this. I think Dr. Carafano touched on this. As we work our way through the gray area, particularly in the context of a war, would you agree that we also have to pay attention to whatever tactical objective we may have in the war at that point? In other words, it is relevant, is it not, whether a particular process contributes to our ability to get the intelligence that we need, or otherwise win the war? Would you agree that that's relevant to our consideration of what process is appropriate in a particular case?

Ms. Bierman, maybe you can answer, and others can comment.

Ms. BIERMAN. I'm sorry, Senator, I thought you were addressing the question to other panelists.

Senator TALENT. What I'm saying is that in the application of due process in particular cases, there are gray areas. In deciding what we ought to do in particular areas, isn't it relevant for us to consider what is going to help us in actually winning the war? Would you agree that that's a relevant factor in deciding what due process is appropriate in a particular case?

Ms. BIERMAN. I do, Senator. But, at the same time, I am going to go back to what I said before there's always a bottom line, at some point.

Senator TALENT. Yes. There are things that we pretty clearly know we don't want to do. There are things we pretty clearly know are appropriate. Then there is a gray area. One of the conclusions I'm reaching about this is that we're really living in this gray area now. One of the concerns I have is, if we try and pretend to a certainty that we don't have, it may affect, on the ground, what actually happens, in ways that are unproductive.

Dr. Carafano, you look like you're eager to say something.

Dr. CARAFANO. Sir, I wanted to agree with your statement and draw another historical example. Look at the Nuremberg trials. I don't think, today, by a lot of standards, people would argue that the Nuremberg trials actually didn't meet the criteria of Common Article 3. But, as a historical judgment, people look back at them, and they say they were equitable, they say they redressed a legitimate evil, and they say they sent a message to the world on what was the appropriate behavior. I think the lesson of the Nuremberg trials is we have to think relatively broadly into what's an accept-

able judicial process. If we bog down into the nit noise of, "Well, it's not legitimate unless you have this exactly small thing, then it's illegitimate," that's putting the rule of law ahead of reality.

Senator TALENT. I'm particularly interested in how all this may affect interrogations, as opposed to trying or processing detainees that we decide we want to bring before some kind of trial situation. Now, my understanding is that the Court's decision leaves open the question of the extent to which Article 3 applies to interrogations. Is that correct, in your judgment, or do you think the Court decided one way or another pretty clearly?

Ms. MASSIMINO. I think that the Court's embrace of Common Article 3, Common Article 3 deals with both the standards for trial and interrogations, but what's more relevant from my perspective is that Congress has spoken on this already, and quite clearly. So, that piece of this puzzle has been, thankfully, largely resolved, in my view. Now what's needed is the implementation of that standard in operations manuals, field manuals, so that people understand clearly what the standard is that Congress passed. We have crossed that threshold, I think, already.

Senator TALENT. We prohibited cruel or inhumane punishment. I was going to focus on the "degrading" provision, the provision in Article 3 against humiliating or personal outrages, humiliation, or degrading. Is it your view that that is an objective standard that applies, regardless of the cultural or personal background of the prisoner, or do you think that might vary in different circumstances?

Ms. MASSIMINO. I think that the ICRC has said in the Convention Against Torture, in interpreting the torture convention, that there's only a certain amount of specificity you can get to with our criminal law, that there is a totality-of-the-circumstances question. In the debate, as I'm sure you recall, last year, about the DTA. It was for the very reason that it's going to be different, what you do to one person may be torture or cruel, inhuman, and degrading treatment and the circumstances may be different for another. We have wisely constructed a system that drives people away from the edge. I think that's what the Army Field Manual on Intelligence Interrogation traditionally has done, and I understand the new manual will do the same.

So, I think that there is a recognition that there will be some gray areas, whether it's in Common Article 3 or in the standard on cruel, inhuman, and degrading treatment. That doesn't mean that we should be creating more gray areas.

Senator TALENT. I liked your comment that we drive people away from the edge, because I think that's a point—can we define where the edge is?

Ms. MASSIMINO. I think, as clearly as we can, Congress has done that.

Senator TALENT. Yes. So what you're saying is, we're building into the system a bias against going near the edge, so, if the edge, for example, might be a reference to the Quran, or mistreatment of the Quran in front of a prisoner, we are driving our interrogators away from that edge. So, do you all have a concern that perhaps we are biasing the system against the use of more aggressive, or perhaps effective, interrogation techniques by insisting that they

stay away from the edge, but then telling them we can't define where the edge is?

Ms. MASSIMINO. I'm not concerned about that, because I think Congress did its job last year in defining that, and had this very debate.

Senator TALENT. Yes, but you just said we didn't define it, we left a considerable amount of discretion involved.

Chairman WARNER. We're going to have to ask your panel to bring to a conclusion their testimony.

Senator TALENT. I'm sorry, Mr. Chairman. I said I was going to be brief.

Ms. MASSIMINO. I apologize, sir.

Senator TALENT. Wait a minute. This is the Senate. That happens rather a lot. [Laughter.]

Mr. FIDELL. Senator?

Chairman WARNER. I want you to finish.

Senator TALENT. I will desist.

Chairman WARNER. Please say your point, but I see a number of hands being raised here, and I'm just concerned about the time.

Senator TALENT. Yes, I'm sorry, Mr. Chairman.

Mr. FIDELL. I just want to, if I can, refer you, Senator, to what the President has stated on the subject, or a closely parallel subject, in the current Manual for Courts-Martial. As I said before, Article 93 prohibits cruelty and maltreatment. He has prescribed an objective standard. That's the current state of the law in the United States.

Senator TALENT. Okay.

Thank you, Mr. Chairman.

Chairman WARNER. I thank the distinguished Senator from Missouri. I appreciate very much your active participation in this matter.

Senator TALENT. I apologize to the Chairman for trespassing on my time.

Chairman WARNER. That's all right. I think everybody has thus far. You'd have been the sole one that has. [Laughter.]

Senator TALENT. Because we have an objective standard for that rule here, I know. [Laughter.]

Chairman WARNER. That's right.

Senator Dayton, you had a question you wished to ask.

Senator DAYTON. Thank you, Mr. Chairman.

I say this has been a very valuable hearing. I regret that it seems to have been prejudged by some, as reflected in at least one of the opening statements of my colleague. We're at this point, and I think it's important to reiterate first, because the Supreme Court determined that the Bush administration exceeded its constitutional authority, and second, because the commission hasn't worked. Unless I'm misinformed, based on your comments and also the hearing last week, the commission has not brought a single case to trial. Unless it's the unstated objective of the administration just to hold people indefinitely, because they've been classified as enemy combatants, without any review process whatsoever and that's occurred here now for some 4½ years, in some instances. Otherwise, the commissions have failed in their stated purpose, which is to bring that due process to bear on these individuals.

I think this is another example of a very unfortunate predisposition of this administration, to reject years of collective wisdom and careful effort on the part of its predecessors of both Republican and Democratic administrations, as we saw with the rejection, when started, in the arm control agreements or the International Environmental Accords, and now we see with the UCMJ and Common Article 3 of the Geneva Conventions. In those instances, not to critique or to try to improve upon what has been set forth before them, but just to discard them. Then we find ourselves disrespected in the eyes of much of the rest of the world, and we wonder why.

I'm reminded of the old adage, "We judge ourselves by our intentions. Others judge us by our actions." I think clearly we believe, and we believe properly, that our intentions are well and good. But there is a dissonance between how we perceive ourselves and how we're perceived in the eyes of both our friends and allies, as well as our adversaries around the world, as well as those that are subject to being persuaded one way or the other. I think this administration has given scant thought to the implications of these decisions and actions on how we're perceived, and that has a direct bearing on how other nations act in ways that affect our national security, you and others have emphasized.

I guess one question, or clarification, I'd just like to make, because we're talking about a choice or perceiving a choice in what our starting point is, in terms of how we approach this, whether it be the President's order, Military Order Number 1, or whether it be the UCMJ. Mr. Mernin, if I'm reading from your testimony here, and if there's any disagreement with this, please let me know, or by anyone else. You said, "After the President issued the military order, of the 10 or so follow-on directives establishing the detailed rules for military commissions, only one was released for public commentary. That directive concerned establishing the elements of offenses, and we offered comments, as requested. The DOD subsequently refused to make public the comments that were received." If we have the President's directive, but we don't have any follow-on directive establishing those rules, and we don't have the public comments that the DOD received, then it may have had very valid reasons for taking that position. I don't know how we start with the commission, which hasn't acted yet, and when we don't know all of the details of what its authority and rules and procedures are. How can we possibly evaluate that?

Mr. MERNIN. No, perhaps I was inartful. The follow-on directives were issued, but they were issued without the opportunity for public comment.

Senator DAYTON. Okay.

Mr. MERNIN. Except in one instance.

Senator DAYTON. I see. Okay, so, they have been made public? Yes?

Mr. FIDELL. Senator, maybe I can intervene on this. The history of this and it's somewhat discussed in a law review article by an author whom modesty prevents me from further identifying.

Senator DAYTON. We're not modest here. Please don't feel constrained. [Laughter.]

Mr. FIDELL. The background is this. The administration, with the exception, I believe, of Military Commission Instruction Number 2,

which defines crimes and elements of offenses and, I think, one other, issued the rules without what we all assume is the customary notice and opportunity for comment that you associate with Federal rulemaking. We made a Freedom of Information Act (FOIA) request, "we" being NIMJ, made a FOIA request for all of the comments that the administration received. At least that was one way to find out what this was all about. We received many comments, but the administration withheld comments, I think, 10 people who were most directly consulted privately in the preparation of the rules.

Senator DAYTON. I need to ask you to conclude here.

Mr. FIDELL. Yes, I will.

Senator DAYTON. My time is expiring.

Mr. FIDELL. I will, immediately. Just to tell you that the matter is the subject of a decision by the U.S. District Court, which we are about to appeal to the U.S. Court of Appeals.

Senator DAYTON. Okay.

Mr. FIDELL. For the DC Circuit.

Senator DAYTON. All right. Since my time is winding down here, and I want to ask one other question here, I think it's important to go back to this order that the President issued and just remind ourselves of the sweeping nature of it. It states here that this will apply to an individual as well, subject to this order, shall mean an individual who is not a United States citizen with respect to whom I determine from time to time in writing that first of all, he has reason to believe that such individual, at the relevant times, was, or is, a member of the organization known as al Qaeda, et cetera. Second, it is in the interest of the United States that such individual be subject to this order. This is an incredible reach of determination, subject solely to the President of the United States. To which, then, proceedings apply that can include life imprisonment or death. So, you are talking about a scope here that is just extraordinary.

I guess my question is, can we provide these proper due process and individual rights and protections and not sacrifice, which no one wants to do here, I believe the national security interests of the United States? I wish we had another 20 minutes, and we don't, for you to respond as to exactly what it is in this that pits one of those objectives against the other. In the particulars, as one of you used the word, but is there anything that any of you believes should be established that says that any of these individuals we are holding are not innocent until proven guilty? We can hold them, from what we were told last week, by the judge advocates. We can hold them, whether they're determined, by whatever process we use, to be, "guilty or innocent," even if they're innocent thereafter. That's where I respectfully question my colleague, Senator Inhofe. That's certainly the opposite of a right that he claims is not accorded to American citizens, regarding criminal actions, we're applying to these individuals.

But, does anybody suggest that we start with a proposition that these people are guilty until somehow demonstrated innocent? Is that antithetical to our national security interests in any way?

Ms. MASSIMINO. That we presume that they're guilty?

Senator DAYTON. Well, I'm stating in the opposite.

Ms. MASSIMINO. Yes.

Senator DAYTON. Is there any need for an exception to the principle that they are not innocent until proven guilty?

Ms. MASSIMINO. No, I don't believe there is. I think that you've heard from most of the panelists here that principle is one of the hallmarks of a fair judicial proceeding. I think you're right to go back and look at and notice the sweeping nature of the original order, because it's relevant to the way in which you all will approach the task at hand.

I believe that the military orders and instructions that came out to implement that order were to be fair, an attempt to take that fundamentally flawed structure, which you just read from, and to try to make it fairer and to better approximate a system of justice that the military officers were involved in, in producing those rules, would be more comfortable with. They ultimately failed. But I think that we can learn a lesson from that approach and say there were many of those engaged in that effort who would have preferred to have started with the UCMJ. Now we have a second chance.

Senator DAYTON. As you stated in your opening testimony, and I appreciate that.

My time has expired, too. I thank you. It's been an excellent set of presentations and discussion.

I apologize, in advance, to the second panel. I have to leave for another commitment, but I'll pass it on to Madam Chairman.

Senator COLLINS [presiding]. Thank you.

First, let me explain and apologize to the panel for not being here for your statements and the previous testimony. I was chairing a hearing in another committee, and we don't yet allow cloning, although it would be helpful, at times.

We have heard a great deal of testimony about how to best craft a system to prosecute the enemy combatants. I've been struck by the number of times the military commissions created by the President's order deviate from the procedures with courts-martial. One area that has caused me considerable concern is the dilemma of, how do we handle classified information that is relevant to the case? The Supreme Court seems to be telling us that we cannot keep certain evidence from the accused or their civilian attorneys, but I am also concerned that we not compromise sensitive intelligence sources or methods, or reveal those in the process.

I'd like to go across the entire panel and ask each of you, what specific guidance can you give us to allow us to craft rules regarding evidence that strike an appropriate balance, in your judgment, between the rights of the accused to have access to relevant evidence and our country's need to protect intelligence sources and methods?

Ms. MASSIMINO. I could comment briefly on that. I would advise, first of all, that we not jump to a proposal to deviate from the rules on this question of classified evidence or on any of the other issues that have been mentioned by others as reasons why the UCMJ and courts-martial procedures are inappropriate. I think and I am not the expert on this panel, so I defer to the military law experts, and, on the next panel, I'm sure you'll hear but I believe that we've approached this, to date, with a somewhat impoverished view of the

flexibility of the military justice system that we have. I think it would be more productive, and result in a stronger product, if we first try to test the limits of the existing system and look at the flexibility of the rules to deal with classified evidence before we put that on our list of things that we need to draft to deviate from the UCMJ. I will leave it to my colleagues to discuss the specifics.

Senator COLLINS. Thank you. If we could just go down the entire panel.

Ms. BIERMAN. Senator, thank you for that question. I'm going to echo comments of my colleague, but also approach it from 30,000 feet, which is, you start with the fundamental right of an accused to see the evidence against him. As you suggested, you balance that with national security. There's another really good reason to look, again, to the rules that the court-martial system has developed over the decades, and that's because it's a system that the people who will be implementing the military commissions are very familiar with. They know it inside and out. They know how to do it. There's a question of legitimacy. If the United States were to craft rules specifically for these detainees, these accused, to ensure the convictions, there's a huge legitimacy issue.

When we talk about classified, I think we should not forget that some of the interrogation techniques that have been used against some detainees who may have provided evidence against some of these accused, may be, in fact, in that realm. When we're talking about classified, we should distinguish between and think about the tension between information that is of national security interest, because it truly is about our national security, and information that is about something that should not have happened in the first place.

I just wanted to point that out. Thank you, Senator.

Senator COLLINS. Thank you.

Mr. Fidell.

Mr. FIDELL. Thank you, Senator.

The short answer to your question, Senator Collins, is there's no need to reinvent the wheel. The President of the United States has already covered this entire field amply in Military Rule of Evidence 505. I have, anticipating your question, brought with me an analysis of the application of Rule 505. I believe it will provide all the comfort you might, or any Senator might need, on the question of classified information.

With the chairman's, or acting chairman's, permission, I'd like to offer this. You are the acting chairman?

Senator COLLINS. Right. Temporarily.

Mr. FIDELL. Then, ma'am, if somebody can take this from me.

Senator COLLINS. It will be included in the record.

Thank you.

Mr. FIDELL. Happy to provide it for the record.

Senator COLLINS. Thank you. That's very helpful.

[The information referred to follows:]

Military Rule of Evidence 505 has been successfully used in many courts-martial, including in espionage cases where Rule 505 has successfully protected intelligence means and methods. In the case of United States v. Lonetree, for example, "[p]ursuant to Mil.R.Evid. 505, Manual for Courts-Martial, United States, 1984, the Government sought to keep the identity of [an intelligence] agent secret," even though the Government intended to call the agent as a witness during its case in chief. United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992). "The judge granted the Government's motion and prohibited Lonetree from discovering Doe's name or asking about Doe's background during cross-examination." *Id.* Despite a challenge by the defense, the Court of Military Appeals upheld that approach on appeal. *Id.*

Military Rule of Evidence provides a great deal of flexibility, authorizing not only the complete protection of some information, as in *Lonetree*, but also limited disclosure, which can include "the deletion of specified items of classified information from documents to be made available to the defendant" and "the substitution of a portion or summary of the information for such classified documents." Mil. R. Evid. 505(g)(2). But while the Mil. R. Evid. 505 approach is flexible, it does not allow the members to receive evidence that the accused has not seen. Rather, redacted documents or summaries will be made available to both the accused and the members.

There should not be any concern that presiding officers will insist that the defense be given access to documents that would actually harm the national interest or that they will refuse to tailor appropriate summaries that will allow the case to go forward while also protecting classified information. As one commentator has noted, "As can be expected, the courts have been extraordinarily deferential in reviewing executive agency decisions related to national security. Claims of privilege for military secrets are entitled to the 'utmost deference.' In examining a claim of privilege, the court should only be satisfied that 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged.' As one circuit has noted: 'The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classification in that area.'" Major Christopher M. Maher, The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information, 120 Mil. L. Rev. 83, 109 (1988) (footnotes omitted).

Major Maher continues, "While only a few criminal cases have involved challenges to government claims that classified information is privileged, under the Freedom of Information Act the government routinely claims that classified information is exempt from disclosure. Again, courts are very deferential to agency classification decisions. Because the significance of individual items of classified information may appear trivial except when combined with other information, courts have routinely sustained the withholding of superficially 'innocuous information.'" *Id.* (footnotes omitted).

Military judges can be trusted to be *at least* as protective of classified information as Article III courts have proved to be.

Mr. MERNIN. Senator, I would defer to Mr. Fidell on this. He's my go-to guy on this kind of thing. But I would just point out that, first and foremost, there is the fundamental right to have access to the evidence which is being used against you. We can't, in a fundamental way, deviate from that. By that, I mean if there were a prosecution which hinged upon a piece of secret evidence that it was felt just absolutely could not be shared with the defense or defense's counsel, then at that point, in my view, you have problems with the prosecution, at that point. Other than that, you find ways to deal with it through established procedures of redaction, in camera review, the court and the parties review the same evidence, and you deal with it. If you reach a breaking point on a particular prosecution, then you don't have a prosection.

I don't want to call anything not a real problem, but there aren't going to be, postured as we are now, hundreds of military commissions trying these cases. There have been various estimates on the number of detainees where what they've alleged to have done rise

to the level where we're going to see these law-of-war commissions. I don't think this is going to be as big a problem, in our context, as one might think.

Senator COLLINS. Dr. Carafano?

Dr. CARAFANO. I don't think it would be a major issue. But what I'd like to do, to be as precise as possible, is provide my answer for the record.

[The information referred to follows:]

The administration and SASC also differ with respect to the rules of evidence, compulsory self-incrimination, and handling classified information. The appropriate compromise is to defer to the administration as it seeks to adopt these procedures to ensure that U.S. national security is not compromised in the course of the trials. Notably, the administration approach includes robust appellate procedures that would allow defendants to appear through a Court of Military Commission Review to the DC Circuit Court and, by certiorari, to the Supreme Court. This appeal process is an adequate guarantee that procedures used to withhold classified information from defendants are not abused.

Senator COLLINS. Thank you.

Senator Levin, back to you.

Senator LEVIN. I think Chairman Warner wanted to dismiss this panel and thank them very much for their great testimony, and bring on the next panel.

Senator COLLINS. The Senator did that eloquently. I will just second his thanks. We very much appreciate your testimony today. This is a complicated issue, and it's very helpful to us to have your expertise. Thank you.

I would call the second panel forward, if I had the information to do so from the chairman. [Laughter.]

I'm very pleased to welcome our second panel of distinguished legal experts. Neal Katyal is a professor of law at Georgetown University. David Schlueter—I'm not sure if I'm pronouncing that correctly, is professor of law and director of advocacy programs at St. Mary's University. Scott Silliman is a professor of the practice of law and Executive Director of the Center on Law, Ethics, and National Security, at Duke University.

So, we'll start with Professor Katyal.

STATEMENT OF NEAL K. KATYAL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Mr. KATYAL. Thank you very much, Senator Collins, Chairman Warner, Senator Levin, and members of the committee, for inviting me here. I appreciate the careful attention that Congress is devoting to military commissions. Chairman Warner, in particular, I appreciate the opening remarks you made. I believe that this committee is pursuing exactly the right approach in last week's and this week's hearings.

On November 28, 2001, I testified before the Senate Judiciary Committee about the President's then-2-week-old commission plan. I warned that Congress, not the President, must set this commission plan up. If Congress did not, the result would be no criminal convictions and a court decision striking these tribunals down. 1,693 days have elapsed since that testimony. During that entire time, not a single trial took place, nor was a single criminal convicted. It took over 2 years before anyone was even indicted, and 3 weeks ago, the Supreme Court invalidated this scheme.

I did not come here to gloat. The decision to file a lawsuit against the President was the hardest one I've ever faced. I previously served as National Security Advisor at the Justice Department, and my academic work extolls the idea of a strong President, and it builds on the unitary executive theory of the presidency. My work in criminal law centers on the need for laws to benefit prosecutors.

In the intervening 4 years, I have never once waivered from my belief that it is the prerogative of this body, Congress, not the President, to set these rules. I have also learned I was wrong when I testified in November 2001. I didn't know much about courts-martial at the time. So I emphasized in my testimony that, until Congress acted, the baseline would be civilian trials. But I've had the privilege of studying the military justice system now for the past 4 years, and I've learned why they are the envy of the world.

The Supreme Court's *Hamdan* decision emphasized that both courts-martial and civilian courts can try terrorism cases. Justice Stevens's opinion put it simply, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case." Justice Kennedy agreed, "Congress has prescribed these guarantees for courts-martial, and there is no evident practical need that explains the departures here." Indeed, there have been 370 courts-martial in Iraq and Afghanistan since 2002, compared to zero military commission trials.

I would urge Congress to heed the views of the Supreme Court Justices here, for four reasons:

First, we are talking about only a handful of people here. Ten have been indicted thus far, and we hear different numbers. Today, one of the prosecutors told me maybe 30 more people would be indicted in the military commission system from Guantanamo. We should be wary of legislating for such a small group, particularly when there is no exigency. As the *Hamdan* decision made clear, these individuals will continue to be detained, under existing law, as enemy combatants. Here, we are talking about criminal trials, not detention. That's the issue before this committee. The function of a trial, as Justice Douglas reminds us, is as follows, "'The function of a prosecutor is not to tack as many skins of victims as possible against the wall. His function is to vindicate the rights of the people, as expressed in the laws, and give the accused of crime a fair trial." I don't believe we can say that about the existing military commission system.

Second, there is no empirical evidence at all to show that the existing court-martial system can't handle these cases. Before changing the rules, we should study and attempt to try to use the existing system. That is particularly so because, as my prepared statement goes into detail at pages 7 to 11, the criticisms about hearsay and other evidentiary claims that have been levied against the court-martial system seem to me to be substantially overblown.

Third, any amendment to the UCMJ is bound to draw a legal challenge, and the greater the deviation from the structure and procedure of a regularly constituted court, the more likely it is that it will not only be challenged, but invalidated. Any such court challenge would delay or cast into uncertainty any trial conducted, and that'll leave everything gummed up for yet another number of

years. In any such trial, moreover, the trial system would have to make up the rules as it went along, with all the inefficiencies and other problems that entails.

Because we are talking about the most awesome powers of government, the death penalty and life imprisonment, the Federal courts will carefully scrutinize these procedures. The only way to ensure the system is not tossed out 4 years from now is to use one that is battle-tested and approved already. Courts-martial and civilian trials meet these tests, military commissions do not.

Finally, we should be wary of any attempt to create two tracks of justice, one for us and the other for them. I believe Senator McCain said it exactly right last week when he warned, "If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners."

There is a grave risk that adopting a different system for this handful of prisoners will dramatically undermine the image of the United States as a fair and just nation. It will look like victor's justice, a spoiled system, instead of the rule of law.

Any claim to benefit from legislation has to be weighed against these practical difficulties. To those, has to be added the sorry experience with the military commission system, a system in which I have served now for several years, a system that its own prosecutors have said is fundamentally unfair. By departing from the existing institution, and, in particular, the proud Court of Appeals for the Armed Forces, and the existing rules, delay, not bringing folks to justice, will be the inevitable result.

As the chairman has said repeatedly, the eyes of the world are upon us. What Congress does here may establish a legal framework for generations to come. This is a crucial moment, not just for this body, but for the Nation, as a whole. In my judgment, we should proceed with caution and study, and do everything in our power to make sure we need a new system before gambling once again on an unproven one. Given the existing numbers of different ways in which people can be prosecuted today in courts-martial and civilian trials, and given the detention power which already exists and is given to the President, the first rule should be to do no harm. We had not had a military commission trial in 55 years. If this body has to rush legislation through to meet an October deadline, it seems to me quite dangerous results may unfold. The safest course, it seems to me, given the existing detention power, and given the existing prosecution alternatives, is to do no harm. Let's do it right the first—or, I guess, rather, we could say, the second time, at this point, and doing it right is also the fastest and best way.

My closing to you, Senators, is the same as my closing to the United States Supreme Court, which is to quote the great American patriot, Thomas Payne: "He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach unto himself."

Thank you very much.

[The prepared statement of Mr. Katyal follows:]

PREPARED STATEMENT BY PROFESSOR NEAL KATYAL

INTRODUCTION

Thank you, Chairman Warner, Senator Levin, and members of the Armed Services Committee, for inviting me to speak to you today. I appreciate the careful attention that your committee, and that Congress as a whole, is devoting to the issue of military commissions.

On November 28, 2001, I testified before the full Senate Judiciary Committee about the President's then 2-week-old plan to try suspected terrorists in ad hoc military commissions. I warned that committee that Congress, not the President, must set up the commissions, and that if Congress did not, the result would be no criminal convictions and a Supreme Court decision striking these makeshift tribunals down.

One thousand six hundred ninety three days have elapsed since my testimony before the Judiciary Committee. During that entire time, not a single trial took place, nor was a single criminal convicted, in these military commissions. It took over 2 years before anyone was even indicted in a military commission. On June 29, 2006, the Supreme Court invalidated this scheme devised by presidential fiat.

I did not come here to gloat. The decision to file a lawsuit against the President was the hardest professional decision I have ever faced. I previously served as a National Security Adviser at the United States Department of Justice (DOJ), and my academic work extols the idea of a strong President in a time of crisis, adopting the "unitary executive" theory of the Presidency. My work in criminal law centers on the need for tough laws that benefit prosecutors, and ways State and local governments can innovatively control crime.

But, despite the fact that I think courts should defer to the President overwhelmingly, I felt the decision to adopt military commissions by executive decree encroached on the constitutional prerogatives of this body, the Congress of the United States. So I filed suit, along with Lieutenant Commander Charles D. Swift of the United States Navy and Perkins Coie, a law firm in Seattle. I spent the last 4 years working on what ultimately became the Supreme Court's decision in *Hamdan* v. *Rumsfeld.*[1] I argued that case before the Supreme Court of the United States, as well as the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit.

In the intervening 4 years, I have never wavered from my belief that it is the prerogative of Congress, not the President, to create a court system. But I have also learned that I was wrong when I testified in November 2001. I didn't know much about courts martial at the time, and so I emphasized that until Congress acted, the baseline would be Federal civilian court trials.

I've had the privilege of studying the military justice system over the past 4 years, and have learned why they are the envy of the world. The Supreme Court's *Hamdan* decision emphasized that both courts martial and civilian courts can try terrorism cases. Justice Stevens' opinion put it simply, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."[2] Justice Kennedy agreed, noting that "Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here."[3] Indeed, there have been 370 courts-martial in Iraq and Afghanistan since 2002, compared to zero military-commission trials.[4]

I would urge Congress and this committee to heed the words of the Supreme Court, and to employ our military justice system that this body has so carefully and successfully designed. It has worked well for 55 years. In other words, if it ain't broke, don't fix it.

That said, we must also not lose sight of the fact that our existing Federal civilian system has worked well in combating terrorism. Indeed, the DOJ recently extolled its resounding success in terrorism cases in Federal civilian court—where it has proceeded with nearly 500 terrorism prosecutions.[5]

I believe that the *Hamdan* decision—which invalidated the President's system of military commissions—represents a historic victory for our constitutional process, and, in particular, the role of the United States Congress and Federal judiciary in

---

[1] *Hamdan* v. *Rumsfeld,* 548 U.S. (slip op.) (2006).

[2] *Hamdan* (slip op. at 60).

[3] Id. (slip op. at 16) (Kennedy, J., concurring).

[4] The delay cannot be blamed on civil litigation challenging the tribunals, since the first injunction was not entered until November 8, 2004 and that injunction only applied to the *Hamdan* case.

[5] Remarks of Deputy Attorney General McNulty, American Enterprise Institute, May 24, 2006.

our tripartite system of government. But I am here to help you determine appropriate steps, consistent with the Court's opinion, for identifying a process that will handle cases against suspected terrorists held at Guantanamo Bay and around the world and that will reflect our country's honored commitment to fairness, to equality, and to justice for all.

I commend this committee, and the chairman in particular, for proceeding along a very sensible and wise path. I believe the chairman stated it perfectly last week:

> [I]n my judgment, as a Congress, in this legislation, must meet the tenets and objectives of that [*Hamdan* v. *Rumsfeld*] opinion. Otherwise, such legislation that we will devise and enact into law might well be struck down by subsequent Federal court review. That would not be in the interests of this Nation.
>
> The eyes of the world are on this Nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees.

Remarks of Senator John Warner, Hearing on the Future of Military Commissions to Try Enemy Combatants, July 13, 2006. The eyes of the world are indeed upon us, and what Congress does here may establish a legal framework for the war on terror for generations to come. We should proceed with caution and study the problem first, and do everything in our power to be sure that we need a new system before gambling once again on an unproven one. Given the number of different existing avenues for prosecution and detention of those at Guantanamo, the first rule should be for this body to do no harm.

I. THE FLAWED MILITARY COMMISSIONS

To understand the appropriate next steps, I believe it is necessary to highlight for the committee several of the fatal—possibly irreparable—flaws in the military commissions under the President's Order of November 13, 2001.[6] I think that these defects illuminate why any attempt to start with or ratify the President's Order would be a serious mistake.

The purpose of a criminal trial is to test the Government's allegation that a person has committed a crime. The goal of a trial is not to secure a conviction, it is to convict the guilty. In serving this purpose, a trial does not involve the detention power. As the Supreme Court said in *Hamdan*, a true enemy combatant can still lawfully be held regardless of a trial. The military commission's sole purpose is to determine whether an individual is guilty of a crime. The only way a trial can adequately prove guilt or innocence, to the American people and to the world, is when it employs procedures that enable the court to sift the facts from allegations, and that enable it to demonstrate publicly a defendant's guilt—beyond a reasonable doubt. Unless it does that, a procedure—whether one calls it a military commission, a court-martial, or something else—simply does not count. It is not a court in any sense that Americans would recognize. Such a "trial" would shame the proud traditions of both American military and civilian justice.

As my colleague Lieutenant Commander Swift explained to the Senate Judiciary Committee last week, the commissions consistently failed to meet these proud traditions, both in design and in execution.[7] Although the commissions were established pursuant to the President's Order in November 2001, a prosecutor and defense counsel were not even appointed until 2003. It took another year, until 2004, until someone was even charged. *Hamdan*'s case is instructive: he was captured in 2001, but the President did not designate him eligible for a commission trial until July 2003. But he was not charged with an offense at that time; rather, he was placed in solitary confinement and, despite a demand for speedy charges, Hamdan was not charged with any crime for another year.[8] In fact, the Federal lawsuit in *Hamdan* v. *Rumsfeld* preceded the filing of charges—one of the main demands of the lawsuit was that Hamdan be charged because the prosecution was sitting on the case while Hamdan was stuck in solitary confinement.

The commissions denied Hamdan many fundamental rights, including the right to be present at his own trial and to confront the evidence against him. As Justice Stevens explained, the commissions startlingly provided that any confrontation

---

[6] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter "Presidential Order" or "Order").

[7] *Hamdan* v. *Rumsfeld:* Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary, 109th Cong. (July 11, 2006) (statement of Lieutenant Commander Charles Swift), available at http://judiciary.senate.gov/testimony.cfm?id=1986&wit—id=5510 [hereinafter "Swift Testimony"].

[8] *Hamdan,* (slip op. at 4) (Stevens, J.).

"rights" could be eviscerated at the discretion of a single individual: "The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close.'"[9] The government created this gaping exception without ever explaining how it could operate consistently with its assurance of a full and fair trial.[10] The reason that they did not offer a justification on this point is clear: the two are patently incompatible. The accused's right to be present and to confront the evidence against him are indisputably "the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the Uniform Code of Military Justice (UCMJ) itself."[11] As Justice Scalia recently observed for the Supreme Court, "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Crawford* v. *Washington,* 541 U.S. 36, 49 (2004) (quoting *State* v. *Webb*, 2 N.C. 103 (1794)).

The military commissions contained myriad other flaws that made them unlawfully biased: they allowed the prosecution to withhold exculpatory evidence from the defense. They dispensed with time honored evidentiary standards, such as the prohibition against hearsay.[12] They countenanced woefully inadequate rules to govern the impartiality of proceedings and participants. For example, the Appointing Authority—the very same individual who convenes and refers charges against individuals to the military commissions—was given a breathtaking amount of power over the establishment and proceedings of the commissions: to select members who vote on guilt or innocence, to oversee the chief prosecutor, to approve or disapprove plea agreements, to close commission proceedings, and to answer interlocutory questions from the presiding officer.[13]

In addition to these procedural and structural flaws, the military commissions suffered from a dangerous conceptual mistake. The government wrongly asserted that the military commissions were not bound to enforce the laws of war. This assertion—roundly rejected in the Court's opinion—ignored Congress' clear mandate in the UCMJ, our longstanding treaty commitments, the Supreme Court's precedent, and our Nation's historical understanding that commissions must comply with the laws of war.

This divergence from the laws of war was in no way hypothetical. Hamdan was charged with an offense—conspiracy—that is not even recognized in the laws of war.[14] As Justice Stevens explained, the Government "has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission."[15] Further, the government's assertion was based on an erroneously cramped reading of the canonical statement of the laws of war: the Geneva Conventions. There is at least one provision of the Geneva Conventions that, regardless of whether a conflict is between signatories, applies with "as wide a scope as possible"—including to the conflict with al Qaeda. That provision is known as Common Article 3, because it was so essential as to be included in each of the four Geneva Conventions concluded in 1949.[16] Notably, Common Article 3 requires that Hamdan be tried by a "regularly constituted court,"—which these irregular, ad hoc military commissions cannot satisfy.

Finally, as if to underscore that Hamdan was at the mercy of a hastily constituted system, rather than a regularly constituted court—even these biased procedures were subject to change by the stroke of a pen. Most notably, the Department of Defense (DOD) issued a new order restructuring the military commissions just 1 week before the government was due to submit a brief in opposition of certiorari.[17] They

---

[9] Id. (slip op. at 50).

[10] Id. (slip op. at 71 n. 67) ("[T]he Government suggests no circumstances in which it would be 'fair' to convict the accused based on evidence he has not seen or heard.").

[11] Id. (slip op. at 61).

[12] See id. (slip op. at 51) ("Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, 'would have probative value to a reasonable person.' Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn.") (internal citations omitted).

[13] Id. (slip op. at 12–15) (Kennedy, J., concurring).

[14] See id. (slip op. at 43–49) (Stevens, J.) (plurality).

[15] Id. at 48 (plurality).

[16] See id. (slip op. at 66). Of the four Geneva Conventions, the most relevant is the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("GPW").

[17] See id., (slip op. at 49–50) (noting that the order governing the commissions' procedures "was amended most recently on August 31, 2005—after Hamdan's trial had begun"); Gov't Br. in Opposition to Certiorari, *Hamdan* v. *Rumsfeld,* No. 05–184, 2005 WL 2214766 at *5 n.3 (Sept.

changed the rules multiple times, including one change literally on the eve of oral argument in the Supreme Court, when the Pentagon issued a press release stating that it had prohibited testimony obtained by torture from being introduced in the military commissions. (In actuality, even that rule change was cosmetic, since the actual instruction only prohibited such testimony when the prosecution stated it was obtained by torture, and provided no discovery rights to find out whether testimony was, in fact, obtained by torture). In addition, the President's order explicitly disclaimed that Hamdan had any rights—even merely to enforce the procedures established by the order.[18]

For all of these reasons and more, military lawyers involved in both the prosecution and the defense recognized that these commissions lacked the integrity they had come to expect from the military justice system throughout their careers.[19] It is in that system—the one those military lawyers knew and insisted upon—that this Congress will find the best way forward.

II. COURTS-MARTIAL: A RESPECTED, EXPERIENCED INSTITUTION.

The military already has a battle-tested system for dealing with the problem of trying our enemies: courts-martial. In 1950, Congress adopted the UCMJ, a step that revolutionized military law. It built a system based on fundamental respect for our Nation's traditions as well as international law. The result was a military-justice system that is the envy of the world. We should only break from that proud American tradition for the best of reasons, supported with specific hard facts. There are no such reasons here, and changing the rules now may be another fruitless step backward from the important goal of bringing terrorists to justice. Indeed, rather than searching for ways to resuscitate the failed military commissions, this committee, and Congress as a whole, should affirm this proud American tradition of military justice in those cases in which suspected terrorists cannot be tried by civilian courts.

Our civilian courts, after all, have handled a variety of challenges and complicated cases, from the trial of the Oklahoma City bombers to spies such as Aldrich Ames. They have tried the 1993 World Trade Center bombers, Manuel Noriega, and dozens of other sensitive cases. They have prosecuted cases where the crimes were committed abroad. They have prosecuted hundreds of terrorism cases since September 11.

I am well aware that some organizations, including the CATO Institute, filed briefs in *Hamdan* arguing that only the Federal civilian justice system was appropriate. I do not take that position, because I can imagine that there are reasons why we may want to have an alternative to the civilian justice system. I take it that this was the point of Congress' 1916 statute, still on the books, that gives courts martial the ability to try violations of the laws of war. See 10 U.S.C. 818. That statute, as the Supreme Court emphasized in *Hamdan* v. *Rumsfeld*, provides the President with the power to try terrorism cases in courts martial.

Courts martial are tooled up, under existing authority, for handling terrorism cases. They offer a thorough, respected, and established justice system that is accustomed to handling the inherent security risks and logistical problems of trials for crimes against the laws of war. I would urge this committee to tread carefully before assuming otherwise. This is one area where a solution may be worse than the disease. Consider four basic reasons why this is the case.

- First, the *Hamdan* decision only blocked the trials of 10 individuals. Before rushing to legislate for these 10 men, we should be absolutely convinced of the need for legislation.
- Second, courts-martial have tremendous flexibility today, and can handle the complexities of foreign cases.
- Third, any attempt to resuscitate the military commissions by tinkering with their precise procedures will get bogged down in litigation that may continue for years.
- Fourth, creating two systems of justice, one for "us," and one for "them," will look like victor's justice and have little credibility in the eyes of the world. The court-martial system already commands international respect.

7, 2005) ("On August 31, 2005, Secretary Rumsfeld approved changes to the military commission procedures. . .").

[18] See President's Order •7(c) ("This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.").

[19] Swift Testimony, supra, at 1.

a. Legislation for a Handful of Individuals is Unwise

Only about 10 individuals are presently indicted by the military commissions and those indictments took over 4 years to prepare. To create an entirely new legal system for these 10 individuals and to attempt to do it reasonably promptly is unprecedented. I am aware that there have been some statements that 75 individuals would be designated for trial before these commissions, but a prosecutor in the Office of Military Commissions last week stated that he was not aware of more than 10 additional cases that could be prosecuted in them.

As Senator Graham reminded us last week, in each of these 10 cases, the individuals are being held as "enemy combatants," and are unable to go free under existing law—whatever Congress decides about prosecution. Even if Congress abolished military commissions, courts-martial, and civilian-trial jurisdiction tomorrow, these individuals would still be detained at Guantanamo Bay as enemy combatants. Justice Stevens' opinion for the Court recognized that present legal status in *Hamdan* itself, stating that the detention issue was not before it. There are, to be sure, two cases pending in the United States Court of Appeals for the District of Columbia Circuit, in which individuals are seeking the right to challenge their detention, but even if the detainees win those cases, it is widely expected that they will wind up at the Supreme Court. Even if the Court were to decline certiorari, they would then go back to the trial courts for factual hearings and oral argument, none of which will set any detainee free, even an entirely innocent one, for a very long time.

This is, in short, one of the worst factual contexts for new legislation. The legislation would be created for only a small number of people, all of whom have already been confined for years, and all of whom will continue to be locked up regardless of any legislation that Congress passes. To boot, each of those men is already amenable to trial in court-martial and in a Federal district court.

b. Courts-Martial Have Tremendous Flexibility and International Respect

The existing court-martial system offers significant promise in handling terrorism cases.[20] We've had courts-martial on the battlefields of Afghanistan and Iraq. The "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. The UCMJ, in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today.

In *Curry* v. *Secretary of the Army,* 595 F.2d 873 (CADC 1979), the DC Circuit rejected a constitutional challenge by a U.S. servicemember to certain structural aspects of the UCMJ. Noting that the UCMJ was designed to work in peace time and in war time, the court stated:

> Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the Service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.

593 F.2d at 877. When drafting the Code, its principal author, Edmund Morgan, emphasized that it struck a flexible balance between fairness for defendants and operation within a military scheme.

> It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian court was impractical. . . We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.

H.R. 2498 at 605–06 (1949) (Statement of Prof. Edmund Morgan). Those who have practiced within the military law system understand this well. As F. Lee Bailey once put it:

---

[20] *Cf. Hamdan* (slip op. at 49 n.41) ("That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in Federal court those caught 'plotting terrorist atrocities like the bombing of the Khobar Towers.'")

> The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the UCMJ than by any court, State or Federal. I suppose that if I were guilty and hoping to deceive a court into an acquittal or create a reasonable doubt in the face of muddled evidence, I would be fearful of a military court because their accuracy in coming to the "correct" result (in fact and not simply a legally correct result, which means only a fair trial, and not that guilty men are found guilty or that innocent men are acquitted) has a far better accuracy rate than any civilian court has ever approached.[21]

I have listened over the past week to testimony by various administration officials, who now say what they have not been saying for the past 4 years, that courts-martial are unable to try these cases. At a minimum, I would strongly urge the committee to inquire, in detail (and perhaps in closed proceedings if necessary) about the 10 current indictments and why they think a court-martial cannot handle them—and to have defense counsel who possess security clearances present at the hearing to respond. I know of no reason why a court-martial would be unable to handle a trial like that of Salim Hamdan, should an al Qaeda member be captured today. Indeed, the impracticability determination required by section 836 would best stand up in court after empirical evidence is generated showing that current court-martial rules cannot be applied.

The administration witnesses thus far have listed a parade of horribles that supposedly follow from the UCMJ. In the 4 days since this committee has invited me to testify, I have undertaken a quick examination of the code, and my expedited examination suggests that each claim is considerably overstated:

- Miranda Warnings. Article 31(b) of the UCMJ does contain a heightened Miranda requirement. But our Nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States* v. *Lonetree,* 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." See, e.g., *United States* v. *Loukas,* 29 M.J. 385, 387 (C.M.A. 1990). They are not required when questioning is conducted for "operational" reasons. Id. at 389. The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.
- Hearsay. The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including Military Rule of Evidence 807's residual hearsay exception, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

  In his testimony before both the Senate Armed Services Committee and the House Armed Services Committee, Assistant Attorney General Bradbury said that both the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) allowed hearsay evidence. For example, he told the Senate Armed Services Committee that "a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the factfinder, and as long as it is not outweighed by undue prejudice."

  As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate—an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY's and ICTR's rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan

[21] F. Lee Bailey, For the Defense 38 (1976).

Milosevic emphasized that "regardless of how repetitive [written statement] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused." *Prosecutor* v. *Milosevic,* ICTY Case No. IT–02–54, P 8 (Mar. 21, 2002).[22]

Those who rely on ICTY evidence rules would also do well to consider that the factfinders in those tribunals are all legally-trained individuals and judges who are used to certain standards of evidence, and who know how to discount evidence that does not meet traditional indicia of reliability. The military commission, by contrast, has an untrained, lay, system of factfinders, all of whom may have differing assumptions about such matters. Rules of evidence are drafted, in part, to guide lay "jurors" and avoid evidence that might be inflammatory or probative in the minds of the untrained.

• Warrants. Under Military Rule of Evidence 315(e)(4), evidence obtained during a search in a foreign country will be admissible even if it is seized without a warrant. Additionally, under Mil. R. Evid. 314(g)(4) if the Constitution does not require a warrant then the court-martial will not require one either.

• Protection of Witnesses. Mil. R. Evid. 507 allows protection of identity of witnesses.

• Chain of Custody. Mil. R. Evid. 901–903 deal with the admission of documents—and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., Military Rules of Evidence Manual 9–4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. Id. Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a sine qua non to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States* v. *Holmquist,* 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), cert. denied, 514 U.S. 1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, supra, at 98; see also *United States* v. *Hudson,* 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. See, e.g., *United States* v. *Thomas,* 38 M.J. 614 (A.F.C.M.R. 1993); *United States* v. *Parker,* 10 M.J. 415 (C.M.A. 1981).[23]

---

[22] "There is also a brand new Rule 92 bis providing for the admission of a witness's written statement, so long as it does not go to proof of the conduct or acts of the accused." Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int'l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution* v. *Galic,* "There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in that rule." *Prosecutor* v. *Galic,* ICTY Case No. IT–98–29–AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

The Appeals Chamber also emphasized that "the purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms, and a party is not permitted to tender a written statement given by a prospective witness to an investigator of the Office of the Prosecutor under Rule 89(C) in order to avoid the stringency of Rule 92 bis." Id. (footnote omitted).

[23] Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. See *Prosecutor* v. Mucic, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. See *Prosecutor* v. *Milosevic,* Case No. IT–02–54–T, Trial Chamber III Final Decision of

• Classified Evidence. A court-martial, unlike a civilian trial, can take place with a "jury" composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an in camera (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and necessary" classified information to the prosecution's or accused's case can be made available. Mil. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505's procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused's request to review that decision. *United States* v. *Lonetree*, 35 M.J. 396 (C.M.A. 1992), cert. denied, 507 U.S. 1017 (1993).

The military rules of evidence already provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d). Courts-martial also grant broad privileges for withholding information when it is "detrimental to the public interest." Mil. R. Evid. 506(a).

The most troubling thing about the testimony that administration officials have provided over the past week is that they have read the UCMJ in the most selective, condemning manner possible. Their reading is in considerable tension with the way they have been reading other statutes for the past 4 years, including the 1978 Foreign Intelligence Surveillance Act and the 2001 Authorization for the Use of Military Force. In those settings, they have emphasized the flexibility and open-endedness of statutes, and supplemented their readings with caselaw interpreting the provisions. But here, they are reading the statutes in the most restrictive way possible. Nothing they have said thus far justifies this skepticism. Before this body accepts such skepticism, it should have, at a minimum, some empirical evidence showing that courts-martial cannot try these cases, instead of a rather questionable projection by a prosecuting branch.

Moreover, a court-martial is a decidedly legal proceeding. Congress already has substantial law on the books authorizing and governing them. The Supreme Court has on countless occasions recognized and affirmed such proceedings—most recently in the *Hamdan* opinion. They satisfy all the conditions the Hamdan majority found the president's commissions failed to meet. They would eliminate the problems of uniformity that the Supreme Court found so damning to the military commissions.[24] They would provide assurances of independent proceedings and review that the commissions sorely lack.[25] They would satisfy Common Article 3's requirement of a "regularly constituted court"—a requirement that may be difficult, if impossible, to achieve by patchwork legislation.

By using an existing system, we would not just be reaffirming our core American values, we'd also have smoother prosecutions. Right now, the United Kingdom refuses to recognize the commission system, with its attorney general calling them completely "unacceptable" because they fail to offer "sufficient guarantees of a fair trial in accordance with international standards." Australia has cut a special side deal with the Bush administration so one of its citizens, David Hicks, is treated differently from other commission defendants. A United Nations (U.N.) Expert Committee says these commissions are fundamentally unfair—a report that will prompt other nations to refuse to let their citizens be tried in these bodies. Extradition, sharing of prosecution/intelligence information, and availability of witnesses will all become extremely serious problems when other countries refuse to cooperate. Without an extensive track record showing that courts-martial are failures, it is excep-

---

the Admissibility of Intercepted Communications in the case of (June 14, 2004) available at http://www.un.org/icty/milosevic/trialc/decision-e/040614.htm.

[24] See id. (slip op. at 56–62).

[25] See id. (slip op. at 14) (Kennedy, J., concurring) ("This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.").

tionally dangerous to gamble our prosecution strategy on the administration's diplomatic ability to persuade other nations to cooperate with these commissions.

I am by no means the first person to suggest this course. Just last week, Professor Scott Silliman, who served for 25 years in the Air Force's Judge Advocate General (JAG) Department, endorsed the same approach before the Senate Judiciary Committee: "[Courtsmartial] is a fair and well-proven system of law, created by Congress some 56 years ago, that is more than adequate to the task. Article 18 of the Code gives general courts-martial jurisdiction to prosecute violations of the law of war, and the President need only make the policy decision to use them."[26] Bruce Fein, a former high-ranking DOJ official in the Reagan administration, also wrote: "[T]rial by courts-martial under the UCMJ would prohibit secret evidence and require sworn testimony. The reliability of verdicts compared with military commissions would be sharply advanced. The government invariably wins when justice is done."[27]

c. Legislation for this Handful of Defendants Will Get Bogged Down in the Courts and Delay the Crucial Goal of Bringing Terrorists to Justice.

Whatever purported benefits might be gained by some new system have to be weighed against the inevitable litigation risk. The *Hamdan* decision makes clear that any changes that depart from our Nation's military tradition and international law are going to be closely scrutinized by the courts. The result of changing the rules again now could be another 4 years with no prosecutions and perhaps yet another reversal by the Supreme Court. "Four more years" is not a convincing slogan, especially when not a single terrorist has been brought to justice in these military commissions.

This body should do what the President did not over 4½ years ago, consider whether its decision to create a new trial system will set back the war on terror by inviting litigation, and the overturning of criminal convictions in terrorism cases. The *Hamdan* decision is important here because of its implications for the Detainee Treatment Act (DTA). Some individuals, including Justice Scalia, read the DTA to strip the Supreme Court of jurisdiction over Guantanamo cases. Under their reasoning, the DTA meant that Hamdan could only come into Federal court to challenge the military commission after he was convicted, not beforehand.

But that reading did not prevail—and with good reason. Senator Levin of this committee worked with Senator Graham and others to modify the initial version of the DTA, which would have created that outright jurisdiction stripping. Instead, the modifications of Senators Levin and Graham grandfathered the *Hamdan* case—and in a way that is good for the fight against terrorism. Could you imagine if the contrary reading would have prevailed? We would have put the country through the 10 commission trials, at huge taxpayer expense, and then they would have come to the Supreme Court 4 or 5 years from now at the earliest. They then would have been thrown out as illegal for the reasons the Supreme Court gave us on June 29. We would have then possibly faced the terrible prospect of these individuals going free.

The Nation owes a debt of gratitude to Senator Levin for ensuring that careful thought and attention was devoted to this point in the last-minute appropriations process, and to Senator Graham and the others who worked with him. Otherwise, we would be having these debates in Congress about how to try suspected terrorists 4 or 5 years from now—and in a much worse factual environment—where criminal convictions have been thrown out as illegal and where terrorists might even have been released. By trying them according to court-martial procedures, we still have the opportunity to do it right the first time.

For that reason, if this body adopts any legislation today, it should mandate an anti-abstention principle, and provide for expedited review of any military commission challenge to the Supreme Court of the United States. If you do not, we will face the same prospect of criminal convictions being overturned in several years. The Hamdan decision makes clear that the Federal courts have a vital role to play in ensuring the fairness and legality of any system of criminal justice. That role should be played at the outset, to avoid the trauma to the Nation that would result from a decision setting the convicted terrorists free, or, possibly forcing an individual to be retried after they have already previewed their defense for the prosecu-

---

[26] *Hamdan* v. *Rumsfeld*: Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary, 109th Cong. (July 11, 2005) (statement of Scott L. Silliman), available at http://judiciary.senate.gov/testimony.cfm?id=1986&wit—id=5511.

[27] Bruce Fein, Are the Military Panels Needed?, Washington Times, July 11, 2006, available at http://www.washingtontimes.com/commentary/bfein.htm.

tion. In these circumstances, a retrial would not be considered just in the eyes of the world.

An expedited review provision has been used many times in recent years, including, for example, the Bipartisan Campaign Finance Reform Act. A three judge district court would hear the challenge, and then it would go to the Supreme Court on a fast-track basis. That path would provide a sure footing and stability beforehand.

Again, my strong view is that it is better to get the show on the road and use the existing system, instead of having to wait for a risky new scheme to be tested in the courts. But the worst of all worlds would be legislation that adopts a risky system and tries to defer Federal court challenges until after convictions happen. Such a system will put courts in an impossible position. This country, the families and survivors of the September 11 attacks, and the rest of the world, deserve to see a fair trial of the suspected al Qaeda terrorists that the administration has been holding onto for more than 4 years now. A "wait and see" attitude toward criminal convictions of suspected terrorists is not something that can wait any longer.

Finally, judicial abstention provides yet another powerful and compelling reason for the use of courts martial instead of commissions. The Supreme Court in 1975 in *Schlesinger* v. *Councilman* stated that challenges to a court-martial generally must take place after, not before, someone is convicted in them. The government tried to advance a similar principle in *Hamdan*, but not one of the three courts to hear the case—at the trial, appellate, or Supreme Court level—accepted this notion. Instead, all three courts made clear that they would hear legal challenges, pre-trial, to military commissions. Courts-martial have developed a body of caselaw and tradition that Federal courts feel comfortable deferring to; but a newfangled institution will command no such deference. Because we are talking about the most awesome powers of government—dispensing the death penalty and life imprisonment—courts will carefully scrutinize the procedures and rules for trial. The only way to ensure that scrutiny yields a decision in which the system is not tossed out is to use a system that is battle-tested and approved already by the Supreme Court of the United States. Courts-martial and Federal civilian trials meet these tests; military commissions do not.

d. Creating a Separate Trial System Will Undermine American Credibility and Threaten Compliance with the Geneva Conventions.

Senator McCain last week stated it perfectly:

> [W]e will have more wars, and there will be Americans who will be taken captive. If we somehow carve out exceptions to treaties to which we are signatories, then it will make it very easy for our enemies to do the same in the case of American prisoners.

Remarks of Senator John McCain, Hearing on the Future of Military Commissions to Try Enemy Combatants, July 13, 2006.

Let's be clear about what the *Hamdan* decision did and did not do. It did not, by its terms, guarantee prisoner of war privileges to al Qaeda or individuals who do not wear a uniform and comply with the laws of war. Nor did it, by its terms, extend the full protections of the Geneva Convention to Hamdan or any other detainee. Instead, it simply reaffirmed that the minimal, rudimentary requirements of Common Article 3 apply to all conflicts.

We must be careful not to further the perception that, in matters of justice, particularly when the death penalty is at stake, the American government adopts special rules that single out foreigners for disfavor. If Americans get a "Cadillac" version of justice, and everyone else gets a "beat-up Chevy," the result will be fewer extraditions, more international condemnation, and increased enmity toward Americans worldwide.

An extensive amount of material has already been generated on this point. Secretary of State Madeline Albright and 21 other senior diplomats filed a brief in *Hamdan* v. *Rumsfeld* explaining that the military commissions lacked credibility internationally and were interfering with our ability to project our Nation as one of fairness and justice.[28] 422 Members of the European and United Kingdom parliaments filed a brief condemning military commissions as fundamentally unfair and a violation of international law.[29] That brief, notably, was signed by leaders of all of the major political parties in Britain, including the conservative Tories. Retired generals and admirals filed a brief containing similar views—building on Colin Pow-

[28] See http://www.hamdanvrumsfeld.com/Hamdan—AlbrightDiplomats—brief.PDF.
[29] See http://www.hamdanvrumsfeld.com/HamdanParliamentariansFreshfields.pdf

ell's stated beliefs while serving as Secretary of State.[30] All of these warnings square with what the Senate has itself said about the Geneva Conventions—that they represent minimal standards for all conflicts. In recommending ratification of the Geneva Conventions in 1955, the Senate Committee on Foreign Relations stated:

> Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. . . . The practices which they bind nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the injunctions of formal treaty obligations.
>
> We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be measured against their approved standards, and the weight of world opinion cannot but exercise a salutary restraint on otherwise unbridled actions. . . .
>
> The committee is of the opinion that these four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.

The Army Field Manual itself has recognized in the past that compliance with Common Article 3 is necessary in order to promote interrogations, and to win the hearts and minds of the enemy and potential sympathizers.

> Humane treatment of insurgent captives should extend far beyond compliance with Article 3, if for no other reason than to render them more susceptible to interrogation. The insurgent is trained to expect brutal treatment upon capture. If, contrary to what he has been led to believe, this mistreatment is not forthcoming, he is apt to become psychologically softened for interrogation. Furthermore, brutality by either capturing troops or friendly interrogators will reduce defections and serve as grist for the insurgent's propaganda mill.[31]

Some have suggested, in response to the Supreme Court's decision, that while Congress must respect the Supreme Court's interpretation of the Geneva Conventions,[32] Congress does not need to respect the Conventions themselves. It can pass a new law—such as one authorizing the current military commissions or a substantially similar alternative—that overrides the Conventions and denies the protections of Common Article 3 in full or in part to suspected members of groups like al Qaeda. As a matter of domestic law, Congress currently has the power to do this. But the political costs would be enormous and the legal consequences severe.

For starters, even if accompanied by a "jurisdiction-stripping" measure, any such statute would invite a litany of legal challenges. *Hamdan* did not reach constitutional questions. If Congress now authorizes commissions that fail to meet recognized international standards, it runs the risk of violating constitutional due process and tying up the courts for years in new rounds of detainee-rights litigation.

A statute that works to limit Common Article 3 would also be in serious violation of international law, on at least two levels. First, any statute that does not comply in full with Common Article 3 would amount to a breach—and likely a material breach—of one of the United States' most fundamental treaty obligations. Common Article 3 is no ordinary provision. It is often referred to as a "Convention in miniature"[33] for the way it distills the hundreds of articles contained in the four Geneva Conventions into "the common principle which governs them,"[34] a principle of "indivisible nature."[35] A statute that conflicts with Common Article 3 would violate "a provision essential to the accomplishment of the object or purpose of the treaty" and

---

[30] See http://www.hamdanvrumsfeld.com/GeneralsandAdmirals.pdf

[31] Army Field Manual 34–52.

[32] See *Sanchez-Llamas* v. *Oregon,* 126 S. Ct. 2669, 2684 (2006) (explaining the Supreme Court's interpretive supremacy over treaties).

[33] E.g., 3 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

[34] (1960). 34 Id. at 35.

[35] Id. at 38. These quotations come from the official ICRC commentary to the Geneva Conventions, which the Supreme Court recognized in Hamdan as "relevant in interpreting the Conventions' provisions." *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2789 n.48 (2006).

therefore constitute a material breach of the entire Geneva Conventions.[36] Because Common Article 3 is non-derogable, claims of military or security necessity are no justification for violating it.[37] Because the provisions of Common Article 3 are not severable from one another, Congress must apply the article in its entirety.[38] Accordingly, a statute that serves to "rein in"[39] any provision of Common Article 3, for any reason, would leave the United States in material breach of all four Geneva Conventions. Treaty obligations are "too fundamental to be easily cast aside,"[40] and that maxim holds especially true here, where the treaty at issue is one of the United States' most powerful tools for upholding the law of war and ensuring humane treatment for our soldiers.[41]

In addition to violating treaty law, any statute that conflicts with Common Article 3 would be argued to be illegal on a second level of customary international law. Common Article 3 sets forth "the most fundamental norms of the law of war"[42] and thereby reflects "elementary considerations of humanity."[43] As a result, it is now widely regarded to be a signal example of customary international law.[44] (Some even believe Common Article 3, and the Geneva Conventions more generally, to be jus cogens, a peremptory norm of general international law that may never be set

---

[36] See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 60(3)(b), 1155 U.N.T.S. 331, 346 (defining "material breach"); see also Anthony Aust, Modern Treaty Law and Practice 238 (2000) (noting that the breach of even "an important ancillary provision" of a treaty will constitute a material breach); Mohammed M. Gomaa, Suspension or Termination of Treaties on Grounds of Breach 39 (1996) (The [materially] breaching act may be based on grounds of municipal law such as the enactment of legislation or execution of rules of municipal law which are contrary to the State's contractual obligations."). While the Vienna Convention on the Law of Treaties is not binding on the United States, it is widely agreed, and executive-branch officials have assumed, "that the Convention generally reflects customary international law." Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. PA. L. REV. 399, 424 (2000).

Some commentators have argued that violations of Common Article 3 constitute not only material breaches, but also "grave breaches" expressly criminalized under the Geneva Conventions. See, e.g., Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 VA. J. INT'L L. 267, 272–73 (1994). The U.S. Government has taken this position at least once. See Amicus Curiae Brief Presented by the Government of the United States of America, at 35–36, *Prosecutor* v. *Tadic,* Case No. IT–94–1–T, Opinion and Judgment (May 7, 1997).

[37] See Theodor Meron, Internal Strife: Applicable Norms and a Proposed Instrument, in Humanitarian Law of Armed Conflict: Challenges Ahead 249, 255–57 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (explaining why "[i]t is now generally accepted that humanitarian instruments, having been adopted to govern situations of armed conflict, are not subject to derogations" on any grounds). A few particular articles of the Geneva Conventions (such as Articles 5 and 27 of the Fourth Convention) do allow limited derogations, but Common Article 3 is emphatically not one of them.

[38] Cf. *Hamdan* v. *Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 10 & n.58 (2006) (statement of Harold Hongju Koh, Dean, Yale Law School), available at http://www.law.yale.edu/documents/pdf/Deans—Office/KOH—Hamdan—TESTIMONY.pdf (observing that the Supreme Court gave no indication in Hamdan that Common Article 3 may ever be applied piecemeal).

[39] See Kate Zernike, Administration Prods Congress To Curb the Rights of Detainees, N.Y. Times, July 13, 2006, at A1 (quoting one Senator as saying that Common Article 3 must be "reined in" by Congress).

[40] *United States* v. *Dion,* 476 U.S. 734, 739 (1986).

[41] It is important to note that, contrary to what Daniel Collins asserted last week, see *Hamdan* v. *Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Daniel Collins, Partner, Munger, Tolles & Olson), available at http://judiciary.senate.gov/testimony.cfm?id=1986&wit—id=5512, if Congress simply asserts that the existing commissions are "regularly constituted," this would not be sufficient to save compliance with Common Article 3. First, it takes a highly formalistic interpretation of "regularly constituted" to mean merely "sanctioned by congressional declaration." Second and more basic, this argument ignores section 1(d) of Common Article 3, which states that protected persons must be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (emphasis added). The Supreme Court has already indicated in Hamdan that the existing commissions fall far short of these guarantees.

[42] *Kadic* v. *Karadzic,* 70 F.3d 232, 243 (2d Cir. 1995).

[43] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicar*. v. *U.S.*), 1986 I.C.J. 14, 114, para. 218 (June 27).

[44] See, e.g., id.; Kadic, 70 F.3d at 243; *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002); The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 380 (2004) ("[Common Article 3's] minimum standards are generally accepted throughout the world as customary international law.").

aside unless a subsequent contrary norm develops.[45]) Any statute that tries to avoid or narrow Common Article 3 would thus be not only a profound affront to the norms and morals of the global community, but also claimed to be an illegal affront to them.

Make no mistake: If Congress wants to avoid applying any provision of Common Article 3 to "enemy combatants" or other groups, it must be crystal clear that it so intends, because under the Charming Betsy doctrine courts will construe statutes so as to harmonize with international agreements whenever fairly possible.[46] Congress's abrogation of Common Article 3 would need to be very explicit, and very public, or else courts will not recognize it. The boldness required to specifically override the guarantees of Common Article 3 with new legislation would be exceptional. Indeed, it would be unprecedented; apparently no legislature has ever passed such a measure.[47]

If Congress were to assume this ignoble mantle, the legal troubles wouldn't end with constitutional challenges and our breaches of treaty law, customary law, and, arguably, jus cogens. To effectuate its new statute, Congress would need to amend or repeal at least three other controlling statutes: the UCMJ, the McCain Amendment, and the War Crimes Act. The latter statute imposes Federal criminal sanctions on "conduct . . . which constitutes a violation of Common Article 3."[48] Congress would need to take the remarkable step of striking that language from the War Crimes Act unless it wants U.S. military personnel—including those who administer deficient trial proceedings—to be prosecuted for war crimes in U.S. courts. But even that would not protect these military personnel from prosecution abroad. Under the principle of "universality," "[m]ost authorities have accepted that breaches of the laws and customs of war, especially of the 1907 Hague Conventions and the 1949 Geneva Conventions, may be punished by any state that obtains custody of persons suspected of responsibility."[49] Not only other countries' courts, but also the founding charters of numerous international tribunals expressly recognize violations of Common Article 3 as war crimes.[50]

In the legal fallout that would ensue from any congressional effort to "rein in" Common Article 3, the fact that al Qaeda does not abide by the article would be of no moment. Were it a party to the Geneva Conventions, al Qaeda would be in material breach. No one doubts this. But the Geneva Conventions, as well as background principles of international law, do not permit other countries to breach, suspend, or terminate the Conventions or any part thereof in response to another party's material breach.[51] If the United States does not think Common Article 3 should apply in full in a particular armed conflict, it must—as a matter of Geneva law and

---

[45] See Ingrid Detter, The Law of War 410 (2d ed. 2000); Theodor Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348, 350 (1987). The official commentary to the Geneva Conventions notes that its principles "are today the essential expression of valid international law in this sphere" and therefore "exist independently of the Convention and are not limited to the field covered by it." 1 Int'l Comm. of Red Cross, supra, at 412–13. Even formal denunciation of the Conventions does not "impair the obligations which the Parties to the conflict remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." Id. at 413.

[46] See *Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829); Restatement (Third) of Foreign Relations Law of the United States § 114 (1987).

[47] See Adam Liptak, Scholars Agree That Congress Could Reject Conventions, but Not That It Should, N.Y. Times, July 15, 2006, at A10; cf. *Prosecutor* v. *Furundzija,* Case No. IT–95–17/1–T, Judgement, • 138 (Dec. 10, 1998) (observing that no State has ever "shown or manifested opposition to the implementation of treaty provisions against torture," including those contained in Common Article 3), available at http://www.un.org/icty/furundzija/trialc2/judgement/furtj981210e.pdf.

[48] 18 U.S.C. § 2441(c)(3).

[49] John Norton Moore Et Al., National Security Law 379 (1990); accord Ian Brownlie, Principles of Public International Law 303 (6th ed. 2003).

[50] See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, art. 8, § 2(c), (e)(vi), U.N. Doc. A/Conf.183/9 (2002); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 4, U.N. Doc. S/Res/955 (1994); Statute of the Special Court for Sierra Leone, Jan. 16, 2002, art. 3, available at http://www.scsl.org/scsl-statute.html; see also Moirah Sanchez et al., Case Concerning the Women and Children of the Civil War, 10 ILSA J. INT'L & COMP. L. 215, 223–24 & nn.20–21 (explaining international courts' prosecution of Common Article 3 violations and state approval thereof).

[51] Common Article 1 of the Conventions stipulates that the Contracting Parties "undertake to respect and to ensure respect for the present Convention in all circumstances" (emphasis added). This language reflects the customary rule that humanitarian treaties may not be suspended or derogated from in response to another party's material breach. See Vienna Convention on the Law of Treaties, supra, at art. 60(5); see also AUST, supra, at 238 (indicating that the drafters of the Vienna Convention had the Geneva Conventions specifically in mind when they included this provision).

international law—formally denounce the entire treaty, an act that no state has ever before taken.

Against this mainstream interpretation of the Geneva Conventions,[52] and to widespread public criticism, some administration officials have argued that the United States may retaliate against al Qaeda and the Taliban by temporarily suspending the Conventions with respect to those entities.[53] If one accepts this logic of negative reciprocity—and there is no guarantee that creative lawyers in other governments wouldn't—then a congressional act that breaches the Conventions might be seen to authorize other countries to suspend application of the Conventions with respect to the United States. This may be unlikely in the case of our allies, but it is not impossible in the case of many key players in the war on terror; the administration has, after all, already supplied them with the legal arguments.

So a new statute "reining in" Common Article 3 would not only raise significant constitutional and administrative concerns, leave the United States in violation of a major treaty obligation and a major tenet of customary international law, fundamentally alter and undermine our legal framework for the treatment of captives, and expose U.S. officers to possible war crimes liability; it might also set the course to the unraveling of the Geneva Conventions themselves.

I do not need to remind this committee why the Geneva Conventions are so vital to our national interest, or explain how defying the Conventions would do irreparable, perhaps unprecedented damage to our Nation's standing and reputation in the eyes of the world, including those whom we are trying to win over to our side. As commentators on the law of war have observed, "the rules contained in Article 3 are minimum standards in the most literal sense of the term; standards, in other words, no respectable government could disregard for any length of time without losing its aura of respectability."[54]

Finally, it is sometimes said Congress must act in the wake of the Hamdan decision because otherwise a rogue international prosecutor will indict a United States government official while traveling abroad. This argument is a canard. Leave aside the fact that the Defense Department has publicly stated that it has been in full compliance with Article 3, and that our troops are trained to dispense Common Article 3 protections. The more basic problem is that whatever Congress (or, for that matter, the Supreme Court) defines Common Article 3 to mean wouldn't matter to this hypothesized rogue prosecutor abroad. If that prosecutor wanted to use the customary definition of Common Article 3 as applying to all conflicts, he would be free to do so—regardless of what the Supreme Court or Congress of the United States said. The decision of both domestic institutions is utterly irrelevant to what a rogue prosecutor in Spain, Belgium, or some other country might decide to do.

I mentioned before that if Congress chooses to pass a law overriding any provision of the Geneva Conventions, it would make ours the first government ever to do so. It would not, however, make us the first country to publicly violate Common Article 3. Other prominent examples include the Khmer Rouge in Cambodia, the Revolutionary United Front in Sierra Leone, the current Khartoum government in Sudan, and Saddam Hussein in Iraq.[55] These are not the bedfellows the United States is accustomed to keeping, nor the precedents the United States wants to evoke. Con-

---

[52] Expressions of this position can be found, inter alia, in Detter, supra, at 403–04, 410; Fritz Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War 75 (2d ed. 2001); David A. Elder, The Historical Background of Common Article 3 of the Geneva Conventions of 1949, 11 Case W. Res. J. Int'l L. 37, 52 (1979).

[53] See Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Dep't of Defense 23–25 (Jan. 22, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf (acknowledging legal precedents and norms to the contrary, but asserting that the Executive may suspend the Geneva Conventions because "unfairness" and "non-compliance" might result if we did not do so).

[54] Kalshoven & Zegveld, supra, at 69.

[55] See Michael Byers, War Law: Understanding International Law and Armed Conflict 36 (2005) (Sudanese government violating Common Article 3); Laura Forest, Note, Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country's Diamond Resources, 11 Ind. Int'l & Comp. L. Rev. 633, 659 n.225 (2001) (RUF violating Common Article 3); Erik Suy, International Humanitarian Law and the Security Council Resolutions on the 1990–1991 Gulf Conflict, in Humanitarian Law of Armed Conflict: Challenges Ahead 515, 523 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (Saddam Hussein violating Common Article 3); Hans-Peter Gasser, Non-International Armed Conflicts, 31 Am. U.L. Rev. 911, 921 (1982) (Khmer Rouge); Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Gaor, 53d Sess., Annex, 75 (1999), available at http://www1.umn.edu/humanrts/cambodia–1999.html.

gress should make sure that any "legislative response" to *Hamdan* does not tamper with Common Article 3 and put America on the wrong side of history.

III. MOVING FORWARD.

Chairman Warner and members of the committee, the Supreme Court got it right. The president's military commissions departed in major ways from the most basic tenets of American justice. For the first time, defendants were kicked out of their own criminal trials without their consent. Even a military commission prosecutor called the system "a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."[56] Another prosecutor lamented that "writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard—particularly when you want to call yourself an officer and a lawyer."[57] This is the danger of departing from established and time-tested rules.

Indeed, something that has gone without notice thus far is that the lengthy judicial opinions that sided with Mr. Hamdan all have been penned by jurists who actually served in our military: Justice John Paul Stevens, Justice Anthony Kennedy, and lower court Judge James Robertson. I believe this is hardly a coincidence. For years, the military has stood at the forefront of protecting the rule of law, knowing that if our courts give the executive branch the power to break from the Geneva Conventions, then executives from other countries will do it back to our own troops some day when they are captured. As a group of retired admirals and generals pointed out to the Court as amici curiae, during Senate considerations of the Conventions, ensuring the protection of our troops was an overriding concern.[58] Perhaps for that reason, and despite all the administration's resistance to the Court's Geneva Conventions holding, the Pentagon recently issued a memo informing all branches of the military of the Supreme Court's interpretation of the Conventions and finding that Common Article 3—the provision at issue in *Hamdan*—now protects detainees across the globe and must be respected.[59] These are all steps in the right direction.

Legislation in response to *Hamdan* must also consider the open-ended nature of this conflict and guard against undue encroachment of military jurisdiction in the administration of justice. After all, our tradition of civilian justice is one of the defining principles of this nation, one that the founders of this republic were prepared to defend with (in the words of the Declaration of Independence) their lives, their fortunes, and their sacred honor. Unlike past military commissions, which were used in combat or occupation zones under military control, the use of commissions in the freestanding conflict with al Qaeda means that potentially anyone, including an American citizen apprehended on American soil, could be tried before such a tribunal. As the Supreme Court has repeatedly pointed out in defending the jurisdiction of civilian courts, the jurisdiction of past military commissions has been strictly confined by time, place, person, and charge. All of those constraints appear to be much weaker, if they are going to be applied at all, in the proposed military commissions today. The result is that new legislation authorizing military commissions in an unbounded "war on terrorism" almost certainly would depart from the longstanding view, enshrined in one of the landmark decisions of the Supreme Court, Ex parte Milligan, 71 U.S. 2 (1866), that when the civilian courts are open and unobstructed in the exercise of their function, they should be used. This Congress should not resort to military commissions unless it is convinced that the gravity of the threat truly requires such a momentous step. In a very real sense, use of military commissions expresses a lack of faith in the institutions of civilian rule that have served this country well in times of crisis every bit as dangerous as that which we face today.

What makes America great is not the quality of the soil on which we stand, but the principles that define our Nation. My parents came here from a distant land, attracted by that promise, of inalienable rights for all and equal opportunity. We are a land of justice and fairness, and with a system that is strong enough to handle even the most extraordinary of challenges. We witnessed an extraordinary event 3

---

[56] See Swift Testimony, supra, at 1 (quoting Air Force Captain John Carr).

[57] Id. (quoting Air Force Major Robert Preston).

[58] Amicus Br. of Retired Generals and Admirals, *Hamdan* v. *Rumsfeld*, No. 05–184, at 3, available at http://www.hamdanvrumsfeld.com/briefs ("I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States. . . . To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.") (quoting Senator Alexander Smith).

[59] Mark Mazzetti and Kate Zernike, White House Says Terror Detainees Hold Basic Rights, N.Y. Times, July 12, 2006.

weeks ago in the Supreme Court, where a man with a fourth-grade Yemeni education accused of conspiring with one of the world's most evil men sued the President in the Nation's highest court—and won. Only America is strong enough to permit such a challenge. Only America is fair enough to let that challenge proceed. Only America is wise enough to let such a decision stand as the law of the land—and to celebrate it as a vindication of the Rule of Law. For on that day, Hamdan won something that every American has celebrated from the Declaration of Independence on—a fair trial. While the rule of law came out the winner in *Hamdan,* it is not as if national security came out the loser. Quite the opposite, in fact. Hamdan, like any suspect, deserves to be tried and held accountable for any crimes he committed, but in a way that is fair and preserves America's honor and integrity.

In sum, I ask members of this committee to see an America that is fulfilling the promise to protect our troops and values—a promise embodied in the words of Justice Rutledge, dissenting in the last great military commission case, *Yamashita* v. *Styer* (1946):

> More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the second inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the Nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.
>
> This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.

In 1956, a young former law clerk to Justice Rutledge quoted these words in a book chapter.[60] His name was John Paul Stevens. Exactly 50 years later, he made good on Justice Rutledge's promise.

Thank you.

Chairman WARNER [presiding]. Very interesting. Very interesting testimony. We thank you for participating.

We'll now have Mr. Schlueter, Hardy Professor of Law and Director of Advocacy Programs, St. Mary's University.

Mr. SCHLUETER. Yes, sir.

Chairman WARNER. We welcome you.

STATEMENT OF DAVID A. SCHLUETER, HARDY PROFESSOR OF LAW AND DIRECTOR OF ADVOCACY PROGRAMS, ST. MARY'S UNIVERSITY

Mr. SCHLUETER. Mr. Chairman, Senator Levin, members of the committee, thank you for the opportunity to address you today on the issue of the status of military commissions following the *Hamdan* decision by the Supreme Court.

As with the others, I have prepared a detailed written statement, and I've presented it to your staff.

Chairman WARNER. Yes. All statements, in their total form, will be put into the record.

Mr. SCHLUETER. Just a brief note, on background. It's a personal honor to sit before you today, Senator Warner. We shared a common law professor, Professor Kenneth Redden, at the University of Virginia.

Chairman WARNER. Yes.

---

[60] John Paul Stevens, Mr. Justice Rutledge, in Allison Dunham and Philip B. Kurland (eds.), Mr. Justice, The University of Chicago Press (Chicago 1956).

Mr. SCHLUETER. I started off as an Active-Duty JAG, and taught at the Army JAG School for 4 years, and did my Masters of Law work at the University of Virginia, where Professor Redden was one of my mentors. When he found out that I was in the military system, he encouraged me to write a book on military criminal justice. It's now in its sixth edition. I know that Professor Redden would be honored, if he were here with us today, to know that two of his former students are facing each other and talking about a matter of national interest. So, it is also a personal honor to finally sit here and talk to you.

Chairman WARNER. Thank you. We're not only facing each other, we're joining one another in trying to resolve a problem that faces our country.

Mr. SCHLUETER. Very much so.

Chairman WARNER. I remember him with great affection and respect.

Mr. SCHLUETER. We miss him dearly.

Chairman WARNER. Thank you.

Mr. SCHLUETER. Just a bit about my background. I was an Active-Duty JAG for 9 years, stayed in the Reserves for about 25 years, and, in that time, specialized in military justice and did a lot of writing on it.

I left the JAG Corps to take a position to work at the United States Supreme Court as an in-house counsel. I currently teach constitutional law, evidence, trial advocacy, and sometimes criminal procedure. So, I have a lot of interest in this. Frankly, until last Friday, when I got a call from your general counsel, I had hoped to stand on the sidelines and watch with interest as to what you decided in Washington, and then write about it. It is an honor to be here and to have my views heard.

With all due respect, I think we're missing the point in all of this. I was asked to respond to the *Hamdan* decision, and have looked it over many times. It strikes me that we're in danger of throwing out the baby with the bath water. In short, in my view, the baseline should be the existing rules for military commissions.

Mr. Fidell didn't mention it, but a number of years ago the NIMJ published a book, "The Annotated Guide to Procedures for Trial by Military Commissions," and 10 of us were asked to write commentary on each one of the rules, and to critique it, and to prepare and contrast it with the UCMJ and the Manual for Courts-Martial. I encourage the committee to take a close look at this.

This has been somewhat of a bandwagon, and I think the *Hamdan* decision has provided a number of interest groups with the opportunity to criticize not only the President, but also the rules, when, in fact, the Court has really only, itself, identified several issues that were of most concern to it. The presence of counsel, for example, was one of the issues that Justice Stevens mentioned in his plurality, but he couldn't even get a fifth, a vote on whether or not the rules of procedure would require the defendant's absence at all proceedings. So, I think it's very important to go back to the reason we're doing this, and that is to carefully analyze the opinion and just exactly what it said and didn't say.

On a similar note, what strikes me in what was wrong in this case is that the President probably didn't apply as much trans-

parency as he should have. If the President and the Pentagon had gone, to a greater extent, to go through the rules and explain why they weren't practical, I don't know that we would be here today. But they didn't do that, and that was the peg on which the Court was able to hang its coat and to say that there wasn't sufficient justification for deviating from the rules.

That, in turn, led to a question about whether Article 3, the Common Article, would apply or not. The Court did not say that all of Article 3 would apply. It wasn't before it. Anything that the Court said about Article 3, other than the requirement that the punishment be imposed by a regularly constituted court, is dicta. That was the only thing that the Court really focused on, was that one specific provision in Article 3, which, again, the Court concluded had been violated.

Now, in my written statement, I provide two suggested amendments to the UCMJ. I only recommend two. I'm concerned that what you're potentially thinking of is a complete overhaul of the military justice system. Once you start analyzing the UCMJ point by point, a variety of interest groups will come forward and ask that the entire provision be considered. It's not necessary to do that. I recommend that you follow the constitutional structure that has worked well for over 50 years, and that is that you delegate to the President, in the first instance, to draft the appropriate rules. If you want to put a reporting requirement in, that would be fine. But I do not encourage Congress to take on the task of writing yet another set of rules that would apply with commissions particularly in mind.

So, I recommend two amendments. The first amendment would address an issue that has never been resolved legislatively, and that is the President's authority to convene military commissions. I recommend an amendment by adding a new Article 5(a), which would specifically delineate the three types of commissions. Our focus today has been on law-of-war commissions, but two other commissions have been used in history. I recommend that you consider those, as well.

Finally, I recommend, very importantly, to amend Article 36(b). Article 36(b) says, we call it the "uniformity requirement," and I don't believe it was ever the intent of Congress to require that all the rules concerning provost courts, which haven't yet been mentioned, but are in that provision, military commissions, and courts-martial would all be uniform. The uniformity requirement, in my view, was designed in 1950 to address the uniformity between the various Armed Forces and not between all of the various military tribunals, the administrative-type tribunals that might be constituted.

Several witnesses have testified that the Manual for Courts-Martial, in the preamble, indicates that the same procedures should be used. But that preamble is not official; it's only the views of the DOD. It is clear that, in history, the parallel between general court-martial rules of procedure and military commissions were essentially the same. I personally have no trouble with a two-tier system. We have two-tier systems now within the military justice system, in terms of the level of the offense and the types of procedures that are applied.

So, in my written statement, I recommend that we amend Article 36(b) to make it clearly what I believe Congress originally intended, that the uniformity principle only apply as within the Armed Forces.

I do think that the baseline ought to be the existing rules. As I've said earlier, my sense is that there were only three or four areas that concerned the Court, and I'm satisfied that bright lawyers in the Pentagon, working with public interest groups that can respond to those in a transparent system, would address those issues.

As I also pointed to in my statement and I have experience with this. I served for 17 years as the reporter for the Federal Rules of Criminal Procedure. I am intimately familiar with the process for drafting amendments to the Federal Rules of Criminal Procedures. Members of the committee, what you have today in the military justice system is the equivalent of a Federal criminal trial. There are some exceptions, but I don't know that you want to get into the process of applying those same rights and privileges to individuals who are terrorists and are destined or they have the design of destroying our country.

On a final note, I asked my Sunday-school class, on Sunday morning, if they had any thoughts that they thought I ought to share with you, and their almost unanimous reaction was, "Why do we even need military commissions to try these people? They're out to destroy us."

I come from San Antonio, Texas. I'm not in the Beltway. We used to live here, but I think it is so important that Congress listen to the voice of the American people. That doesn't necessarily mean that American people are always right, but I think, for the most part, the person on the street really wonders why it is that people who cut off the heads of the people they capture are entitled to the same due-process rights that our American servicemembers are entitled to.

My recommendation is, again, the baseline be the existing rules, that they be modified to adjust to the concerns raised by the Supreme Court, and that, at the core, it is critical that we provide them fundamental due process. There are core fundamental due-process principles that ought to be applied, and I don't think we need to get about the business of applying all of the rules of evidence to trials by military commissions.

With that, I thank you.

[The prepared statement of Mr. Schlueter follows:]

PREPARED STATEMENT BY DAVID A. SCHLUETER

I. INTRODUCTION

Mr. Chairman, Senator Levin, and members of the committee, thank you for the opportunity to address the issue of the status of military commissions in light of the Supreme Court's recent decision in *Hamdan* v. *Rumsfeld.* In that case the Supreme Court held that the military commission that had been convened to try Salim Ahmed Hamdan, violated the Uniformed Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions. The question before Congress is to frame an appropriate legislative response to that opinion.

The following discussion addresses the Court's decision and possible responses to that decision.

A. In General

On November 13, 2001, the President issued a military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[1] In that order the President stated, inter alia, that persons identified as members of al Qaeda or as persons who had engaged in terrorist activities, would be tried by military commissions. The order authorized the Secretary of Defense to appoint military commissions to try those persons. The Secretary did so in Military Commission Order No. 1, dated March 21, 2002. On May 2, 2003, the Department of Defense (DOD) released eight Military Commission Instructions, which provided more specific guidance on military commission procedures.

Salim Ahmed Hamdan, a citizen of Yemen, was captured, detained, and charged with one count of conspiracy, and was set to be tried by a military commission, sitting at Guantanamo Bay, Cuba. Hamdan sought habeas corpus relief in a Federal district court in the District of Columbia, which granted him relief on his arguments that first, the President lacked the authority to establish military commissions to try him for a conspiracy and second, the procedures to be used by the military commission violated the basic tenets of international and military law.[2] The United States Court of Appeals for the District of Columbia, reversed.[3]

The Supreme Court reversed the Court of Appeals and concluded that first, it had the authority to review the case[4] and second, that the military commission that had been convened to try Hamdan lacked jurisdiction because "its structure and procedures violate both the UCMJ and the Geneva Conventions."[5] Four members of the Court agreed that the crime of conspiracy was not a crime recognized by the law of war and therefore could not be tried by military commission.

Regarding the President's authority, the Court concluded that because the commission at issue was not expressly authorized by Congress, its task, as in Ex parte Quirin,[6] was to decide whether Hamdan's military commission was authorized. The Court reviewed the long history of military commissions, and noted that they have typically been used in three situations:

- First, military commissions have been used as substitutes for civilian courts where martial law has been declared;
- Second, military commissions have been used to try civilians where a temporary military government has been established and the local courts are not functioning; and
- Third, military commissions have been convened as incident to war where "there is a need 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."[7]

The third type, the Court said, was last used in World War II and was primarily a factfinding body to determine whether the person charged had violated the law of war. Its jurisdiction, the Court said, was limited to offenses recognized during a time of war.

B. The President's Authority to Authorize Military Commissions

In *Hamdan*, the Court did not decide whether the President has the independent authority to convene military commissions. It merely held that under the facts of the case, the military commission lacked jurisdiction to try Hamdan. The Court stated that at most, the UCMJ, the Detainee Treatment Act (DTA), and the Authorization of Use of Military Force acknowledged the President's authority to convene military commissions in those situations where they were justified under the Constitution and the laws, including the law of war.

The Court reviewed prior cases on the subject and concluded that in those cases, the Court had concluded that under the facts, the commissions in question were legal and consistent with the Constitution.

---

[1] 66 Fed. Reg. 57833.
[2] 344 F.Supp.2d 152 (D.C. 2004).
[3] 415 F.3d 33 (D.C. Cir. 2005).
[4] The Court rejected the government's argument that § 1005(e)(1) of the Detainee Detention Act of 2005 (DTA) stated that no court would have the jurisdiction to hear or consider any writ of habeas corpus filed by persons detained at Guantanamo Bay.
[5] 126 S.Ct. at 2759.
[6] 317 U.S. 1 (1942).
[7] 126 S.Ct. at 2776.

C. Limits on the President's Authority to Authorize Military Commissions

Absent a more express authorization from Congress, the Court said that its task was to decide whether the commission in question was justified. In doing so, the Court analyzed three possible limitations on the President's authority.

1. Crimes Charged Must Be Cognizable Under the Law of War

First, a plurality of the Court concluded that the charge against Hamdan—conspiracy—was not recognized under international law. Even if it were, the plurality said, the alleged acts did not occur in a theatre of war or after September 11, 2001. The Court, however, cited its decision in *In re Yamashita*, 327 U.S. 1, 13 (1946) for the proposition in that case that "neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war." An argument could be made that the plurality would recognize Congress' authority to permit non-law-of-war crimes to be prosecuted by military commission.

2. The Procedures Must Be Uniform with Rules of Procedure for Courts-Martial

Second, the Court interpreted Article 36(b) of the UCMJ to require that the procedural rules for military commissions must be uniform with the rules governing courts-martial, unless it is impractical to do so.

Article 36 provides:

> "§ 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 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) All rules and regulations made under this article shall be uniform insofar as practicable."

The Court stated that Article 36 places two limits on the President's authority to establish the rules for military commissions. First, Article 36(a) requires the President to promulgate rules of procedure that mirror the Federal rules of practice, to the extent practical and to the extent that they are not contrary or inconsistent with the UCMJ. The Court apparently agreed that the President had made that determination in his November 13, 2001 order.

Second, the Court held that Article 36(b) requires that the rules for military commissions be uniform with the rules for courts-martial, insofar as such rules are practical. The Court stated that there was nothing in the record to show that the President had made such a determination in this case.

The Court detailed several procedural rules for *Hamdan*'s military commission and concluded that they were clearly inconsistent with established practices for courts-martial. In particular, the Court was concerned about the provisions in the commission rules that would preclude the accused from hearing the evidence against him.

3. The Procedures Must Comply with Common Article 3 of the Geneva Conventions

Finally, the Court held that the commission rules also violated the Geneva Conventions.[8] The Court of Appeals had concluded that the Geneva Conventions did not apply because (1) those conventions are not judicially enforceable, (2) Hamdan was not entitled to their protections, and (3) even if he was entitled to their protections, the *Schlesinger* v. *Councilman*[9] abstention doctrine applied. Without deciding the merits of the argument that Hamdan was not entitled to the full protections of the Conventions because the conflict is not between signatory states, the Court concluded that one of the provisions, what is referred to as Common Article 3, did apply. That article appears in all four Geneva Conventions and requires that if the conflict in question is not international in character, a party to the conflict may not pass a sentence without a "previous judgment by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples."[10] The Court concluded that at a minimum, a military commission "can be reg-

[8] 126 S.Ct. at 2793.

[9] 420 U.S. 738 (1975) (civilian courts should not interfere with ongoing court-martial proceedings).

[10] 126 at 2795 (citing Common Article 3).

ularly constituted by standards of our military justice system only if some practical need explains deviations from court-martial practice." That need had not been shown, the Court said.

D. What the Supreme Court Did Not Hold

In analyzing a legislative response to the Court's decision in *Hamdan*, it is important to briefly address what the Court did not hold:

- First, the Court did not address the merits of the arguments on whether the full force and effect of the Geneva Conventions apply to the detainees held in Guantanamo Bay, Cuba.
- Second, the Court did not hold that the President lacks authority under the Constitution to convene military commissions.
- Third, the Court did not hold that certain provisions in the UCMJ or the Manual for Courts-Martial must be applied to military commissions.
- Fourth, the Court did not hold that only war crimes could not be tried by a military commission.

III. FORMULATING A LEGISLATIVE RESPONSE TO HAMDAN

A. In General

In its opinion, the Supreme Court stated that if "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."[11]

There are at least two issues that should be legislatively addressed in response to the Court's decision in *Hamdan*:

First, despite the long historical debate and conversations about the President's authority to convene military commissions, the Court in *Hamdan* did not directly address that issue. In my view, Congress should address that issue head on and codify the President's authority to do so.

Second, the Court in *Hamdan* focused a great deal on its perceived requirement in Article 36(b), UCMJ, to make the procedural rules of military commissions and courts-martial uniform. That is not a commonly-held viewpoint, and for reasons discussed below, Article 36 should be amended to make it clear that uniformity is not required.

Given the long-standing role of Congress in exercising its Constitutional powers under Article 1 § 8 (concerning the rules and regulations for the Armed Forces) it is appropriate for Congress to map out only broad policy guidelines for implementing military commissions, and leave to the President and the DOD the task of more specifically setting out the procedures and rules to be used.

B. Addressing the President's Power to Create Military Commissions.

One of the first issues deserving Congressional attention is the longstanding question about the President's authority to convene military commissions. In the past, when it reviewed the constitutionality of military commissions, it either assumed that the President had the inherent authority, as Commander in Chief, to convene such tribunals, or that Congress in some way had authorized such tribunals. In *Hamdan*, the Court noted that because Congress had not specifically authorized a military commission to try the accused, the Court's duty was to determine whether the commission, assuming the President had the authority to convene commissions generally, had properly done so in *Hamdan*.

An appropriate first step would be to amend the UCMJ to address explicitly the President's authority to convene military commissions. That amendment could take the form of a new article that would provide the authority, with or without any other limitations concerning when such commissions might be authorized. That new provision could also address the President's authority to promulgate rules of procedure for conducting such commissions, a subject addressed below.

That amendment could also include a reference to the three types of military commission recognized by the common law and addressed in the Court's opinion in *Hamdan*.

A proposed amendment to the UCMJ, in form of adding a new Article 5a is at the end of this statement.

C. Addressing the Uniformity-of-Rules Requirement in Article 36(b)

1. In General

One of the key, and more difficult, points made by the Supreme Court in *Hamdan* was the fact that the proposed commission rules of procedure were inconsistent with

[11] 126 S.Ct. at 2799.

the UCMJ. The Court relied heavily upon language in Article 36(b), which the Court said, required the President to apply the rules used in courts-martial to the military commission. As pointed out by Justice Thomas in his dissent, it is not clear where the majority got that particular reading from the statute.[12]

The most common reading given to Article 36(b) is that the uniformity requirement was designed to make the practices in the various armed forces uniform, in response to the sometimes disparate practices that existed before the UCMJ was enacted in 1950.

Notwithstanding its reading of Article 36(b), the Court recognized the ability of Congress to amend the UCMJ.[13]

At first blush it would seem an easy task to simply merge the existing UCMJ provisions and the Rules for Courts-Martial (RCMs) found in the Manual for Courts-Martial into any military commission. Doing so is not only not feasible—given the complexity of existing statutory and Manual provisions—but could actually undermine the very purposes and functions of military commissions. That purpose is to expeditiously, without the unnecessary sacrifice of due process, determine whether a given person has committed an alleged offense, and if so, to justly determine a fitting punishment.

In considering the question of simply adopting existing court-martial procedures into military commissions, it is important to first briefly set out the modern court-martial procedures.

2. How Courts-Martial Function

Courts-martial, which are only temporary tribunals, are created to determine the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces. Some would argue that they are designed to enforce discipline and others, to insure that justice is done.[14]

The current court-martial is a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the Federal judiciary and is not subject to direct judicial review in that system. In some points, the court-martial provides greater safeguards than its civilian counterparts, and a brief survey of the current practice bears this out.

Before swearing and preferring court-martial charges, a company commander is responsible for conducting a thorough and impartial inquiry into the charged offenses.[15] This almost always involves obtaining legal advice from a judge advocate. During that investigation, an accused is entitled to the protections of the Fourth Amendment, vis a vis searches and seizures, the privilege against self-incrimination, and the Sixth Amendment right to counsel, for example, at a pretrial lineup. Those protections are provided not only by case law, which as concluded that those constitutional protections extend to servicemembers, but perhaps more importantly by the Military Rules of Evidence.[16]

If charges are preferred they are moved up the chain of command for recommendations and actions by higher commanders. If the command believes that the charges are serious enough to warrant a general court-martial (roughly equivalent to a civilian felony trial) the commander orders that an Article 32 investigation to be held.[17] At that investigation the accused is entitled to be present, to have the assistance of counsel, to cross-examine witnesses, and to have witnesses produced.

---

[12] 126 S.Ct. at 2842 (Thomas, J., dissenting). Paragraph 2(b)(2) to the Preamble to the Manual for Courts-Martial states, however, that:

> Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of evidence prescribed for courts-martial.

The Preamble is part of the "supplementary materials" published by the DOD and Department of Transportation. They do not constitute the official views of the DOD or any other agency and "do not constitute rules." Discussion, Preamble to the Manual for Courts-Martial (2005). Rules for Courts-Martial (RCM) 101, Scope, states only that the RCMs apply to procedures for courts-martial. No mention is made of other military tribunals.

[13] 126 S.Ct. at 2799.

[14] See Schlueter, Military Criminal Justice: Practice and Procedure, § 1–1 (6th Ed. 2004)

[15] Art. 30, UCMJ

[16] See Mil. R. Evid. 301 (privilege against self-incrimination); Mil. R. Evid. 304 (procedures for determining admissibility of accused's statements); Mil. R. Evid. 305 (Article 31(b) warnings and right to counsel warnings); Mil. R. Evid. 311–316 (rules addressing requirements for searches and seizures); and Mil. R. Evid. 321 (admissibility of eyewitness identifications).

[17] Art. 32, UCMJ

Although the Article 32 investigation is often equated with a civilian grand jury, in many ways it is far more protective of an accused's rights than a grand jury.

If the command decides to refer the charges to a court-martial, the convening authority selects the court members, but does not select either the counsel or the military judge. Specific provisions in the UCMJ prohibit a convening authority from unlawfully influence the participants or the outcome of the case.

The accused is entitled to virtually the same procedural protections he would have in a State or Federal criminal court—largely as a result of the requirement in Article 36(a) that the rules of procedure for military courts are supposed to parallel the procedures used in Federal courts. For example, a military accused is granted:

- the right to a speedy trial (under the Sixth Amendment and under a 120-day speedy trial provision in the Manual for Courts-Martial);
- extensive discovery, that is supposed to be co-equal with the right of discovery for the prosecution;
- the right to production of evidence for examination and testing;
- the right to request witnesses, including expert witnesses;
- the right to request the assistance of experts in preparing for trial;
- the right to confront witnesses;
- the right to select either a trial with members or a trial by the judge alone (bench trials);
- the right to request inclusion of enlisted members, if the accused selects trial by members (effectively a jury trial);
- the right to full voir dire of the court members and the right to exercise both challenges for cause and peremptory challenges;
- the ability to challenge the military judge for cause;
- the right to file motions in limine, motions to suppress, and motions to dismiss the charges on a wide range of grounds (for example invoking constitutional privacy rights to dismiss rules or regulations governing personal conduct).

In many cases the accused and the convening authority engage in plea bargaining and execute a pretrial agreement. Typically, those agreements require the accused to plead guilty in return for a guaranteed maximum sentence. Before accepting a guilty plea, the military judge is required to conduct a detailed "providency" inquiry to insure that the accused is pleading guilty voluntarily and knowingly, and that a sufficient factual basis supports the accused's plea.

If the accused pleads not guilty, during the trial the Military Rules of Evidence apply.[18] Those rules, which mirror the Federal Rules of Evidence, include a number of rules not found in the latter. For example, Section III of the Military Rules includes very specific guidance on searches and seizures, confessions, eyewitness identification, and interception of oral and wire communications. Section V contains thirteen detailed rules governing privileges. In particular, Military Rule of Evidence 505 provides very detailed guidance on disclosure of classified information and Rule 506 provides equally specific guidance of disclosure of government information that would be detrimental to the public interest.

Sentencing is usually a separate proceeding. The rules of evidence (unlike in the Federal system) apply at the sentencing phase. During sentencing, the accused is entitled to present witnesses and other evidence for the court's consideration, and to challenge the prosecution's evidence.

The post-trial procedures are extremely detailed. A copy of the record of trial is given to the accused, at no cost. Depending on the level of punishment imposed, a formal legal review of the proceedings is prepared. The post-trial review and recommendations are presented to the convening authority for consideration. During that process the accused has the right to present clemency matters to the convening authority.

For certain courts-martial, appellate review is automatic in the one of the service Courts of Criminal Appeals. Appellate counsel is provided free of charge. Review in the military appellate courts may take upwards of 1-year. The members of those courts are high-ranking military officers. Those courts are given factfinding powers and have the authority to reassess a court-martial sentence.

An accused may petition for further review by the United States Court of Appeals for the Armed Forces, which sits in Washington, DC. That court is composed of five civilian judges, who are appointed for 15-year terms. The time from the initial trial to completion of review by the Court of Appeals can typically take several years.

[18] See generally Saltzburg, Schinasi & Schlueter, Military Rules of Evidence Manual (5th Ed. 2003).

During appellate review, it is not unusual to find a court-martial being reversed for violation of one of the many procedural rules, summarized above.

An accused may then seek certiorari review at the Supreme Court of the United States.

3. Why Attempting to Make the Rules for Courts-Martial and Rules for Military Commissions Uniform Raises Additional Problems

There are several reasons why attempting to simply use either the UCMJ or the Manual for Courts-Martial as a default system for military commissions potentially causes additional problems.

First, it is essential that military commissions be able to operate quickly and efficiently to determine guilt or innocence and if a person is found guilty, an appropriate sentence. Applying the RCMs and the Military Rules of Evidence provide valuable due process rights for servicemembers—that may rival the protections provided in the civilian system. Applying them in a military commission setting could virtually bog down the system in delays experience in everyday courtrooms.

Second, it seems clear that using the UCMJ or the Manual for Courts-Martial as a presumed template for military commissions could require a drastic overhaul of those provisions. For example, Military Rules of Evidence contain a number of privileges. Given the nature of the controversy regarding privileges, Congress in enacting the Federal Rules of Evidence in 1975 could not agree on a set of privilege rules and instead left it to the Federal courts to determine which privileges to adopt and which to reject. The Military Rules of Evidence, on the other hand specifically cover communications such as the clergy member privilege.[19] Deciding which privileges to apply, and when, would be a very difficult task.

Similarly, the UCMJ and the Military Rules of Evidence provide very detailed guidance for rights-warnings to suspects and very detailed guidance on obtaining evidence by search and seizure. Those rules would have to be completely rewritten to address any exceptions for military commissions. In the alternative, Congress or the President could draft a provision in the UCMJ or the Manual for Courts-Martial that explicitly exempted various rules in those sources. Legislatively, that would be extremely cumbersome.

4. Proposal: Amend Article 36(b) to Make it Clear that the Uniformity Requirement Applies Only to Courts-Martial and Create a Separate Provision for Military Commission Procedures

As a starting point for redrafting any rules governing military commissions, it would be important to make clear, what many have assumed to be the case, that Article 36(b) was intended to apply to uniform rules of practice among the Armed Forces.

First, and to that end, Article 36(b) should be amended to state clearly that the uniformity requirement extends only to courts-martial. The text of the proposed amendment is below.

Second, a new provision should be added to the UCMJ, specifically addressing the adoption of procedural rules for military commissions. The *Hamdan* decision is a good starting point for identifying key procedural due process protections that civilized nations would expect to exist in any tribunal. In addition, common principles of procedural due process would inform the drafters of such rules: the right to be present during all proceedings; the right to the assistance of counsel; the right to cross-examine government witnesses and challenge the government evidence; the right to be heard; and the right to an appeal by an impartial body.

In the discussions following *Hamdan*, much has been made about applying the authentication and hearsay rules. Clearly, those rules, although basic to the everyday courtroom practice in both civilian and military courts would have to be adjusted for practice in the military commissions. So too, would the now-accepted discovery rules have to be carefully considered.

The task for drafting these military commission rules should rest first in the President and DOD. That is the model that has been used for decades and generally works well. Given the delicate, and potentially international, nature of military commission proceedings, Congress could require that the President report the rules to Congress.

---

[19] Mil. R. Evid. 503. If the Military Rules of Evidence were to apply to military commissions, unaltered, an unlawful combatant being tried by military commission could exclude any statements he or she made to a spiritual advisor, notwithstanding the fact that the statement was completely voluntary and overhead by a guard. One option would be to state that none of the privileges in the Rules of Evidence apply, but that would also preclude invocation of the attorney-client privilege. An alternative option would be to go through each privilege and determine which provision applied or did not apply to a military commission.

In any event, it is clear from *Hamdan* that any rules adopted by the President, with or without congressional approval, will be subject to review in the Federal courts.

IV. CONCLUSIONS AND RECOMMENDATIONS

The Supreme Court's decision in *Hamdan* v. *Rumsfeld* provides Congress and the President with an opportunity to re-evaluate the subject of military commissions, specifically the authority of the President to convene such tribunals and consideration of rules of procedure that will be consistent with the Constitution and the rule of law.

To those ends, two amendments to the UCMJ seem appropriate. The first amendment would be to add a new Article 5a, which would address the President's authority to convene military commissions, and second, address the promulgation of procedural rules for those commissions.

The second amendment would address the uniformity requirement in Article 36(b) to make it clear that that provision applies only to uniformity concerning court-martial practices among the Armed Forces.

The proposed amendments are as follows. New material is underlined, and language to be deleted is struck through:

§ 805a. Article 5a. Authority to Convene Military Commissions; Rules of Procedure

(a) The President may convene military commissions to——

(1) Serve as a substitute for civilian courts at times and locations where martial law has been declared;

(2) Try foreign nationals as part of a temporary government over occupied territories where the civilian government cannot and does not function; and

(3) Try foreign nationals accused of violating the law of war, during times of war.

(b) Pretrial, trial, and post-trial procedures, includes modes of proof, for cases tried before military commissions, may be prescribed by the President, which are not inconsistent with fundamental guarantees of due process.

NOTES

Proposed Article 5a explicitly codifies the historically recognized authority of the President to appoint military commissions. Subdivision (a) states the three types and functions of military commissions, recognized by the plurality in *Hamdan*. 126 S.Ct. at 2775–76 (citing authorities). Subdivision (b) authorizes the President to promulgate rules for military commissions. The baseline for such rules would be fundamental concepts of due process.

"§ 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 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 practicable, the rules governing cases triable in courts-martial shall be uniform for all Armed Forces. All rules and regulations made under this article shall be uniform insofar as practicable."

NOTES

The amendment to Rule 36(b) would make it clear that the uniformity requirement extends only to courts-martial procedures. It would thus create a clean slate for adopting military commission rules that more carefully address the balance between the function and purposes of military commissions, the basic due process rights of an accused, and preservation of national security.

Clarifying the uniformity requirement in Article 36(b) does not answer the question of what rules should be adopted for military commissions. But it does free the drafters of such rules from the strictures of the very detailed procedural and evidentiary codes now applied to courts-martial and yet still adopt rules that comport with basic due process.

Chairman WARNER. I was waiting to hear what you told your Sunday school class. I don't mean to be impertinent, but it seems to me that it's the adherence to the rule of law that sets this Nation apart from those that chop off the heads.

Mr. SCHLUETER. Absolutely. Absolutely. I was asking them for their input. I didn't tell them exactly what I was going to say.

Chairman WARNER. If you're given the opportunity, you can say that one of your fellow students suggested that as an answer.

Mr. SCHLUETER. I will. Thank you very much, Senator.

Chairman WARNER. I found your testimony very enjoyable. I do hope I can spend a minute with you before we conclude our proceedings.

Now, we have Mr. Silliman, professor of the practice of law and Executive Director, Center on Law, Ethics, and National Security, Duke University.

Thank you for joining us.

STATEMENT OF SCOTT L. SILLIMAN, PROFESSOR OF THE PRACTICE OF LAW AND EXECUTIVE DIRECTOR, CENTER ON LAW, ETHICS, AND NATIONAL SECURITY, DUKE UNIVERSITY

Mr. SILLIMAN. Thank you, Mr. Chairman.

I think we've heard the two extremes expressed already on this panel. I think Professor Katyal would have us use courts-martial, as they are currently existing, which would require absolutely no action on the part of Congress. The President could start them immediately. Professor Schlueter has suggested that the baseline really ought to be the President's military order and Military Commission Order Number 1. I'm going to provide a path between those two, Mr. Chairman.

But I think we need to absolutely understand what the Court did and what it did not do in *Hamdan* v. *Rumsfeld.* It did not deal with the constitutional power of the President to create military commissions. As a matter of fact, in a very lengthy portion of that opinion, Mr. Chairman, it acknowledged, but it did not affirm that it exists. What that case is all about is a statutory interpretation, much like the Court did in a case over 200 years ago called *Little* v. *Barreme* and in the Steel Seizure case. It said, when the President is acting as Commander in Chief under his Article 2, Section 2, powers, then he must stay within the constraints that Congress has imposed upon him, and, in this instance, those are in the UCMJ.

I might also say, Mr. Chairman, that I do not agree with many on the first panel that Common Article 3, as interpreted by the United States Supreme Court, extends, by that ruling, outside the context of military commissions. I am well aware of what Secretary England did within the DOD; and I would suggest that, as a matter of policy, that makes sense. It was not, in my opinion, Mr. Chairman, required, as a matter dictated by the Supreme Court. The Supreme Court carefully looked at Common Article 3, through the lens of Article 21. That's all it did. That's why it made no other reference to any other provision, but for the regularly constituted court. It didn't deal with humiliating treatment or anything of the like. So, we're dealing with a question of statutory interpretation, not constitutional interpretation.

I want to limit my comments to commissions.

There are basically three options, Mr. Chairman. One, as suggested, is to take the existing military commission rules and procedures, and merely give congressional sanction to them, basically putting everything back the way it was. Now, I think we should know that the original military order of November 13, 2001, was basically copied from President Roosevelt's order of 1942, and it had absolutely no participation from military lawyers. It was a matter of convenience to use that as a model, even to the extent that if you look at that order, in paragraph 7(b), it reads in effect "to suspend the writ of habeas corpus," which the Supreme Court, in the *Quirin* case, struck down. So, I do not think that the Military Commission Order Number 1, which had to be constrained within the President's military order, could not change that. It should not be the base we ought to use.

Now, it is clear that if this Congress wanted to limit the application of Common Article 3, it could do so domestically. You have that right. Because a treaty and a statute, under Article 6 of the Constitution, are treated as the same, and the last trumps the earlier one. But I would suggest, Mr. Chairman, that to do that, to reinstitute a system of procedures that was criticized by the United States Supreme Court, and which do not meet commonly recognized international law standards, would be imprudent. So, I strongly suggest that's not what the Court should do.

Senator LEVIN. You mean Congress.

Mr. SILLIMAN. I'm sorry. Congress. Thank you, Senator Levin.

A second option is to craft a completely new system of rules and procedures for military commissions using the President's military commission order as the base, and building up by including those provisions, perhaps from the court-martial procedures, perhaps from the international tribunals, that, in the eyes of Congress, would be appropriate.

That approach, I'm sure, could cure most, if not all, of the defects raised by the Supreme Court in its opinion. It could create a more flexible standard for the admissibility of evidence, I think, which is a concern for many of the members of your committee. I do share the view, though, that however you build a standard for the admissibility of evidence, that it should not allow, under any circumstances, the introduction of evidence that was acquired through torture or coercive interrogation techniques that are outside either the DTA or the current version of the U.S. Army Interrogation Manual.

Now, that second option would be a better option, in my judgment, than reinstituting the current system, but I think there is a third option that is better, that requires no major legislation on the part of Congress, and that is to take the UCMJ as the baseline, and then to make adjustments from that to accommodate the needs of security and the concept that there are some provisions of the UCMJ which may not be applicable.

Now, I would remind you, Mr. Chairman, that there is already existing jurisdiction in the UCMJ, under Articles 18 and 21, for jurisdiction by military commissions. As the Supreme Court told us, that in those commissions, underneath the UCMJ—not outside of it, the way the President created it that the rules and procedures should be uniform with court-martial rules and procedures insofar

as practicable. Yes, you could legislate, and legislatively reverse what the Supreme Court said. I don't think we need to do that, nor should we do that.

Granted, there are probably two articles, maybe one more, that would need to be amended by using military commissions under the UCMJ. One that's been mentioned, I think several of us agree Article 36 would have to be amended to allow for military commissions, rather than courts-martial. I also agree that there should be some kind of robust, substantial judicial review in the Court of Appeals for the Armed Forces. I agree with that. That could be done easily with a change to Article 66.

But you remember, sir, that this Congress, in 1951, made the decision that, although you have the constitutional authority to make rules governing the land and naval forces, that, in Article 36 and Article 56, with regard to maximum punishments, you did make the conscious decision to delegate to the President of the United States the authority to make those rules. It has worked well for 56 years.

So, I disagree with Mr. Dell'Orto that there are going to be 140 or 145 articles of the code that need to be changed. I totally disagree with that. At most, there would be three or four that would require congressional action.

The other rules of procedure that would be changed, if they need to be changed, are in the military rules of evidence and the rules for courts-martial, in the Manual for Courts-Martial. That's the President's executive order.

Yes, the NIMJ proposal, I think, generally is a good idea. I think there needs to be, Senator Levin, at least a notice requirement. I think that's very important so that Congress knows what the President determines to be impractical.

I do suggest one thing, that the invitation to the first panel was to solicit and to bring forward to this committee the ideas for these changes. I think that's the wrong group, simply because I spent 25 years as an Air Force lawyer, a prosecutor and defense counsel, but I've been out for 13 years, teaching law at Duke. What this committee needs to do is to solicit and receive the comments of the Active-Duty lawyers. You had the JAGs here last week, but even those two stars, those flag officers, are not the ones that are practitioners. I'm talking about the young captains and majors who know it far better than any of us do, and it is their counsel that I think needs to be heard.

Now, there is, perhaps, a risk that if that group were convened and they could do it very quickly, Mr. Chairman, and provided to the President, and perhaps provided to this committee, their ideas on how to make those minor changes, that the President might not agree with that group. That, we know, happened 3 years ago, with regard to interrogation techniques.

I think, with the reporting requirement, or, Senator Levin, perhaps something greater than that, that this body of individuals who are the practitioners, who know it best, and whose guidance I would look to, as far as those fine refinements, can do it quickly to meet your timetable, but they, far better than any of us, are the ones you should be listening to.

So, Mr. Chairman, I would suggest that what this Congress needs to do, as far as legislative change, is limited to a few articles of the code. The vast changes to make the military commission system, under the code, adaptable, so it provides for captures on the battlefield, for evidence and chain of custody, those can be done in the Manual for Courts-Martial, under, perhaps, Article 18. You need not change the rest of the provisions. It can be built into Article 18.

I do worry, sir, that in the perceived rush for legislative action, that we take the risk of erring, because the system that we build will not just be for *Hamdan* and perhaps 20 or 30 others, it will be a system that must be built for the future, for future conflicts. So, let's not let the rush steer us away from receiving the advice of those who know it best, and who can provide you with that good advice and counsel.

Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Silliman follows:]

PREPARED STATEMENT BY SCOTT L. SILLIMAN

Mr. Chairman, Senator Levin, and members of the committee. My name is Scott L. Silliman and I am a Professor of the Practice of Law at Duke Law School and the Executive Director of Duke's Center on Law, Ethics, and National Security. I also hold appointments as an adjunct Associate Professor of Law at the University of North Carolina, and as an Adjunct Professor of Law at North Carolina Central University. My research and teaching focus primarily on national security law and military justice. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department.

I thank you for the invitation to discuss with the committee my views on the Supreme Court's opinion in *Hamdan* v. *Rumsfeld* [1] and what your legislative response should be to that ruling. As you take testimony and deliberate on the type of statutory system which could be adopted or crafted for prosecuting terrorists for violations of the law of war, I submit that the task before you extends far beyond Hamdan and the few others at Guantanamo Bay currently facing military commissions. It is to fashion a system for prosecuting terrorists that will withstand judicial scrutiny in our courts, meet commonly accepted international legal standards, and be available for use in other non-traditional armed conflicts in the future. As I will explain in greater detail later, I believe such a system should be predicated upon the Uniform Code of Military Justice (UCMJ) and its core elements of procedural protection, with minor modifications made where deemed appropriate. I will first briefly discuss military commissions in general and the substance of the Supreme Court's ruling in *Hamdan* before turning to what I believe are the legislative options currently under consideration.

MILITARY COMMISSIONS GENERALLY

Military commissions have been used to try those accused of violations of the law of war as far back as the Revolutionary War when Major John Andre, Adjutant-General to the British Army, was prosecuted in 1780 on a charge that he had crossed the battle lines to meet with Benedict Arnold and had been captured in disguise and while using an assumed name.[2] Others were conducted during the Mexican and Civil Wars, and more recently during World War II.[3] There are actually three different types of military commissions: martial law courts, occupation courts, and war courts.[4] Martial law courts have been used when martial law is declared,

[1] *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006.)

[2] See generally Scott L. Silliman, On Military Commissions, 36 Case W. Res. J. Int'l L. 529 (2005); Louis Fisher, Military Tribunals and Presidential Power (Univ. of Kansas Press 2005).

[3] Id.

[4] Major Timothy C. Macdonnell, Military Commissions and Courts-Martial: A Brief Discussion fo the Constitutional and Jurisdictional Distinctions Between the Two Courts, The Army Lawyer, March 2002, DA PAM 27–50–350, 19, 37.

such as during the Civil War[5] and in Hawaii during World War II.[6] An occupation court can be used when the United States is an occupying power, such as in post-war Germany when an American dependent wife was charged with murdering her military husband in violation of the German criminal code.[7] Finally, war courts have been used to prosecute violations of the law of war during a period of recognized armed conflict, such as during World War II.[8] The military commissions which were established by President Bush in his Military Order of November, 13, 2001,[9] and which were envisioned for use at Guantanamo Bay were of this last type, war courts.

THE COURT'S OPINION IN *HAMDAN* V. *RUMSFELD*

The first issue facing the Court was jurisdictional could it still rule on Hamdan's case since the Government argued that the Detainee Treatment Act (DTA),[10] enacted on December 30, 2005, "stripped" the Court of the power to hear Hamdan's petitions for habeas and mandamus, even though they had been filed in the district court over 2 years earlier and the Supreme Court had granted certiorari almost 2 months prior to the President signing the act into law. Using principles of statutory construction, the Court ruled that it retained jurisdiction.[11]

On the merits, the Court initially probed the interplay between the powers of the President and those of Congress in time of war, raising, but not answering, a question left lingering from Milligan:

> "Whether Chief Justice Chase was correct in suggesting that 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."[12]

The Court went on, however, to specifically reject the Government's assertion that the President's authority to convene military commissions flowed from statute, whether it be the Authorization for the Use of Military Force (AUMF),[13] the DTA, or the UCMJ.[14] In one sentence of singular significance, albeit buried in a footnote, the Court clearly foreshadowed its principal holding:

> "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations which that Congress has, in proper exercise of its own war powers, placed upon his powers. See *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise."[15]

The Court then discussed two statutory provisions which established just those limitations, Articles 36(b) and 21 of the UCMJ, 10 U.S.C. §§ 836(b) and 821, respectively. The Court looked to the text of Article 36(b),[16] interpreting it to mean that procedures established for military commissions must be uniform with those established in the UCMJ for courts-martial unless such uniformity was not practicable.[17] The Court ruled that the President's determination that such uniformity was impracticable was insufficient to justify the variances from court-martial procedures.[18]

With regard to Article 21,[19] the Court ruled that Congress had conditioned the President's use of military commissions on compliance with the law of war, of which

---

[5] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[6] *Duncan* v. *Kahanamoku,* 327 U.S. 304 (1946).
[7] *Madsen* v. *Kinsella,* 343 U.S. 341 (1952).
[8] *Ex parte Quirin* 317 U.S. 1 (1942); *Johnson* v. *Eisentrager,* 339 U.S. 763 (1950).
[9] Military Order, Detention, Treatment,and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (2001).
[10] Pub. L. No. 109–148, 119 Stat. 2739 (2005), hereinafter DTA.
[11] *Hamdan, supra* note 1, at 2769.
[12] Id. at 2774.
[13] Pub. L. 107–40, 115 Stat. 224 (2001).
[14] "The Government would have us dispense with the inquiry that the Quirin Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions." . . . ."Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws', including the law of war." (Id. at 2774, 2775).
[15] Id. n. 23.
[16] "All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b).
[17] *Hamdan,* supra note 1, at 2790.
[18] Id. at 2791.
[19] 10 U.S.C. § 821.

Common Article 3 of the Geneva Conventions was a part and which dictated the use of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[20] Because the accepted definition of a regularly constituted court includes ordinary military courts (courts-martial) but excludes all special tribunals,[21] the President's military commissions were not in compliance with Common Article 3 since he had demonstrated no practical need for deviating from courts-martial practice.[22]

Put most simply, the Court's ruled that in unilaterally creating a system for military commissions, the President exceeded his authority by running afoul of statutory limitations imposed by the Congress, in this instance in the UCMJ.[23] Since my testimony is limited to the Court's ruling with regard to military commissions under the President's Military Order, I will not address whether or to what extent the Court's inclusion of Common Article 3 as a part of the law of war impacts other applications of executive power in the War against al Qaeda.

POSSIBLE LEGISLATIVE OPTIONS IN RESPONSE TO THE COURT'S DECISION

One option being considered is to pass a law which which merely gives legislative sanction to the prior system for military commissions-putting everything back in place the way it was-notwithstanding the Court's determination that there must be compliance with Common Article 3. Because Article VI of the Constitution treats statutes and treaties alike as "the Supreme Law of the Land,"[24] and a later enacted statute displaces an earlier one,[25] I believe that, as a matter of domestic law, Congress could legislatively restrict the application of Common Article 3 with regard to military commissions. There is, however, no assurance that such a "reblued" military commission system would pass judicial muster and, at the very least, it would invite additional challenges in the courts and further years of uncertainty. More importantly, merely giving Congressional sanction to the minimal level of due process in a military commission system which was criticized as inadequate by the Supreme Court[26] and which fails to satisfy commonly recognized international legal standards is, I believe, imprudent.

A second option is for Congress to craft a statute authorizing a completely new military commission system, using the President's Military Order and Military Commission Order No. 1[27] as a base line and "building up" to a higher level of due process by adding in procedural protections from the UCMJ. Such a statute could which remedy most of the defects which the Court cited in its opinion, and yet still satisfy those who demand a more flexible standard for the admissibility of evidence. For example, less reliable testimony such as unsworn statements or hearsay is not allowed in our Federal and state courts, but could be admissible in military commissions if Congress made that the rule. Even under this more flexible standard, however, I strongly believe that statements of an accused or others acquired through coercive interrogation techniques should not be allowed into evidence under any circumstances. If the statute provided that a detainee would be present at all trial sessions, unless he became disruptive; if there were provisions to ensure that classified national security information was safeguarded; and if there was some provision for a more substantial judicial review of a conviction, such as in the United States Court of Appeals for the Armed Forces which deals with military justice issues, such a system would, I think, satisfy the objections of most. In other words, if virtually all the due process safeguards which currently apply in courts-martial, save for a more flexible standard for the admissibility of evidence, were grafted into a newly

[20] Id. at 2796, citing the Geneva Conventions of 1949, 6 U.S.T. at 3320 (Art 3(1)(d)).

[21] Id.

[22] Id. at 2797.

[23] In this regard, the Court's analysis in Hamdan is no different from that in earlier cases. *Little* v. *Barreme,* 6 U.S. (2 Cranch) 170 (1804) and *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

[24] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art VI, cl. 2.

[25] See Head Money Cases, 112 U.S. 580, 598–599 (1884).

[26] A military commission system with a similar lax standard for the admissibility of evidence and little overall due process drew criticism from two justices of the Supreme Court in an earlier era. Although the Court upheld the constitutionality of the military commission which convicted Japanese General Tomoyuki Yamashita, Justices Rutledge and Murphy wrote scathing dissents about the lack of due process requirements in that commission. *Yamashita* v. *Styler,* 327 U.S. 1, 26–29, 44–45, 48–66 (1946).

[27] Department of Defense Military Commission Order No. 1, Mar. 21, 2002, available at http://www.defenselink.mil/news/legalrefs.htm (last visited July 17, 2006).

enacted military commission system, that type of legislative response would be, I suggest, a better option. I submit, though, that this option starts from the wrong base line—the old system—and is unnecessary because an already existing statute can readily be tailored to achieve a better result.

The third option, and the one I advocate, is to use the UCMJ[28] as the base line, and then make whatever minor adjustments may be necessary where certain provisions of the Code or the Manual for Courts-Martial[29] are deemed impracticable. The UCMJ is a fair and well-proven system of law, created by Congress some 56 years ago partly in response to the many criticisms of military justice actions during World War II where there was little due process in courts-martial. It is the military criminal code used to deal with misconduct committed by members of our own Armed Forces, and the Supreme Court clearly implied that it could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay. Further, and more importantly, the Code already provides for jurisdiction to prosecute, either by courts-martial or military commission, those who violate the law of war during armed conflict,[30] although I am unaware of any such trials being conducted under this authority. If we were dealing with individuals who were classified as prisoners of war, the Third Geneva Convention requires that only a court-martial (or perhaps trial in Federal criminal court) could be used to prosecute them;[31] but those held at Guantanamo Bay have not been so classified, so either system under the UCMJ, courts-martial or military commission, is permitted. To use courts-martial, the type of tribunal used for our own military personnel, with its inherent procedural protections which meet and sometimes exceed those in Federal criminal trials, is clearly not appropriate.

The use of military commissions, as provided for under the Code, is therefore the better prosecutorial forum. Even before the enactment of the UCMJ in 1950, military commissions were recognized as an alternate form of tribunal for use by commanders in the field when courts-martial were deemed inconvenient or impracticable.[32] However, Congress in the UCMJ stipulated that the rules and regulations

---

[28] 10 U.S.C. § 801 et seq. (2000 ed.).

[29] Manual for Courts-Martial, United States (2005 edition), Exec. Order No. 13365, 69 Fed. Reg. 71333 ((2004) (hereinafter MCM).

[30] Article 18 reads, in part, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818. Article 21 reads "The provisions of this chapter conferring jurisdiction upon-courts-martial do not deprive military commissions, 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, provost courts, or other military tribunals" 10 U.S.C. § 821. Article 2(a)(12) extends personal jurisdiction to those non-military, non-U.S. citizens at Guantanamo Bay: "Subject to any treaty or agreement to which the United States is or may be a party or to an accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a)(12).

[31] Article 84 provides that "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power. . .."; and Article 102 states "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the Armed Forces of the Detaining Power. . . ." Geneva Convention Relative to the Treatment of Prisoners of War, arts 84, 102, July 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[32] The legislative history of Article 15 of the Articles of War, the predecessor of Article 21 of the UCMJ, is relevant in this regard. Army Brigadier General Crowder, then Judge Advocate General of the Army, testified before the Senate Subcommittee on Military Affairs on February 7, 1916, as follows:

"General Crowder: Article 15 is new. We have included in Article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced. . . . It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. . . . Yet, as I have said, these war courts never have been formally authorized by statute." (Emphasis added) Testimony of Brigadier General Enoch H. Crowder, United States Army, Judge Advocate General of the Army, on February 7, 1916, before the Subcommittee on Military Affairs, United States Senate, Revision of the Articles of War, S. Rep. No. 130, 64th Cong., 1st Sess. 40.

under the Code should be "uniform insofar as practical"[33] and, no matter how that provision was interpreted in the past, the Supreme Court in Hamdan said that it meant that "the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable."[34] The task, then, is to identify those court-martial provisions which would clearly be impracticable when prosecuting terrorists by military commission. I suggest that those articles of the UCMJ which would not, in part or in whole, be practicable in military commissions are few; the greater number would be in the Manual for Courts-Martial, an executive order, which requires action only by the President, perhaps with congressional approval.

As to the UCMJ, I suggest that Article 31(b),[35] requiring the rendering of advice of rights to a person being interrogated who is suspected of an offense, has no application in a military commission procedure. Similarly, Article 32,[36] requiring a pretrial investigation prior to the convening of a general court-martial, would be neither necessary nor appropriate. Finally, with regard to appellate review of convictions of military commissions, Article 66[37] would need to be amended by adding military commissions to the jurisdiction of the service Courts of Criminal Appeals, and also adding a provision for the President to designate which of the respective Courts of Criminal Appeals would exercise jurisdiction over the commissions. Since Article 67,[38] regarding review by the Court of Appeals for the Armed Forces, uses the term "cases", there appears to be need for any amendment to that provision.

Proposed amendments to the UCMJ sponsored by the National Institute of Military Justice (NIMJ), which are on record with the committee and which I specifically endorse, would effect the change to Article 66. As to excluding Article 32 from military commission procedure, the NIMJ proposal also contains a recommended amendment to Article 36 which would grant the President the authority to prescribe procedures for military commissions, applying the principles of law and the rules of evidence prescribed for general courts-martial (with the exception of Article 32) insofar as he considers them practicable, as long as those procedures are not contrary to or inconsistent with international law. The amendment also contains a reporting requirement to Congress regarding the President's determination of impracticability. Finally, the NIMJ proposal includes an amendment to Article 21[39] which would provide specific statutory authorization for the President to establish military commissions (and provost courts) in time or war or pursuant to an authorization for the use of force, as long as the commissions are consistent with international law, including the law of war. Since I take the view that the President, when acting pursuant to his commander in chief powers under Article II, Section 2, is constitutionally empowered to establish military commissions unless constrained by Congress,[40] I do not believe this proposed amendment to Article 21 is necessary, but it may be prudent as an additional, statutory grant of authority for him to establish a commission system pursuant to the Code.

There are several provisions of the Manual for Courts-Martial which would seemingly not be practical in military commission procedures, but, as mentioned above, making changes to these provisions is within the purview of the President but would also presumably be subject to the reporting requirement of NIMJ's proposed amendment to Article 36. The speedy trial rules governing courts-martial,[41] as well as the myriad rules governing the admissibility of evidence and the application of the exclusionary rule,[42] will need to be tailored to meet the exigencies of captures and acquiring evidence in battlefield environment while still maintaining a fundamental fairness to the accused. The provisions which govern the admissibility of classified and other sensitive government evidence (when requested by the accused)[43] which generally mirror the Classified Information Procedures Act,[44] would have to be amended to provide for the safeguarding and use of classified and other sensitive government information to be introduced by the government to prove the guilt of the accused, while still ensuring measure of authenticity of that evidence. As to the many changes to the military rules of evidence governing courts-martial which might be required when applied to military commissions, a general clause re-

[33] UCMJ, Article 32(b), supra note 16.
[34] Hamdan, supra note 1, at 2791.
[35] 10 U.S.C. § 831(b).
[36] 10 U.S.C. § 832.
[37] 10 U.S.C. § 866.
[38] 10 U.S.C. § 867.
[39] UCMJ, Article 21, supra note 30.
[40] See *Madsen* v. *Kinsella,* supra note 7, at 348.
[41] MCM, supra note 29, at R.C.M. § 707.
[42] See generally MCM, supra note 29, at M.R.E. 301–504
[43] Id. at M.R.E. 505–506.
[44] 18 U.S.C. app. III §§ 1–16 (1988).

garding exceptions could perhaps be added to M.R.E. 101[45] and, more especially, M.R.E. 1101[46] to effect that purpose.

Finally, although I have offered a few proposed changes to the rules and procedures for courts-martial which, to my mind, would make them more adaptable for use in military commissions, I strongly urge that a committee of judge advocates be formally convened to carefully study and make recommendations to the President as to what may, in their view, be required. They are the practitioners who know the Code and the Manual best. If this proposed military commission system under authority of the UCMJ is to provide an appropriate forum for prosecuting those we now detain, as well as those who commit violations of the law of war in future conflicts, we must ensure that perceived pressures to legislate quickly do not cause us to err and fail in our goal to establish a system which reflects our national values and which satisfies commonly accepted principles of international law.

Mr. Chairman, Senator Levin, and members of the committee, thank you again for inviting me to share my views with you. I look forward to answering any questions you might have.

Chairman WARNER. Elaborate somewhat on how we reach out to this group. Are they structured in such a way?

Mr. SILLIMAN. Mr. Chairman, I would recommend that you go back to the JAGs who were before you last week, and you solicit from them ideas coming from their trial practitioners. Every Service has a system of trial lawyers and defense lawyers that are in court virtually every day.

Chairman WARNER. I'm familiar with that.

Mr. SILLIMAN. Yes.

Chairman WARNER. It's from that group.

Mr. SILLIMAN. It is from that group that I think you need to hear. We can give you conceptual ideas on where changes should be made. Those are the ones who are actually in court. Also, Dwight Sullivan's defense lawyers for the military commission system. Charlie Swift, Lieutenant Commander Swift, who testified before in the Judiciary Committee, is one of those who would give you great advice and counsel on how these systems can be built to be fair and yet meet the exigencies of battlefield. I think again, not to change the charter that you created this morning, Mr. Chairman, it is vital that as you receive that type of information, which you need, that you not overlook those that can give you the best counsel, because they're doing it now. I'm not. They are.

Mr. SCHLUETER. Could I also respond to that, Senator? I don't know if you had intended to call former retired Major General John Altenberg, who is the appointing authority for the commissions, or any of the individuals who were otherwise involved in prosecuting the cases, but if you're analyzing the current rules concerning military commissions and how they had intended to apply them, it strikes me that they could provide helpful information.

One concern I'd have about just reaching out to the junior JAGs is, if they haven't had any hands-on experience with the commissions themselves, they can tell you firsthand how the courts-martial system works, but I would hope that, at this stage, we'd at least have some experience from those actually on the ground. One was quoted earlier, by one of the earlier panelists, who said that he wished that they tried court-martials to begin with. So, I'd recommend you consider those individuals, as well.

---

[45] MCM, supra note 29, at M.R.E. 101.
[46] Id. at M.R.E. 1101.

Chairman WARNER. Did you wish to reply to that observation there?

Mr. SILLIMAN. No. I'm well familiar with retired Major General John Altenberg, and I just think that because he is the appointing authority for the current commission system, it may be a little bit awkward for him to provide that type of advice. However, I think that when you look to the DOD, and the military commission system is a part of the DOD, that you allow the JAGs, who provide the lawyers for that system, to go within their own ranks and select the four, five, or six practitioners who know the system far better than any of us ever could. Then, to allow them to provide that type of listing of which military rule of evidence, which rule for court-martial, and, on the larger scale, which article of the UCMJ, might need to be amended. Again, my strong suggestion, Mr. Chairman, is as to the code itself, which requires action of Congress, the number of articles that need to be changed or amended are very few.

Mr. KATYAL. On this question, I would add to Professor Schlueter, I think his advice is a good one. I'm a civilian defense counsel in the Office of Military Commissions. My opposite is a prosecutor, Stu Couch, who I think is a fantastic prosecutor and, I think, could illuminate for the committee or others on his team. It doesn't need to be General Altenberg, why they think the rule existing rules for court-martial aren't enough.

From my perspective, I think cases like *Hamdan* could be tried tomorrow in an court-martial. The ideas about hearsay, chain of custody, classified information, I think, can all be handled within the existing system. I think it would be very helpful to hear from the prosecutors in the commissions office as to why they disagree.

Chairman WARNER. All right.

I would invite this gentleman, that you've designated, to visit with our counsel for a few minutes, at the conclusion of this hearing.

Senator Levin, I'm going to let you lead off the questions.

Senator LEVIN. If I understand your point, Professor, you believe there are so few changes that need to be made in the UCMJ, statutorily, they're the advice that they would give would not be as much statutory changes as to changes in the manual. Is that accurate?

Mr. SILLIMAN. I think you would invite them to do both, Senator Levin.

Senator LEVIN. But if you're right, there would not be very many that they would be forwarding to us that require statutory changes, and most of their recommendations would be UCMJ changes. Am I reading you right?

Mr. SILLIMAN. Yes, you are, Senator. The statement that Senator Cornyn used, that came from Mr. Dell'Orto, about 140 to 145 articles of the code that would need to be changed, I think, is, with all due respect, absurd. There aren't that many more articles in the code to begin with. What I'm suggesting is that there's confusion, as far as what requires congressional action and what requires a change by the President of the United States in the Executive order. I would, again, suggest that you not disturb that fundamental delegation of authority that was made in 1951 to the Presi-

dent, to allow him to craft those, with your knowledge, with notice to you, with some kind of cooperation, but I do not believe that it would be, in my judgment, appropriate for Congress to start to legislate what has previously been within the purview of the President, as far as rules and military rules of evidence.

Senator LEVIN. Now, if we do that, however, we're not going to be very different from what his current commissions are?

By the way, let me back up. I think what Senator Cornyn was saying is, it would take, according to the DOD; this was not his assessment, he said that the DOD had indicated there would have to be 120 changes—did he say, in the code or in the manual?

Mr. SILLIMAN. No, I didn't mean to say that's Senator Cornyn's comment.

Senator LEVIN. No. He's saying the code.

Mr. SILLIMAN. But I think the reference was about 150 changes to the military rules of evidence, 170 to the rules for courts-martial, and I think the comment was 140-plus articles of the code would have to be changed. I think that's incorrect.

Senator LEVIN. We're going to get that list.

Mr. SILLIMAN. Right.

Senator LEVIN. We would be happy to share that with you, and then you could comment specifically on it. But I'm just wondering whether or not, if we simply provide a notice requirement for the President, whether we're not going to find the President doing what he's done before, which is to get as close to the commission rules as he possibly can; whereas, I don't think that's the basic thrust of the Court.

Mr. SILLIMAN. Senator, if, in fact, this list is done by the Active-Duty military lawyers.

Senator LEVIN. It can be done by the President.

Mr. SILLIMAN. Well, no, but.

Senator LEVIN. The President's counsel.

Mr. SILLIMAN. Input comes from the military lawyers.

Senator LEVIN. They tried it once.

Their input was not accepted, when it came to rules of detention.

Mr. SILLIMAN. I think this Congress has reacted very strongly to the fact that the military lawyers were shut out. It was noted in several investigations.

Senator LEVIN. It may have been noted, but we didn't react very strongly, in my judgment.

Mr. SILLIMAN. All I'm suggesting, Senator Levin, with all due respect is.

Senator LEVIN. Some members of it did, obviously. Some of us did. But I don't think Congress responded.

Mr. SILLIMAN. I just worry, sir, as far as the long-term approach, that if we're looking to create a system that is not just for the 10, 20, or 30 that we're dealing with now, but that will be a system in place for years, that we not shift the balance so far that Congress itself must legislate these rules. Again, the fundamental delegation, from the Constitution through the UCMJ, is to the President. Now, if the President has disregarded it in the past, then I think steps should be taken to ensure that there be some notice, some requirement there. I do not recommend that Congress take on the responsibility of legislating this system.

Senator LEVIN. My final request would be then to all three of you would be to give us your starting point, whatever it is, and the changes that you believe are either desirable from that starting point. That usually would be if you start from the UCMJ, I would think or required my hunch would be, that verb would be appropriate if your starting point is the commission order. But whether my verb is correct or not, the changes that you would urge upon the committee, from whatever starting point you choose and if you choose no starting point, whatever—however you want to recommend and I know the chairman's very much inclined to get advice from wherever sources we can, but I would surely agree that we should ask the JAGs to have some of their people, who are in the middle of the cauldron, to give us their practical experience on what specific actions we ought to take legislatively. Also, what changes they would recommend in the manual in order to accommodate what, I guess, has been called practicality or necessity or common sense. Obviously, there are some commonsense differences here between the way we are going to handle these criminal trials and the way we would handle criminal trials of people who are charged with crimes who are wearing our military uniform, just based on the circumstances and without going into too many details, what is, I think, obvious.

Mr. SILLIMAN. In my prepared statement, Senator Levin, I do give you those thoughts.

Senator LEVIN. Are those examples or is that comprehensive?

Mr. SILLIMAN. That is one of those ambiguous words, I guess, Senator Levin.

Senator LEVIN. No, I mean, is that intended to be a full listing of the changes that you would recommend?

Mr. SILLIMAN. No, it is my suggestion, Senator, but I also do say, at the end of my prepared statement, that I do very strongly recommend that you go to the those Active-Duty JAGs.

Senator LEVIN. No, I didn't mean that. I was talking about you, yourself, in terms of any specific recommendations.

Mr. SILLIMAN. I do refer to Article 36(b), 31(b), and also any specific series of rules for court-martial and military rules of evidence that I think may be considered impracticable, as far as military commissions. Yes, I do.

Senator LEVIN. We would welcome any additional specifics from you and from our other panel members, a list of specifics that you would recommend to us, because we're going to have to do this, one way or another, and we want to do it right. The chairman, obviously, wants to proceed in a thoughtful way, and that's what he's doing. He's doing it with the support of all the members of the committee, whether we agree with the final outcome or not. The process which we are using here is one which we intend to be as thoughtful and as thorough as we possibly can make it under these circumstances that we face.

Thank you all.

Chairman WARNER. Yes. I join with Senator Levin on that. He's talking about where we would start. Do give us some idea of where you want to end up, though. It's one thing to give us a starting place, but we want to make sure we have your views as to where we should end up on this thing.

The situation we're in we're at war, as a Nation. I know this institution, I think I say with a sense of humility, as well as anybody, and I know what has to be done.

My press secretary came up and turned on the mike; it's like the President the other day at the Big 8, he had his mike on at the wrong time. Now mine was off at the wrong time. [Laughter.]

I'll start all over again.

I join with Senator Levin, as you looking at your starting places, make sure we know where you'd like to see it end up.

But, gentlemen, we're at war. We cannot leave this thing dangling in this situation. The Nation was somewhat taken aback at the far reach of the Supreme Court on this matter. I just know for a fact how this institution works. If we don't get this thing done in this Congress, mind you we convene with the new members getting to sign up for pay the first week in January, and then we go home for 3 weeks. So, that's all we achieve in January. Then, February, we're trying to form into our committees and our leadership. I'm not here to fault Congress; it's just the way this institution works. I do not think we can leave this situation dangling out here without some legislative solution. So, we're going to do our best, and we're fortunate to have folks like yourselves who are willing to step up and help us. I thank you.

Mr. SILLIMAN. Mr. Chairman?

Chairman WARNER. Yes.

Mr. SILLIMAN. One thing, in following what you said. In light of the time, I think it's important that this committee also have a precise focus. The Supreme Court did not strike down interrogation practices of the United States. The Supreme Court did not strike down any other application of presidential executive power in the war on terrorism. It dealt specifically and precisely with military commissions. There have been a lot of questions and comments from the committee with regard to concerns about interrogation techniques, quite apart from whether evidence is admissible. I think you can't solve all of that now. If your goal is to respond directly to the Supreme Court opinion and to put back in place some system for prosecution, I think that can be done, but it must be done to the extent that you can do it apart from those other concerns.

Senator LEVIN. Mr. Chairman, if I can comment on that.

Chairman WARNER. Sure.

Senator LEVIN. I just fully agree with that, and I tried, in my opening statement, to carve that out, because there's been so much misunderstanding, including in the media, about what we are dealing with. We're not dealing with detention and how long people can be detained. It is a fascinating, complicated question. If this is a long war, if it's a war with no known end, when do people ever have a prospect of leaving detention? It's a tremendously important question. But we're not dealing with that. We're not dealing with interrogation techniques. Lord knows, we should do that, with a lot of oversight. But that's not the question we're dealing with, except as it might apply to admissibility of evidence in a criminal trial. We're dealing with a criminal trial. We have to do it right, but it's a very narrow group of people, maybe 10 or 20 or 30 people. But, as you all point out, we're legislating for the future, it's not just for

these 30 people. We should recognize that it's not the hundreds that are there that we're dealing with

If I may say, Mr. Chairman, if we do take additional time to do this—and I hope we don't need to—it's not as though people are going to be released to the battlefield by our delay. So, I hope we can do it this year. I'm with the chairman. I support that effort. But it's not as though that if we do delay, that they're going to have a right to a speedy trial. There's no suggestion of that. It's also true, on the other side of this, that whenever we adopt these rules, that when these trials take place, that when they're acquitted, if they are acquitted, they're not free. They are still in detention. That's lost track of; as well, I'm afraid, by members at times and by the media and by the public. It's a very narrow issue that we have to grapple with, and we ought to do it right. Hopefully, under our chairman's leadership, we can do it this year.

Chairman WARNER. We thank you very much. Thank you, Senator Levin. Again, we express appreciation of the entire Senate for your participation today.

The hearing is adjourned.

[The prepared statement of William E. Eckhardt is also included for the record:]

PREPARED STATEMENT BY WILLIAM E. ECKHARDT

MILITARY COMMISSIONS POST *HAMDAN*

Members of the Senate Armed Services Committee: It is an honor and a privilege to be able to express my views on how Congress should proceed in light of the recent *Hamdan* decision. Unfortunately, such a sensitive and important decision must be made under severe time constraints and political pressure. Rules governing military commissions are old and unrevised but must be retooled to apply in frighteningly different and unimagined circumstances.

Military legal problems are solved using two tools—history and law. Any approach must be multidisciplined. A solution cannot be found while wearing "purely legal blinders." For example, the rule of law on the battlefield is applied using rules of engagement which are composed of international law, domestic law, diplomatic constraints, political constraints, and technological constraints. These different factors have to be combined and harmonized to provide a workable procedure. The goal is to promote the rule of law, but many interdisciplinary factors—not just law—must be considered. In short, any military legal system must be practical and flexible.

Turning first to history. No—and I repeat—No country that has had a serious terrorism problem has been able to use its normal criminal law system. In societies pressed by the threat of terror, adjustments often are made for apprehensions, for detentions, for evidentiary rules, and for protection of the system (buildings, judges, juries). The most immediate problem before this committee deals with procedure—handling classified material and dealing with hearsay. The debate today on rules for military commissions, unfortunately, will be repeated—in all probability—for our civilian Federal rules of evidence. This is the first of several very serious civil liberty issues that we must face as a country in this new time of terror.

Legal problems in an age of terror should be handled with a two step approach. First: Does the government need the unusual "power"? Has it justified its request? Second: If there is a demonstrated need for the procedure, change or power, its enactment should be balanced with steps to control the exercise of that power and with heightened review procedures to be certain that there is no abuse and that justice is done.

Turning to the issue at hand, this committee must decide how to constitute military commissions, must decide what evidentiary rules and review procedures are required, and must help clarify the United State Government's position on Geneva Convention Common Article 3.

COMMISSION SYSTEM

The United States needs a system to exercise judicial power outside the boundaries of the continental United States. Judicial power within the United States is

reposed in our Civilian Article III court system. Historically, application of judicial power outside the continental United States has been done by military law with its twin components—Courts-Martial and Military Commissions—under the authority of Article I. The Courts-Martial System is the gold standard because of its years of maturing under the auspices of the 1950 Uniform Code of Military Justice (UCMJ) and the 1983 Military Justice Act authorizing Supreme Court review of military justice. However, we are now paying the price for long ignoring the true "military" in military law. We are presently forced to concentrate on military commission law with its old rules and quaint customs.

We must not be distracted by the "military" label of these Commissions. They are "military" because the logical place to place this power is in the military code and because the military is the agent for exercising this Federal judicial power. Because they are "military," they must not be perceived as second class or less than legitimate. Historically, after limited use in the Revolutionary War, General Winfield Scott used military commissions extensively in the Mexican War. Later, at the turn of the century in the Elihu Root era, the judicial power of the United States was exercised extra territorially on a broad scale by commissions and by territorial courts. Applied judicial power exercised under Article I must be both practical and flexible. That power must never veer from the Rule of Law but, at the same time, it must be applied with common-sense practical flexibility.

COMMISSION PROCEDURES: EVIDENTIARY RULES; SAFEGUARDS

The immediate evidentiary problems appear to be how to treat hearsay and how to handle classified information. Following the method for handling legal problems in a time of terror noted previously, Congress needs to ascertain if these evidentiary rules are necessary. It appears to me that the need is self-evident that unique rules are required. The next step is to determine safeguards in their application. In short a judge should be required to make certain factual findings that would be extensively reviewed for abuse of discretion. Basic due process would require that no evidence be admitted that a judge found to be "unreliable." Certainly, no evidence that is the result of torture should be admitted. National security rulings should be tested rigorously by requiring strict review of fact finding on the part of the presiding judge.

Congress should pay special attention to the review process. When the government requires an extra "iron fist" there should always be appropriate "checks and balances" in the review procedures. The public must have confidence—both domestically and internationally—that justice has been done.

GENEVA CONVENTION COMMON ARTICLE 3

Congress must pay close attention to the Common Article 3 problem. The technical Geneva Convention Regime is in grave peril. The legal system rests on twin pillars: state restraint and reciprocity. Both pillars are missing in our age of terror. Yet the ideals and principles of the Geneva Convention are the very essence of the ethic of the profession of arms. That ethic is founded upon long respected just war tradition, ancient concepts of military chivalry, and commitment to the rule of law. The United States will follow Geneva Convention principles even if there is no technical requirement to do so. But if one side totally refuses to acknowledge or abide by time-honored rules designed to protect civilians, prevent unnecessary suffering, and safeguard property from unnecessary destruction, it may be unreasonable to expect strict, technical compliance by the other side.

Common Article 3 presents the problem of how to treat individuals captured on the battlefield who do not comply with the rules. Should individuals who do not follow the rules be entitled to the special and privileged status of prisoners of war? The United States Government for years—through numerous administrations—has taken the principled position that one must obey the rules before one is entitled to the privileged status of prisoner of war. Our European Allies have taken a different stance—largely for supposed humanitarian reasons. The Europeans believe that all persons detained should be treated as prisoners of war. The United States believes that such a position totally undermines the very basis for having a Geneva Convention system and discourages compliance with the rules of war. In this very public dispute, the United States is morally correct but its position has been a public relations disaster. However, everyone agrees, as the United States Government has repeatedly stressed, that detainees must be treated humanely.

Because of the controversy surrounding this issue, Congress needs to clarify and to give legitimacy to an authoritative position of the United States Government regarding the applicability of Common Article 3. I am concerned that there may be a difference in the standards of treatment of detainees required by the McCain Tor-

ture Legislation and by the ruling of the Supreme Court in *Hamdan*. Regardless of the technicalities here, confusion is the enemy. Our soldiers deserve and our Nation's honor requires clarity. Further, clarification would seem to be necessary to give complete legitimacy to future military commissions.

CONCLUSION

In conclusion, Congress is now called upon to address the true "military" in military law. It must visit an ancient concept of military commissions and give them vitality and legitimacy. Congress must debate for the first time a change in courtroom rules necessitated by terrorism. Importantly, it must clarify the status of Geneva Convention Common Article 3 at a time when the entire Geneva Convention Regime is in question.

Yet, I am confident that Congress will provide a legitimate military law system—just as it did in the Military Justice Act of 1950. As with that historic Act, the modernized military commission system can become a respected model which will be admired and emulated.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN WARNER

APPELLATE PROCEDURE

1. Senator WARNER. Mr. Fidell, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in your opinion, does the appellate procedure set out in the Detainee Treatment Act (DTA) for final decisions of military commissions (i.e., a limited scope of review in the District of Columbia Circuit) comply with the requirements of Common Article 3 relating to "judicial guarantees?"

Mr. FIDELL. The authoritative commentary to Common Article 3 cautions (III Pictet at 40) that "[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors." The DTA's limitations on the scope of appellate review needlessly raise a question as to whether the military commissions meet that standard. Even if the appellate review prescribed by the DTA satisfies Common Article 3's minimal requirement relating to "judicial guarantees," it should be corrected because it is out of step with normal review of military criminal cases and because it vests appellate review in the wrong court.

The United States already has an expert military appellate court: the United States Court of Appeals for the Armed Forces (USCAAF) (previously known as the United States Court of Military Appeals). USCAAF has been in existence since 1951, and has decided thousands of cases. It has an excellent reputation and is an institution of which our country can be proud. There is no reason to shunt the appellate review of military commission cases into the United States Court of Appeals for the District of Columbia Circuit, a court whose involvement with military justice matters is confined to occasional Administrative Procedure Act cases and even rarer military habeas corpus cases.

The fact that the DC Circuit has ruled as it has (i.e., for the government) on Guantanamo-related habeas corpus cases is not a proper basis for making it responsible for direct review of military commission decisions. Doing so reflects a kind of legislative forum-shopping that does not contribute to public confidence in the administration of justice, despite the high regard in which the DC Circuit is widely and justifiably held.

Mr. KATYAL. No. Section 1005(e) of the DTA, under the interpretation given to the Act by the government, turns the traditional concept of a fair trial on its head. It postpones constitutional review of trial procedures until after trial and conviction have occurred. The government has claimed that "review after military justice verdicts is the norm, not before the verdict." But as the Supreme Court said in *Hamdan,* that principle derives from courts-martial—a battle-tested system with independence and a tradition. Here, when dealing with the civil courts, the tradition has always been to review military commissions upfront, as in Ex Parte Quirin (1942) and *Hamdan* itself.

The DTA system is problematic for four reasons. First, review is only granted automatically to those defendants who are imprisoned for longer than 10 years or who face the death penalty. § 1005(e)(3). Because many of the individuals currently detained are accused only of conspiracy, the DTA cuts off automatic review in most cases that could possibly be brought to trial. For these individuals, appellate review is granted only at the discretion of the court of appeals. Without an avenue for appeal before or during the trial, these prisoners would face a court with unfettered discretion.

Second, even in those cases where judicial review is possible, the DTA creates the possibility of an unnecessarily long trial process. Under the DTA, the first trial must proceed to completion and result in a final decision. In the nearly 5 years since the tribunals were established, not a single trial has even commenced. Moreover, even if a trial were to proceed in full, its result would only be final upon the President's determination to that effect. See Commission Order No. 1 § 6(H)(6). In effect, the DTA puts judicial review at the mercy of prosecutors and the President. Then, after the final decision, after review in the DC Circuit Court of Appeals, and presumably after review in the Supreme Court, a decision overturning the verdict would result in yet another trial. Prosecutors would have to scramble to retry these defendants 8–10 years after their capture. Reducing the scope of judicial review to final decisions only subjects both the defendants and prosecutors to excessive delays, high costs, and a potentially interminable trial process. Basic standards of criminal procedure, as well as administrative efficiency, require that trial procedures, writ large, be constitutional the first time around.

Third, the limited scope of review in the DC Circuit also threatens basic fair trial rights. As Justice Kennedy notes in his concurrence, "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial." *Hamdan* v. *Rumsfeld,* 26 S.Ct. 2749, 2807 (2006) (Kennedy, J. concurring). Moreover, if the military trial system is struck down or modified by the courts after conviction, individuals would face retrial after having previewed their defense for the prosecution. The administration has already afforded itself a lopsided advantage in preparing evidence for the trials of suspected terrorists ,with limited rules for disclosure and review. A system where defects are remedied only by retrial exacerbates the asymmetry.

Fourth, the DTA cuts out the most relevant military court—the USCAAF. In 1975, the Supreme Court in the *Councilman* decision looked to this court as providing a crucial degree of independence from the executive in the military justice system. It is a court that is the envy of the world, with specialized expertise in military matters. Given the fact that the administration is saying that the civilian justice system is not appropriate to try suspected terrorists, one would think that the existing military appellate court, the USCAAF, is far better suited to hear these cases than the civilian U.S. Court of Appeals for the District of Columbia Circuit. Decisions from this regular military appellate court may also be subject to more deference in the Supreme Court than the DC Circuit.

Mr. SCHLUETER. I believe that the appellate procedure set out in the DTA, for final decisions by the DC Circuit Court, is sufficient to comply with Common Article 3. As I understand the general scope of Common Article 3, that provision provides the signatory states with some flexibility in the ways in which they provide basic due process to those who are tried in that state's courts. In this instance, the provision provides for "civilian" review of the decisions, and that in the minds of many in the public is a desirable procedure.

Mr. SILLIMAN. No, I don't think it does because it excludes from the nondiscretionary grant of review anyone convicted by a military commission who receives a sentence of less than 10 years; and Common Article 3 makes no distinction based upon quantum of sentence. Further, the scope of review is merely procedural ("whether the final decision was consistent with the standards and procedures specified in the military order. . ."). I'm not sure that I interpret the second clause (section 1005(e)(3)(D)(ii) as enlarging that limited scope ("to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and law of the United States").

2. Senator WARNER. Mr. Fidell, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, what changes in appellate procedure, if any, would you recommend?

Mr. FIDELL. National Institute of Military Justice (NIMJ) recommends that direct appellate review of military commissions be vested in the USCAAF, and that the contrary DTA provision be repealed. We also believe Congress can properly dispense with intermediate review by a Service Court of Criminal Appeals (CCA). However, USCAAF should have plenary review power akin to that exercised by the CCAs, so that it can review findings for proof beyond a reasonable doubt and sentences for appropriateness, as well as any legal issues that may be presented. There is certainly no need for a "review panel" or "Court of Military Commission Review."

Mr. KATYAL. As I testified before the committee, the single most important decision Congress must make if they adopt military-commission legislation is to craft an "anti-abstention provision." This would create an expedited review process, modeled on by the Bipartisan Campaign Finance Reform Act (McCain-Feingold), and

would protect the rights of both sides in what is likely to be an unprecedented new trial system. Challenges would go first to a three-judge district court, with immediate certiorari in the Supreme Court. Federal courts must play their role at the outset in order to avoid the trauma to the Nation of potentially having convicted terrorists set free, and to protect the minimal trial rights of defendants consistent with constitutional and treaty-based obligations. See my prepared testimony at the July 19 hearing (hereinafter "SASC Testimony") at pp. 13–14.

Mr. SCHLUETER. I would not recommend any changes in the appellate procedure for reviewing convictions of those found guilty by military commission. I disagree with the view that those individuals should have their cases reviewed by the existing Service appellate courts (e.g., the Army Court of Criminal Appeals) and then the USCAAF. The appellate review in those courts can take several years. In fact the latter court recently adopted a series of rules to ensure that servicemembers receive timely appellate review of their courts-martial convictions. In a series of cases, the military courts have had to deal with post-trial delays spreading out over as much as 4 years.

In the case of appellate review of convictions by military commissions, it is critical that procedure be efficient and swift. If military courts were to have jurisdiction, if there were attempts to expedite those cases, and not those of American servicemembers, in effect the detainees would receive favored treatment.

Mr. SILLIMAN. I would recommend that appeals from convictions by military commissions be heard in the USCAAF, rather than in the United States Court of Appeals for the District of Columbia. The USCAAF is an Article I court, created by Congress in 1950 as part of the Uniformed Court of Military Justice (UCMJ) to hear appeals of courts-martial from all the Services, and is well versed in military justice issues.

WAR CRIMES STATUE

3. Senator WARNER. Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in light of the Court's Common Article 3 holding, does Congress need to amend the War Crimes Statute (18. U.S.C. 2441) to ensure military interrogators are protected from criminal liability as they perform their duties?

Mr. KATYAL. A statute that would grant immunity for violations of Common Article 3 would be a gross violation of our treaty obligations, as well as customary international law. Although Congress has the power to make such an amendment, it would come at great political cost and would not protect military interrogators from prosecution abroad. Under the principle of "universality," courts abroad may exert jurisdiction over any defendant charged with war crimes that they are able to take into custody. In additional to foreign national courts, the founding charters of numerous international tribunals, including the International Criminal Court, expressly recognize violations of Common Article 3 as war crimes.

Before accepting any claim that the executive branch "needs" a "fix" to either the War Crimes Act or Common Article 3, Congress should understand what the executive's implementing rules are with respect to these laws. For example, the executive branch has the power under Article 2 of the Constitution to "take care" that the laws are faithfully executed—which means that it wields the prosecution power. I would imagine that this power would fairly include the ability to decline to prosecute any and all War Crimes Act violations in a given category of cases. If so, it is not clear what purpose, if any, would be served by legislating an exemption or clarification of the existing act. I believe that it is absolutely essential that Congress inquire as to whether the administration believes that its Article 2 prosecution power gives it the ability to decline to prosecute cases prior to government activity that might otherwise violate the statute. I also think it imperative that the committee ask the executive for any and all memoranda of understanding or other agreements, both formal and informal, between the Department of Justice (DOJ) and other Government agencies with respect to prosecution under the War Crimes Act and violations of the Geneva Conventions. If such documents or agreements exist, they will be the most useful materials in deciding whether any legislation in this area is necessary or appropriate.

Mr. SCHLUETER. Although the Court in *Hamdan* indicated that Common Article 3 is binding law, it is difficult to say how the Court would interpret individual provisions in other cases. Nonetheless, it would seem prudent to enact legislation to protect servicemembers, to guard against an adverse future opinion from the Supreme Court.

Mr. SILLIMAN. No. First of all, there is a memorandum of understanding between the Departments of Justice and Defense whereby it is agreed that American soldiers

are to be tried in military courts rather than Federal Court for any charges arising from their conduct in the field which constitutes an alleged violation of both the U.S. Code and the UCMJ. Any possible allegation of a violation of Common Article 3 would also surely constitute an allegation of misconduct under the UCMJ. Also, testimony before this committee by the Judge Advocates General (JAG) confirms that military personnel are trained to the standards set forth in Common Article 3. Thus, I see no reasons why 18 U.S.C. 2441 needs to be amended.

GENEVA CONVENTIONS

4. Senator WARNER. Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in your opinion, do the 1949 Geneva Conventions represent the present state of customary international law with respect to armed conflict?

Mr. KATYAL. Yes. Both Congress and the Supreme Court, most recently in *Hamdi* v. *Rumsfeld,* have recognized the Geneva Conventions as a codification of the law of war. See 18 U.S.C. § 2441(c)(1) (2003) (defining violations of the law of war as breaches of the Hague or Geneva Conventions); *Hamdi* v. *Rumsfeld,* 124 S. Ct. 2633, 2641 (2004). Congress also considers Common Article 3 an essential element of the law of war, as reflected in the War Crimes Act.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. Yes, they do.

5. Senator WARNER. Mr. Katyal, Mr. Schlueter, and Mr. Silliman, has additional Protocol I of 1977, which the United States refused to ratify, become part of customary international law?

Mr. KATYAL. Yes. The United States Government has adhered to the view that Protocol I constitutes customary international law. See, e.g., Brief of Retired Generals and Admirals in Support of Petitioner, *Hamdan* v. *Rumsfeld,* at 20. In *Hamdan,* the plurality stated that the term "regularly constituted court" must be understood to incorporate at a minimum the trial protections recognized by customary international law as embodied in Article 75 of Protocol I. See 126 S.Ct. at 2797. Several court decisions have held that violations of Protocol I are violations of Common Article 3. See *Kadic* v. *Karadzic,* 70 F.3d 232, 242–43 (2d Cir. 1995); *Mehinovic* v. *Vuckovic,* 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002).

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. Many of the provisions of additional Protocol I are acknowledged by the State Department as customary international law, even though the United States has not ratified that Protocol. For example, Article 75, which gives us a clarification of what the "judicial guarantees" are referred to in Common Article 3, is customary international law.

CLASSIFIED INFORMATION

6. Senator WARNER. Mr. Fidell, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, the present military commission rules allow the appointing authority of the presiding officer of a commission to exclude the accused and his civilian counsel from access to evidence during proceeding that these officials decide to close to protect classified information or for other named reasons. In your opinion, can a process that passes constitutional and statutory muster be constructed without giving the accused and counsel possessing the necessary clearances access to such material in some form?

Mr. FIDELL. NIMJ does not believe any person can properly be convicted of a criminal offense based on evidence that is not made available to the accused and his or her attorney. The current arrangement for classified information in courts-martial—Military Rule of Evidence 505—has been put to the test in numerous cases over the years. That procedure—under which the "members" of the court-martial never have access to information to which the accused is not also privy—is workable. There is no basis for applying a different approach in military commissions.

Mr. KATYAL. The court-martial process provides a clear model of how such a system would—and does—operate. If the accused at any stage of a military trial seeks classified information, the government may ask for an in camera (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and nec-

essary" classified information to the prosecution's or accused's case can be made available. Mil. Rule Evid. 505(i).

Moreover, the military rules of evidence provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d),(g). Courts-martial also grant broad privileges for withholding information when it is "detrimental to the public interest." Mil. R. Evid. 506(a). My testimony addresses these and similar issues at great length, see pp. 7–11.

The one thing that Federal courts have not accepted, as Senator Lindsey Graham has recently stated, is the exclusion of the defendant from his own criminal trial when he is not being disruptive. I was only able to find one example in American history when a defendant was excluded from a military commission in 1865, and that conviction was reversed by the JAG.

Mr. SCHLUETER. Yes, I am confident that we can construct a procedure for balancing the need for national security and access by counsel and the accused and at the same time pass constitutional muster. It is important to note that the Court in constructing a majority vote in *Hamdan,* did not specifically rule that the accused's lack of access to classified information was in itself unconstitutional. It simply held that procedure, and others, appeared to be inconsistent with the UCMJ and the Manual for Courts-Martial, and that the President had not sufficiently explained the need for such variations.

Mr. SILLIMAN. Provision could be made for protecting highly classified national security information by preventing an accused from having direct access to it, as long as he is afforded access to unclassified summaries of that information if it is to be used against him. His military defense counsel, however, assuming he had the requisite security clearance, could not be denied access to the classified information itself. The Manual for Courts-Martial, in Military Rules of Evidence (MREs) 505 and 506, has provisions that mirror the Classified Information Procedures Act with regard to the use of classified information in a criminal trial, although these provisions normally apply to an accused's request to introduce classified information in his defense.

COMMON ARTICLE 3

7. Senator WARNER. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in your opinion, does the statuary prohibition on cruel, inhumane, and degrading treatment or punishment enacted last year constitute sufficient legal guidance to ensure compliance with Common Article 3?

Ms. MASSIMINO. No. The statutory prohibition on cruel, inhuman, or degrading treatment contained in the DTA was a necessary corrective to administration policies holding that: (1) the Geneva Conventions do not govern U.S. conduct in the current conflict; (2) interrogation techniques in violation of that standard and outside of the Army Field Manual on Intelligence Interrogations are authorized; and (3) the treaty obligation to refrain from cruel, inhuman, or degrading treatment does not bind the United States when it acted against aliens outside its territory. The DTA provides important legal guidance by requiring that all U.S. personnel—military and civilian—comply with the prohibition on cruel, inhuman, or degrading treatment, regardless of the location or legal status of those in their custody.

The DTA does not, however, purport to address the full range of requirements set out in Common Article 3 of the Geneva Conventions. Common Article 3 prohibits cruel treatment and torture, as well as "outrages upon personal dignity, in particular humiliating and degrading treatment." While the administration now argues that the requirements of Common Article 3 are vague, that has not been the position of the United States military, now or in the past. To the contrary, the military has recognized and implemented its obligation to comply with Common Article 3 for more than 50 years. After the Supreme Court ruled in the *Hamdan* v. *Rumsfeld* case that the United States was bound by the requirements of Common Article 3 in the current conflict, Deputy Secretary of Defense Gordon England issued a directive restating the obligation to comply with Common Article 3 and finding that DOD policies and doctrine are all already in compliance with Common Article 3. No further legal guidance is necessary in order to ensure compliance with Common Article 3.

Ms. NEWELL BIERMAN. The DTA provided important legal guidance, reaffirming the U.S.'s commitment to humane treatment and making clear that the prohibition

on cruel, inhuman, and degrading treatment governs all U.S. officials and agents, including CIA and civilian contractors.

The U.S. military has considered itself bound by the principles of Common Article 3 in every conflict since the Geneva Conventions were ratified in 1949. The Department of Defense (DOD) Directive issued on July 7, 2006, by Gordon England restates DOD's obligation to comply with Common Article 3 and makes clear that DOD policies, directives, executive orders, and doctrine all already comply with the standards of Common Article 3. As Major General Scott C. Black, JAG of the Army, told the Senate Armed Service Committee the following week: "[W]e've been training to [Common Article 3] and living to that standard since the beginning of our Army. We continue to do so." (7/13/06, SASC). The ranking JAGs of each of the other Armed Services agreed.

The U.S. military has never asked for guidance or complained about the vagueness of the humane treatment principles embodied in Common Article 3 in any of the conflicts it has fought over the past 50 years. The lack of clarity in the current conflict came about because the administration suggested that the Geneva Conventions, including Common Article 3, did not apply. Reaffirming a standard the military knows well—the humane treatment standards of Common Article 3—would restore the clarity that has been lost. Congress should also exercise oversight to ensure that abuses like those that occurred at Abu Ghraib do not happen again, ensure that all those responsible for promoting abusive practices are held fully accountable, and require that the humane treatment requirements embodied in Common Article 3 and the DTA are fully respected and applied by every U.S. agency in every operation around the world.

Mr. FIDELL. The statutory prohibition on cruel, inhuman, and degrading treatment does not purport to address all of the requirements set forth in Common Article 3. Common Article 3 is no more vague than a number of punitive articles of the UCMJ that have been part of military law for decades and are generally recognized as providing fair notice of what conduct is proscribed. Examples include Article 88 (contemptuous words), 89 (disrespect), 91 (contemptuous or disrespectful language or deportment), 92(3) (dereliction of duty, including duty imposed by custom of the service), 93 (cruelty, oppression, or maltreatment), 133 (conduct unbecoming an officer and a gentleman), and 134 (conduct that is prejudicial to good order and discipline or service-discrediting). Additional guidance can be provided in the Manual for Courts-Martial, but if that is done, it should be made clear that no inference arises that the law was too unclear to permit prosecution for misconduct (violations of Common Article 3) that occurred before the additional guidance was promulgated. It should be noted that United States practice is not to charge war crimes as offenses under the law of war, but rather as violations of the pertinent substantive punitive article, such as Article 118, which forbids murder.

Mr. MERNIN. No. The statutory prohibition on cruel, inhuman, and degrading treatment or punishment enacted last year, in its definitional section, articulates a more restricted definition of what treatment is prohibited than does Common Article 3. The baseline treatment standards of Common Article 3 have been incorporated in the training of U.S. Armed Forces for decades as a requirement of international law and the law of armed conflict, as a useful tool to inhibit sliding down a slippery slope of maltreatment, and as consistent with core military concepts of honor and reciprocity. While the New York City Bar Association (the "Association") praised, and continues to applaud, last year's statutory prohibitions set forth in the DTA, the act did not purport to incorporate or subsume the standards of Common Article 3. Moreover, the act's lack of an enforcement mechanism weakens its ability to contribute to or ensure compliance with Common Article 3. Finally, the Presidential signing statement which accompanied the act's becoming law, and reserved the right not to comply with the act in certain circumstances, also may undercut its effectiveness as "sufficient legal guidance."

Dr. CARAFANO. Statutes by themselves rarely provide sufficient legal guidance. The President and military commanders need to be responsible for establishing doctrine, military regulations, and enforcement of expected behavior and treaty compliance.

Mr. KATYAL. Standing alone, the prohibition enacted by Congress last year, the "McCain amendment," does not provide sufficient legal guidance. It has at its core a subjective test—the "shocks the conscience" standard for constitutional due process—that is vague and highly case specific. What gives that law practical content is the principle that its text must be read and enforced in a manner consistent with our international obligations, as Acting Assistant Attorney General Stephen Bradbury acknowledged in his testimony. See http://judiciary.senate.gov/testimony.cfm?id=757&wit—id=5505. Its provisions must prohibit, therefore, all conduct that would be prohibited under Common Article 3. While soldiers and military offi-

cers are quite familiar with these international standards, the administration, for its part, has protested that they are unclear and appears to have pursued policies that violate the Geneva Conventions, even if they do not directly violate the McCain amendment's narrower prohibition. In this sense, then, the McCain amendment has not provided clear legal guidance on compliance with Common Article 3. Now that the *Hamdan* decision has clarified that Common Article 3 applies to all conflicts, government actors cannot hide behind the literal language of the McCain amendment to immunize actions that violate the treaty. The military has developed its own system of guidelines and procedures evincing a comprehension and acceptance of the Geneva Conventions. In fact, each JAG testified before this committee that our troops train to these standards and that the *Hamdan* decision imposes no new requirements upon them. There is no reason to think that, now aware that the article applies, other government actors could not do the same.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. The prohibitions contained in the DTA are virtually identical to those in Common Article 3, except that where the statute refers to "degrading treatment," the Convention's provision uses the enlarged phrase "humiliating and degrading treatment." Both are similar in connotation and, if there is a difference, it is slight. Therefore, I think the statutory prohibition does generally provide sufficient legal guidance for our Armed Forces personnel. Remember that the JAGs, in their testimony before you, acknowledged that Common Article 3 is the standard to which we normally train our Service personnel. Thus, Army Field Manuals, such as the one on accepted interrogation techniques, give clarity to what is, and what is not, permissible without being "cruel, inhuman, or degrading treatment or punishment" and, by extension, "humiliating" treatment as well.

8. Senator WARNER. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, would compliance with that statute constitute compliance with Common Article 3?

Ms. MASSIMINO. No. As noted in response to question 7, Common Article 3 encompasses a broader range of requirements than does the DTA. But even with respect to the common obligation to refrain from cruel treatment, the administration's interpretation of the DTA standard is such that the two standards cannot be equated. Common Article 3 has always been interpreted by the United States as imposing an absolute prohibition on inhumane treatment. Under the Common Article 3 standard, interrogation techniques such as prolonged stress positions, waterboarding, heat injury or hypothermia, the use of dogs to terrify, and other such conduct would clearly be prohibited, regardless of the facts or circumstances surrounding the particular interrogation.

In contrast, and despite the fact that Supreme Court jurisprudence holds that certain acts are inherently cruel, the administration has interpreted the DTA "shocks the conscience" standard as infinitely elastic. Under the administration's interpretation of this standard, conduct is permissible depending on the rationale for employing it. Thus, no technique would be absolutely prohibited if interrogators believed the information they sought was valuable enough to justify the abuse.

For this reason, compliance with the DTA—which the administration has interpreted as a relative standard—would not constitute compliance with the absolute requirements of Common Article 3.

Ms. NEWELL BIERMAN. Unfortunately, no—not if that statute is given the interpretation put forth by the Bush administration, in various legal opinions. Common Article 3 has always been interpreted as imposing an absolute prohibition on all inhumane conduct, drawing a clear line between prohibited and permissible conduct. We believe that this is precisely what Congress intended to do when it passed the DTA—to forbid absolutely the kinds of abusive interrogation techniques we saw in Abu Ghraib.

The Bush administration, however, has interpreted the DTA as imposing a relative standard, creating a sliding scale of prohibited treatment. Applying a "shocks the conscience" test, the administration claims that what "shocks the conscience" depends on the need. This means conduct that would—and should—be prohibited under an absolute bar on inhumane treatment, including techniques such as waterboarding, use of snarling dogs, and exposure to extreme hot and cold, might be allowed in certain situations if the interrogator or other official could explain a sufficiently important need. This appears to be the reason why the administration is asking Congress to interpret Common Article 3 by reference to the DTA.

Given the administration's interpretation of the DTA, if Congress were to agree to this proposal, it would be seen around the world as the U.S. taking a "reservation" to the Geneva Conventions—attempting to unilaterally redefine its terms and

limit its protections. No country in the world has ever before formally renounced its humane treatment requirements under Common Article 3 or suggested that the absolute prohibition on inhumane treatment should be replaced with a sliding scale. Such a step would send a message that America's enemies would all-too willingly amplify and mimic: that the United States affirmatively seeks to limit the scope of the humane treatment requirements.

Mr. FIDELL. No. As noted in response to question 7, the McCain amendment does not purport to address all of the requirements of Common Article 3.

Mr. MERNIN. No. As set forth above, the statute is by its terms not referable to Common Article 3. A number of commentators have offered examples of the potential different treatment standards reflected in the two sources. Before a statutory departure from Common Article 3 is undertaken, it should first take into account the opinion of the JAG testimony concerning the U.S. Armed Forces' teaching, training, and application of the Geneva Conventions, including Article 3.

Dr. CARAFANO. Most likely, unless the statute or Common Article 3 are misconstrued as they were in the *Hamdan* decision.

Mr. KATYAL. No. The McCain amendment's literal prohibition is significantly narrower than that of Common Article 3. The standard it applies is that of the Federal constitution's ban on cruel and unusual punishment. The test is whether the conduct "shocks the conscience." As this standard has been applied, the reasons for the conduct are relevant to the determination of its legality. A finding of some particularly heightened security need, for example, could justify otherwise "conscience-shocking" treatment of prisoners.

By contrast, Common Article 3 also prohibits conduct constituting "outrages upon personal dignity, in particular humiliating and degrading treatment." It does not require any physical harm and does not balance the severity of the conduct against its rationale.

It's easy to see where these two standards would diverge. Imagine the CIA has been "water-boarding" a suspected al Qaeda operative. Under the McCain amendment's standard, such a practice may well be legal. It might be justified by the exigency of the situation, by the rank of the prisoner, or by his access to information. Moreover, this conduct may not count as "torture" under other domestic statutes if it does not cause prolonged physical suffering. Under Common Article 3, however, such a practice may well qualify as the kind of "outrage on personal dignity" that is prohibited in all situations.

Compliance with the McCain amendment will only constitute compliance with Common Article 3 if the constitutional standard is understood to be identical to that of the treaty.

To the extent any legislation that abrogates our Geneva Convention obligations is being contemplated, it deserves the most careful and informed attention by Congress, following the submission of enough intelligence information to make sure that such a step is absolutely necessary. It must take place only after a sober and careful analysis, and not be the product of a rush to legislate.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. Yes, with regard to treatment of detainees, because I see little difference in scope of coverage between "cruel treatment" and "humiliating and degrading treatment", as used in Common Article 3; and "cruel, inhuman, or degrading treatment or punishment" in the DTA.

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

COMMON ARTICLE 3

9. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, the Supreme Court found that Geneva Common Article 3, which bars cruel and humiliating treatment, including outrages upon personal dignity, applies to al Qaeda. In response, some have argued that the terms included in Common Article 3 are vague and undefined in law of war doctrine. In Tuesday's Senate Judiciary Committee hearing, for example, the head of the DOJ's Office of Legal Counsel said that some of the terms are "inherently vague." Is this your understanding?

Ms. MASSIMINO. No. The terms in Common Article 3 are not inherently or otherwise vague. If the DOJ's Office of Legal Counsel finds the terms of Common Article 3 to be vague, perhaps they should talk to the military, to whom the meaning and requirements of Common Article 3 are clear. As the senior serving JAGs recently testified, our Armed Forces have trained to Common Article 3 and can live within

its requirements while effectively defending our Nation. The military has more than 50 years of experience training to and applying this standard. They have not complained of its vagueness; rather, they have always argued for the broadest interpretation of the standard, recognizing the importance to the safety of our own troops of preserving the integrity of Common Article 3. Moreover, as evidenced by Secretary England's July 6, 2006, directive, the DOD's understanding of Common Article 3 was not changed by the recent *Hamdan* decision.

Ms. NEWELL BIERMAN. As stated in the answer to question 7, the military has long understood, trained to, and applied the humane treatment requirements of Common Article 3, without ever raising concerns about its vagueness. The DOD Directive issued on July 7, 2006, by Gordon England restates DOD's obligation to comply with Common Article 3 and affirms that DOD policies, directives, executive orders, and doctrine all already comply with the standards of Common Article 3. The provisions of the Third and Fourth Geneva Conventions—including Common Article 3—are incorporated as required conduct for the armed services in Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and other Detainees, and similar regulations for other Services. As Major General Scott C. Black, JAG of the Army, told the Senate Armed Service Committee the following week: "[W]e've been training to [Common Article 3] and living to that standard since the beginning of our Army. We continue to do so." (7/13/06, SASC). The ranking JAGs of each of the other armed services agreed. As these military leaders make clear, the standards of Common Article 3 have long been deemed sufficiently clear for the military to mandate, teach, and apply. No more vague than other guiding principles, the standards of Common Article 3 have been given concrete meaning through usage over time.

Mr. FIDELL. No. As indicated in response to question 7, some of the prohibitions of Common Article 3 are no more vague than a variety of existing punitive articles in the UCMJ that have withstood judicial scrutiny for many years.

Mr. MERNIN. No. Common Article 3 has provided a useful framework for decades, and should not be discarded based upon a facile claim of vagueness. The cited testimony focused on the ban of "outrages upon personal dignity, in particular humiliating and degrading treatment" as inherently vague. The Association respectfully disagrees. Common Article 3 has been interpreted and followed by our Armed Forces for decades and to discard this well-regarded, clear legal standard—for the sake of expediency in establishing rules which will only apply to a handful of detainees—would be a grave mistake. By its terms, the subject provision accommodates the notion that there might be instances of "humiliating and degrading treatment" which do not rise to the level of "outrages upon personal dignity." As an example, one can posit an instance of verbal ridicule that would constitute an instance of "humiliating and degrading treatment." However, such an isolated event would not rise to the level of "outrages upon personal dignity." Requiring a modicum of interpretation does not make a standard inherently vague.

Mr. CARAFANO. Yes. For example, the phrase contained in Common Article 3 that treatment of detailees should prohibit "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" is vague. To comply with this section, it will require some due process, but what that due process should look like is hardly agreed upon by all "civilized peoples," nor is it even agreed upon who constitutes the body of civilized peoples. Nine justices of our Supreme Court also disagreed sharply on what a "regularly" constituted court was. Some ambiguity was intended by the drafters, which is one reason Congress attempted to remove jurisdiction from the Federal courts, which tend to establish fixed meanings that are too inflexible.

Mr. KATYAL. The "vagueness" of Common Article 3 has never, until now, impeded American military operations. It has never even been raised as an issue, even though American interrogators and soldiers have been subject to its requirements under the War Crimes Act since that law was passed almost 9 years ago. For decades the military has trained its soldiers to comply with a standard that goes well beyond what the Geneva Conventions, including Common Article 3, require. Further, the Government has itself asserted that the DOD has heretofore been in full compliance with the Geneva Conventions in its conduct of the global war on terror. By the administration's own admission, the military has always known how to comply—rendering their claim of vagueness nonsensical.

In reality, the vagueness argument is simply another step in an elaborate dance to protect non-complying parties from prosecution. If the United States wants to insulate such conduct, we should do so only after carefully assessing the costs to the international reputation of the United States and the impact of such a decision on our troops. Please also see my answer to question 8, above.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. First of all, I do not read the Supreme Court's opinion in *Hamdan* v. *Rumsfeld* as ruling that our treatment of al Qaeda detainees, apart from our use of military commissions to prosecute them, must comply with Common Article 3. That was a clear implication flowing from the ruling, but the Court did not make that holding. That is an issue for another day. In that regard, I believe the memorandum issued by the Deputy Secretary of Defense on July 7 regarding to application of Common Article 3 to those being held by DOD personnel is a good policy decision, but not one specifically mandated by the Court's ruling in *Hamdan.*

Having said that, let me now address the substance of your question. I disagree with Mr. Bradbury's testimony in the Senate Judiciary Committee that the terms of Common Article 3 are "inherently vague." As I said in response to a question from the Chairman, it has been acknowledged by the JAG that we train our Armed Forces to the Common Article 3 standard, and in our training manuals and other materials we distribute to our Service personnel, we give definition and clarity to the terms used in the article.

10. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, is there a body of opinion that defines Common Article 3?

Ms. MASSIMINO. Yes. The provisions in Common Article 3 are defined by U.S. case law in relation to the Alien Tort Statute and the Torture Victims Protection Act, such as *Kadic* v. *Karadzic,* 70 F.3d. 232 (2d Cir. 1995). Common Article 3 is also defined by international commentaries, such as the International Committee of the Red Cross (ICRC), and a well-developed body of international case law from international tribunals to which administration witnesses have referred to as a source for guidance on procedure and rules. As I noted in my testimony, the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, has said that "cruel treatment constitutes an intentional act or omission, that is, an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." *Prosecutor* v. *Delalic,* Case No. IT–96–21–T (Nov. 16, 1998) at para. 552. The ICTY similarly held that an outrage upon personal dignity is an act that causes "serious humiliation or degradation to the victim," and requires humiliation to be "so intense that the reasonable person would be outraged." *Prosecutor* v. *Aleksovski,* Case No. IT–95–14/1–T (June 25, 1999) at para. 56. According to that international tribunal, a perpetrator must have acted (or failed to act) deliberately and must have been able to perceive his suffering to be the "foreseeable and reasonable consequences of his actions." *Id.* These formulations are very similar to the way in which offenses are defined under U.S. criminal law.

Ms. NEWELL BIERMAN. Yes. There is a well-defined body of law, based on U.S. legal opinions, ICRC commentary and jurisprudence from international criminal tribunals that defines the nature and scope of the obligations under Common Article 3. U.S. courts have interpreted Common Article 3 in the context of civil litigation brought against human rights abusers under the Alien Tort Claims Act. In *Kadic* v. *Karadic,* 70 3d 232 (2d Cir. 1995), for example, the Second Circuit applied the law of Common Article 3 to conclude that the "offenses alleged by the appellants"—rape, torture, summary execution—"would violate the most fundamental norms of the law of war embodied in Common Article 3." Id. at 243. International criminal tribunals, and commentators, particularly the ICRC have also defined the scope of Common Article 3. The ICRC commentaries have defined the humane treatment standards of Common Article 3 as "concern[ing] acts which world public opinion finds particularly revolting—acts which were committed frequently during World War II." The case law of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) also provides useful guidance on the definition of a Common Article 3 crime. In examining offenses of either cruel treatment or outrages upon personal dignity, the tribunals have made clear that the humiliation suffered must be real and serious and must be so intense that the reasonable person would be outraged and have consistently limited individual criminal liability to serious violations of the humane treatment standards of Common Article 3. The statute for the International Criminal Court (ICC) in Article 82(c) defines war crimes as serious violations of Common Article 3, and the ICTY has said that serious violations of Common Article 3 are prosecutable as war crimes. *Kunarac* (Appeals Chamber), June 12, 2002, para. 68. The Court has also repeatedly set the standard that for a breach of IHL to be a war crime the "violation must be serious . . . it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for

the victim." *Tadic,* (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

Mr. FIDELL. There is a substantial literature on Common Article 3, including instructional materials generated by the Armed Forces. In 1960 the ICRC published a definitive commentary on all of the Geneva Conventions, commonly known as "Pictet," after its overall editor, Jean S. Pictet.

Mr. MERNIN. Yes. The authoritative ICRC Commentary, edited by Jean S. Pictet, was published in 1958. In addition, a number of U.S. courts (see, e.g., *Kadic* v. *Karadzic,* 70 F.3d 232 (2d Cir. 1995), courts of other nations, and international criminal tribunals have rendered decisions concerning or applying Common Article 3. An accessible standard of what constitutes a violation of the article has developed in this body of case law.

Dr. CARAFANO. Not in any final way, nor should there be. In international relations, sovereign states must take responsibility for their own treaty interpretations.

Mr. KATYAL. The requirements and purposes of Common Article 3 have been taken up by U.S. domestic courts in the context of civil litigation under the Alien Tort Statute and the Torture Victims Protection Act, international criminal tribunals, and commentators, particularly the ICRC. Most notably, the Second Circuit Court of Appeals applied the law of Common Article 3 in *Kadic* v. *Karadzic,* 70 F.3d.232 (2d Cir. 1995). The UCMJ, and interpretations of it, are also relevant to defining Common Article 3 because, as *Hamdan* reaffirms, the UCMJ codifies the laws of war. Moreover, the military's long tradition of training soldiers in the proper treatment of prisoners of war, and its longstanding regulations, should also be treated as a relevant source of interpretive guidance.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. There is a body of opinion comprised of customary international law, treatises, other scholarly writings, and even military training manuals from the United States and other countries which clarifies what is required to fulfill the requirements of Common Article 3.

11. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, does the vagueness of these terms require a change in America's relationship to the Geneva Conventions?

Ms. MASSIMINO. No. Our relationship to the Geneva Conventions need not and should not change. The U.S. military has abided by the Geneva Conventions since they were ratified in 1949 and has consistently—until now—maintained that the standards of conduct required by the Conventions are clear. It would not be in the U.S. national interest to deviate from this position now. The United States has greater exposure militarily than any other nation, and thus has the greatest stake in reinforcing the reciprocal nature of the Geneva Conventions. Moreover, a change in America's relationship to the Geneva Conventions would be perceived around the world not only as a breach of our treaty obligations, but as a lack of support for human rights and the rule of law.

Ms. NEWELL BIERMAN. Absolutely not. The U.S. has endorsed, upheld, and promoted the humane treatment standards embodied in Geneva since it was ratified in 1949. As explained in the answers to questions 7 and 9, the U.S. military has long trained to and sought to apply these standards without any complaints about vagueness. Any attempt to redefine the United States' relationship with Geneva will undoubtedly be seen as the U.S. attempting to unilaterally redefine its terms and limit its protections. No country in the world has ever before formally renounced or sought to define away its humane treatment and fair trial obligations under Common Article 3. Such a step would send a message that America's enemies would alltoo willingly amplify and mimic: that the United States affirmatively seeks to limit the scope of the humane treatment requirements. Carving out exceptions now would set a dangerous precedent, undermining humane treatment standards that protect U.S. soldiers if captured by the enemy in future conflicts.

Put another way, the costs of any change would be great and the benefits few to none. When Senator Graham asked the ranking JAGs of each of the armed services at the July 13 hearing before this committee, "Can we win the war and still live within Common Article 3?," all answered with an unequivocal "yes." Former JAG of the Navy, Rear Admiral John Hutson added: "In fact, I'd turn it around. I don't think we can win the war unless we live within Common Article 3." (7/13, SASC Hearing).

Mr. FIDELL. No. The Geneva Conventions were negotiated over 50 years ago and the War Crimes Act, which refers to Common Article 3, 18 U.S.C. § 2441(c)(3), was enacted 10 years ago. It's a little late to claim that Common Article 3 is too vague.

Mr. MERNIN. No. As set forth above, the Association disagrees with the premise that the referenced terms are vague. The treatment standards of Common Article 3 have formed an integral part of our Nation's Armed Forces' overall training and application with respect to detention and interrogation for decades. To whittle away at these respected and tested norms, for the sake of expediency, would send the wrong message to our troops, our enemies, our allies, and to the world.

Dr. CARAFANO. No. The parties to the Convention intended some ambiguities and papered over others. That is true of most treaties, and we do not "change our relationship" to them.

Mr. KATYAL. Not in the least. American officials and soldiers have long demonstrated both the capacity and the willingness to abide by the Geneva Conventions, without complaint of vagueness or insufficient guidance. Further, the military is not arguing that deviations from the Geneva Conventions are required in order to successfully prosecute the war on terror. Disrupting the existing balance of domestic statutes, international law and judicial glosses on these sources of law in any way that reduces or eliminates our obligations under the treaty would be a violation of international law to a degree unprecedented in America's history. The government would forfeit America's status as the world's leading proponent of human rights. By even contemplating such a dramatic—and unnecessary—change, the government is in uncharted territory.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. Because I do not agree that the terms are "inherently vague," I see no need to modify our longstanding acceptance to be bound by the provisions of the Geneva Conventions.

12. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, some have suggested that we put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last year's DTA. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Is this a good idea?

Ms. MASSIMINO. No. See responses to questions 7 and 8. Because of the way the administration has interpreted the DTA standard, were Congress to put in statute that the prohibitions contained in Common Article 3 are identical to the DTA, the result would be a weakening of the Common Article 3 standard. Common Article 3 has always been interpreted by the United States as imposing an absolute prohibition on inhumane treatment of prisoners. Thus, under the Common Article 3 standard, subjecting prisoners to interrogation techniques such as prolonged stress positions, waterboarding, heat injury or hypothermia, and other such conduct would clearly be prohibited, regardless of the facts or circumstances surrounding the particular interrogation. The United States has in the past prosecuted foreign enemies for subjecting our personnel to such acts.

In contrast, the administration has interpreted the DTA "shocks the conscience" standard to be "flexible," so that abusive conduct may be permissible depending on the rationale for employing it. In Vice President Cheney's words, what shocks the conscience is "really in the eye of the beholder." For this reason, legislating that compliance with the DTA constitutes compliance with the requirements of Common Article 3 would result in replacing an absolute standard with a relative one, thereby weakening the Geneva Conventions standard.

Ms. NEWELL BIERMAN. Absolutely not. As explained in the answer to question 8, Common Article 3 has always been interpreted as imposing an absolute prohibition on all inhumane conduct, drawing a clear line between prohibited and permissible conduct. The DTA, in comparison, has been interpreted by this administration as imposing a relative standard, a sliding scale of prohibited treatment. Applying a "shocks the conscience" test, the administration claims that what "shocks the conscience" depends on the need.

Some have suggested that defining the humane treatment standards of Common Article 3 in accordance with the DTA would add "clarity" to uncertain language in Common Article 3. But what is "cruel, inhuman, and degrading" is not inherently more "clear" than what is "humiliating and degrading." In contrast, an absolute standard—which establishes definitive boundaries between prohibited and approved conduct—is certainly clearer and easier to teach and train to than a standard which varies according to the circumstances. In fact, as both Gordon England's July 7 memo—and the statements of the JAGs have made clear—the military has long been teaching and training to the Common Article 3 standards. The military has never concluded that the standard was too unclear to teach, train to, and apply.

Mr. FIDELL. Reference to the 5th, 8th, and 14th Amendments was understandable in light of the United States position on the Convention Against Torture, but was not necessarily a good idea since the Geneva Conventions ought to have a common meaning among nations, rather than one that varies from country to country.

Mr. MERNIN. No. The prohibitions are not identical, and the United States should not by such legislation water down or turn its back on its treaty obligations, nor by doing so encourage or credit another nation's unilateral effort to rewrite the meaning of Common Article 3's baseline safeguards. Nations need to be able to depend upon the uniform application of treaty provisions, or the provisions will over time lose their force.

Dr. CARAFANO. Yes, it is better than most other alternatives, but only insofar as the reference to these constitutional amendments pertains to the definition of cruel, inhumane, and degrading treatment, and not to establishment of any sort of constitutional rights for detainees.

Mr. KATYAL. As I discussed above, the standard courts apply under those amendments is whether the conduct in question "shocks the conscience." This constitutional test, while certainly more familiar to the courts than any new statutory language would have been, may not transfer so cleanly into the context of an international, largely secretive operation against high-level terrorists. First, the test is subjective—the reasons motivating the conduct are relevant to determining whether the conduct is constitutional. For example, punishment grossly disproportionate to the cause of deterring or punishing crime would violate the law. However, where the prisoner is a high-level member of al Qaeda, or has access to information, the "shocks the conscience" standard may well permit conduct that is categorically prohibited by Common Article 3. There is simply no precedent for evaluating our constitutional standard under these circumstances. Second, because it is so subjective and case-specific, the standard in the DTA will put courts in a position of making policy judgments about acts conducted on the ground by military and intelligence personnel. While the flexibility of the DTA standard gives power to the courts to use their discretion, the balancing they will be forced to do makes them more likely to abstain from judgment and allow violations of our international obligations to continue.

Third, because the executive has asserted that those detained abroad have no constitutional rights, including under the 5th, 8th, and 14th amendments, it is not clear that the language of the act protects detainees held outside of the United States at all.

Mr. SCHLUETER. Yes, I believe that using the Constitutional standards, as interpreted by the United States courts is a prudent course.

Mr. SILLIMAN. The definition of "cruel, inhuman, or degrading treatment or punishment" in the DTA is obviously modeled after the Senate's definition in its formal "understanding" of the phrase "cruel, inhuman, or degrading treatment of punishment" as used in Article 16 of the 1984 Convention Against Torture. Even though Common Article 3 has a difference in wording (using the phrase "humiliating and degrading treatment" rather than simply "degrading treatment" as in the statute), because the difference in connotation is slight, I do not believe that reference to 5th, 8th, or 14th amendment standards would necessarily be inappropriate.

13. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, what are the implications of our redefining Common Article 3 in this way?

Ms. MASSIMINO. See response to question 12. The implications of our redefining Common Article 3 by equating it with the DTA standard would be serious. First, it could result in implicitly authorizing for U.S. personnel acts which the rest of the world rightly views and would treat as war crimes. Second, it risks undermining the core Geneva Conventions standard of humane treatment on which our own personnel rely.

Forty-nine retired military leaders recently wrote a letter to this committee about the prospect of the United States redefining Common Article 3 in this way. In their view, "were we to take this step, we would be viewed by the rest of the world as having formally renounced the clear strictures of the Geneva Conventions. Our enemies would be encouraged to interpret the Conventions in their own way as well, placing our troops in jeopardy in future conflicts. American moral authority in the war would be further damaged."

Ms. NEWELL BIERMAN. See answers to questions 8 and 11.

Mr. FIDELL. Adoption of a narrow reading of Common Article 3 has at least four intolerable consequences. First, it destroys any chance for a common, universal understanding of the meaning of these treaties. Second, to the extent that the definition does not address parts of Common Article 3, it leaves those provisions in limbo

as a matter of United States law. Third, it potentially could serve as the basis for undeserved immunity on the part of United States military and civilian personnel who have previously violated Common Article 3. Finally, it would deprive our country of the right to object to abusive treatment of our personnel who fall into others' hands.

Mr. MERNIN. As alluded to in response to question 12, such a redefinition would open the door for our enemies to mistreat American captives yet still claim, behind a curtain of deceptive logic, that their actions were consistent with their interpretation of Common Article 3. Moreover, JAG testimony to this Committee and the Judiciary Committee has made clear that there is neither a need, nor desire within the armed services, to depart from the Common Article 3 standards which have been taught, trained to, and applied for decades.

Dr. CARAFANO. If Congress chose to do so, the Court ought to uphold its action. The only consequence might be that our treaty partners argue we are not in compliance with our treaty obligations.

Mr. KATYAL. First, it would immediately stop some extreme procedures—such as waterboarding. Even the CIA's Inspector General has evidently conceded that such procedures shock the conscience.

Distressingly, however, several large loopholes will persist under the DTA's standard. To the extent that the "shocks the conscience" test would still permit conduct that Common Article 3 would prohibit, such as the elimination of fair trial rights, the statute would violate the Geneva Conventions.

Mr. SCHLUETER. I do not have sufficient experience or knowledge in this area—international law—to be able to give you an informed answer.

Mr. SILLIMAN. This would provide a statutory definition as to what might constitute a violation of Common Article 3 for domestic purposes, but it would not bind either an international tribunal or the courts of other countries on how they might rule on what constitutes a violation of that article of the Conventions.

HOW CONGRESS SHOULD PROCEED

14. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schlueter, in Mr. Silliman's prepared testimony, he stated his view that, as a matter of domestic law, Congress could restrict the application of Common Article 3, but that doing so might not pass judicial muster and would invite additional litigation and more years of legal uncertainty. Could you explain to us why the Supreme Court might not uphold such legislation as Professor Silliman suggests?

Ms. MASSIMINO. Congress has the constitutional authority to pass a law that is in conflict with a treaty ratified by the United States. However, passage of a law restricting the application of Common Article 3 would be a serious breach of our international legal obligations and would likely be viewed by all other nations as a material breach of the Geneva Conventions as a whole. As such, the courts certainly could find it highly suspect, and indeed might overturn the law, particularly if there was any doubt about whether Congress intended to put the United States in breach of its international legal obligations.

Ms. NEWELL BIERMAN. When the United States affirmed and ratified the Geneva Conventions in 1949, it committed to applying the humane treatment and fair justice requirements of Common Article 3. Common Article 3 is part of customary international law. *Kunarc* (Appeals Chamber) June 12, 2002, para. 68. The legislative authorization of military commissions that fail to meet the fair justice requirements of Common Article 3 would put the United States out of compliance with its treaty obligations and would be illegal under a set of core customary international law norms.

Mr. FIDELL. We agree that Congress could restrict the application of Common Article 3, but doing so would constitute a de facto repudiation of the Geneva Conventions, which would be wrong and seriously endanger United States personnel abroad. We defer to Professor Silliman as to whether the Supreme Court would sustain legislation that restricted the application of Common Article 3, especially if Congress's intent to do so was unmistakable.

Mr. MERNIN. With respect to whether the Supreme Court would sustain such a legislative maneuver, the Court could well find that any material departure from the Common Article 3 treatment standards impermissibly violated the law of armed conflict. The Court stated: "Common Article 3 then, is applicable here and, as indicated above, requires that *Hamdan* be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'." Although legislation which attempted to restrict the application of Com-

mon Article 3 would be possible, any step which sought to roll back the explicit guarantees of Geneva, on the heels of the *Hamdan* decision and in the context of the message the DTA sought to convey, would constitute an ill-advised effort to circumvent the U.S. military's experience-driven policy and practice. In this and future conflicts, our troops are the ones most at risk of capture, and our detainee policies have always been premised, in significant part, on the encouragement of reciprocity in the treatment of our captured troops. We should never take steps which heighten the risk of maltreatment of our troops without any demonstrable benefit.

Dr. CARAFANO. If Congress chose to do so, the Court ought to uphold its action. The only consequence might be that our treaty partners argue we are not in compliance with our treaty obligations.

Mr. KATYAL. As a matter of domestic law alone, Congress has the power to pass such a law—though at great political cost, with severe legal consequences. Nevertheless, such legislation would violate international law that binds the United States. Any limit on the application of Common Article 3 would be a material breach of one of the United States' most important and longstanding treaty obligations. As I discussed in my testimony at page 16, Common Article 3 is considered a "Convention in miniature" because of the fundamental principles it embodies. Violating it would be considered a material breach of the Geneva Conventions as a whole. Moreover, as I mentioned above, the 1949 Geneva Conventions codify existing customary international law. Any statute that permits the violation of Common Article 3 would be illegal under this set of core international legal norms.

Mr. SCHLUETER. The Supreme Court's general view is that in interpreting treaties and Federal legislation, the last in time will prevail—if there are any conflicts. Thus, if Congress were to enact legislation covering some of the same topics already covered in Common Article 3, Congress's last word on the topic would normally prevail. So it does not strike me that such legislation would necessarily be constitutionally suspect, or that even if it were, a majority of the court would strike down the Federal legislation.

15. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schlueter, could you also give a more detailed explanation of how such legislation would create more litigation and legal uncertainty?

Ms. MASSIMINO. Legislation that purports to restrict or redefine our obligations under Common Article 3 would certainly be challenged in the courts. To the extent that Congress establishes military commissions that infringe on the basic principles of fair justice described by the Supreme Court in *Hamdan* or authorizes conduct that would violate the Geneva Conventions, such challenges would have merit. In addition to legal challenges, however, legislation limiting the scope and meaning of Common Article 3 would create legal uncertainty, undermining the Pentagon's new rules on detainee treatment (which are grounded on the military's understanding of Common Article 3).

Ms. NEWELL BIERMAN. The President authorized the use of military commissions in March 2002. For the past 4 years, the military commissions—rather than accused terrorists—have been on trial, and appropriately so. In *Hamdan,* the Supreme Court laid out basic principles of fair justice, none of which are reflected in the military commission rules: the tribunal must be fair and impartial; the accused has the right to be present at trial and provided all of the evidence presented to the factfinder; the accused cannot be convicted on the basis of unreliable evidence that he has not been able to confront, such as evidence obtained through torture; and the accused is entitled to an independent appeal of any finding of guilt. If Congress were to authorize commissions that violated these basic fair trial standards, it would undoubtedly lead to another round of litigation, thus delaying even longer the time when the United States holds accountable those who have committed war crimes.

Mr. FIDELL. Because the Supreme Court has not sought to answer questions not directly presented to it, in either *Hamdan* or *Hamdi*, a measure of uncertainty and additional litigation is inevitable. It might indeed have been preferable for the Court to have gone further in both of these decisions in providing a roadmap for Congress and the executive branch. However, the Court's reluctance to do so is consonant with its essentially conservative view of the judicial function in a democracy. Accordingly, additional litigation (and uncertainty until the litigation comes to an end) is inevitable. NIMJ does not agree that the prospect of additional litigation is in itself a reason for or against legislation. So long as our Nation adheres to its commitment to the rule of law and our civilian courts are open, Congress must assume that efforts will be made to seek judicial review of claims that constitutional and other rights have been violated. It is to be hoped that the Federal courts would address such claims on an expedited basis, but if fear of litigation were permitted to

trump important rights and access to the courts, it would be a sad day for our country. Moreover, the Supreme Court has long made clear that executive branch action is most likely to be sustained when it is clearly supported by congressional action. Legislation clarifying what the President can and cannot do may produce litigation, but actions of the President that find support in congressional legislation are most likely to be sustained.

Mr. MERNIN. After *Hamdan,* any legislative response which restricts the application of Common Article 3 will invite further detainee litigation by detainees. First, whether Congress even has the ability to change the substantive law of war as to current detainees would be placed in issue. Second, the substantive arguments as to whether the newly legislated procedures satisfied our treaty obligations and constitutional standards, as set forth by the *Hamdan* court, would be at issue. Departing from the Common Article 3 standards would place an enormous burden on those we call upon to implement these policies, who would be compelled to maneuver in the grey area between the known Common Article 3 standards and the new legislative standards. Damage to the well-earned respect for the U.S. military legal system would be the worst result.

Dr. CARAFANO. There are many lawyers looking for ways to defend their clients and/or cause trouble for the administration. Congress should not concern itself if there is more litigation (there will be), but only if such future litigation has merit.

Mr. KATYAL. If Congress were to authorize practices that violate international and domestic standards, it would run the risk of having the legislation invalidated. Those detained or interrogated by the United States would be able to raise legal claims based, first, on the violation of international law, and second, on the basis of American constitutional protections, whose violation might be inferred from the abandonment of these long-held standards for the treatment of prisoners. For example, imagine that Congress wrote a statute that said that the UCMJ does not incorporate Common Article 3, and therefore allows trials without the presence of the defendant or his counsel. We would see another round of litigation challenging, first, the denial of trial rights as a matter of our treaty obligations with or without an implementing statute; second, the legality of a statute that implicitly repealed the treaty obligation; and third, the constitutionality of the statute under the 5th amendment and other protections. Additionally, we could expect to see litigation in international tribunals and wrangling in the U.N. against the United States for rescinding a fundamental treaty obligation.

Mr. SCHLUETER. If, as noted in the answer to question 14, above, Congress decided to enact legislation covering the same topics as those covered in Common Article 3, I cannot agree that it would necessarily generate any litigation that would not otherwise be generated by those arguing that a violation has occurred under Common Article 3. Even then, only persons with standing, to allege violations of such legislation would be able to initiate such litigation.

16. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in his prepared testimony, Mr. Schlueter states that "it is appropriate for Congress to map out only broad policy guidelines for implementing military commissions, and leave to the President and the DOD the task of more specifically setting out the procedures and rules to be used." Mr. Fidell from the NIMJ seems to agree with that approach. Could the panel address why Congress should set specifically the procedures and rules to be used for military commissions?

Ms. MASSIMINO. As stated in my testimony, before it launches into deliberations about which procedures should govern in military commissions, Congress should satisfy itself that commissions of any kind—as opposed to regular courts martial—are necessary to try those suspected of war crimes. But if it concludes that the courts martial system is insufficient, Congress should be extremely skeptical of proposals that would delegate the task of setting procedures and rules exclusively to the executive branch. While there is nothing inherently wrong with Congress setting broad policy guidelines and delegating the authority to set detailed rules to the executive branch, in this instance such delegation would be unwise. The administration has twice set rules and procedures for military commission that have failed to satisfy basic fair trial standards. The proposal it has now asks Congress to approve is similarly deficient. We see in the administration's current legislative proposal what kinds of rules it would likely establish under such delegated authority: an accused would be denied the right to be present at trial and provided all of the evidence that was obtained by unlawful coercion. A trial system operating under such rules would likely not survive judicial scrutiny and would likely be viewed as illegitimate by the rest of the world.

Ms. NEWELL BIERMAN. There is nothing inherently wrong with legislation that sets policy guidelines and delegates decisionmaking regarding precise rules and procedures. But any delegation should be made to an independent body of experts, such as the current and former ranking JAGs, with the experience required to design rules that are both fair and lawful—and not to the President and DOD. The President and DOD have already proven far too willing to do away with basic fair trial standards to be entrusted with the responsibility of crafting commission rules and procedures. Twice, the administration crafted rules and procedures to govern military commissions—first in March 2002, and then again in August 2005. Neither system withstood Supreme Court scrutiny. Now, rather than adapting in response to the Supreme Court decision, the administration has circulated a draft proposal that incorporates many of the same deficiencies of the earlier systems that were identified by the Supreme Court. At this point, the administration should not be entrusted with the task of designing a system that is sufficiently fair to pass judicial scrutiny.

Mr. FIDELL. The overall design of the UCMJ has long been for many details that might otherwise be enacted by Congress to be decided upon by the President instead. It would certainly be odd for Congress to go into more detail on procedures for trials of enemy combatants than it has for trials of our own personnel. As indicated in our prepared testimony and during the July 19, 2006 hearing, NIMJ believes that the President should have the power to depart, for military commissions, from a default model of general court-martial procedures, subject to substantial protections such as particularized statements of impracticability, reporting requirements, and meaningful judicial review. However, in light of the strong evidence of intransigence on the part of the executive branch in the weeks since the Supreme Court decided *Hamdan,* including claims of impracticability that are entirely lacking in substance, we have concluded that Congress should place some aspects of military commission procedure beyond the President's power—i.e., in those respects he should not be permitted to depart from general court-martial procedures based on a claim of impracticability. We are developing a further revision of our proposal to reflect this.

Mr. MERNIN. The Association believes the suggestion that broad deference to the executive would now result in a satisfactory system is not supported by the public record. We applaud NIMJ's efforts and continue to study its revised proposal which uses as its starting point the UCMJ. The administration reportedly received and disregarded, or failed to credit, significant input as to methods to better structure the commissions. Accounts suggest that the experience and input of senior JAG officers was largely ignored in the commission rulemaking process. One would hope that the executive would now seek to establish commissions which satisfied the goals of security, credibility, and fairness. However, the evidence suggests that circumventing, rather than addressing, the substantive issues raised by the *Hamdan* decision may underlie the administration's efforts to respond.

Mr. CARAFANO. It should not do so; nor should it attempt to micromanage other aspects of military intelligence and prosecution of the war.

Mr. KATYAL. As Justice Kennedy's concurrence reiterates, the President's actions are granted the highest degree of deference when they are consistent with, and authorized by, Congress. Giving the executive branch largely unfettered discretion in the fashioning of a new system creates a high risk that the President's actions will create procedures and standards far below what treaties require, what the Constitution requires, and what our existing laws require. *Hamdan* makes clear that a vague grant of authority, for example, the AUMF, which could theoretically authorize all sorts of executive actions, does not necessarily immunize all actions taken, allegedly, pursuant to it. Congressional authority insulates the President's actions from review only when it is specific, thoughtful, and the product of clear deliberation about the proper separation of power between the branches. If Congress were only to set out policy guidelines that are overbroad to the point of being meaningless, it would abdicate a critical role it plays in guaranteeing compliance with the Constitution and other laws. Moreover, Congress is fully capable of designing a fair, effective, and legal system for trying detainees on its own without deferring to the executive branch.

Indeed, the executive branch cannot be relied upon to craft an adequate military commission system on its own. The executive branch has already attempted to design and implement two military commission systems—the one adopted by Military Commission Order No. 1 of March 21, 2002, and the system of August 31, 2005. Neither withstood Supreme Court scrutiny. Despite the failings of the administration's commissions, executive branch officials initially asked Congress to simply ratify the August 31, 2005, commission system. The administration has since circulated a draft bill that is radically deficient in providing the necessary procedural protections

to create a fair and reliable commission system. The administration's track record suggests that it is unwilling or unable to produce a commission system that would have the necessary fairness to produce reliable findings entitled to domestic and international legitimacy. Congress unquestionably has the constitutional authority to design any military commission system and should exercise such authority. Please also see my answer to question 18 below.

Mr. SCHLUETER. As noted in the question, in my view Congress should leave to the executive branch the task of drafting specific rules and procedures. That is the model that has been used for decades in dealing with military justice issues and is appropriate for any procedural issues dealing with military commissions. The reason for that approach is that both Congress and the Supreme Court have recognized that in the area of military criminal justice procedures, the executive possesses the necessary expertise to draft those rules. A similar approach is used to draft the rules of procedure for Federal courts. That is, under the Rules Enabling Act, the judicial branch is charged with promulgating drafts of amendments to the Federal rules; those rules are transmitted to the Supreme Court, which approves them and forwards them to Congress. Absent any action by Congress, the amendments become effective on December 1 of the year the Supreme Court approved them.

Given the controversial nature of any proposed rules for military commissions, a compromise might be to require that the executive report any such rules to Congress, which is charged under the Constitution with general oversight in this area.

Mr. SILLIMAN. I totally agree with the approach suggested by Mr. Schlueter and Mr. Fidell, and join them in recommending that Congress leave to the executive branch the crafting of the detailed rules of procedure for military commissions, rather than trying to legislate them. I believe that the case law supports the premise that the President, when acting as Commander in Chief, has the constitutional authority to establish military commissions as long as he stays within congressional constraints. The Supreme Court in *Hamdan* v. *Rumsfeld* implicitly reaffirmed this view. Further, those most knowledgeable of how to draw the balance between prosecuting terrorists and safeguarding national security interests are the practitioners of military law—Active-Duty JAGs—who are in the executive branch. Therefore, Congress should legislate only where necessary; for example, where a provision of the UCMJ must be amended, and leave to the executive branch the discretion to establish more detailed rules and procedures in an executive order, such as the Manual for Courts-Martial.

17. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, could each of you comment on Mr. Mernin's recommendation that Congress pass legislation appointing an expert panel with the mandate of advising Congress about the best way to establish a military commission system that would respond to the Supreme Court's decision in *Hamdan*?

Ms. MASSIMINO. This is an interesting proposal. A body of experts—perhaps comprised of former JAGs—who remain independent from the executive branch yet experienced in national security and military commissions would be well-suited to assess the various models and test the contentions made by the administration about the necessity for depriving detainees of certain fundamental procedural protections contained in the UCMJ and Manual for Courts Martial. Also, it is more likely that a design proposed by an independent panel of experts would be acceptable to the American public and deemed legitimate by the international community.

Ms. NEWELL BIERMAN. The process of creating a fair system of justice is complex and confusing, with interacting rules and procedures, and requires great care. The creation of an independent and expert panel to advise Congress is an excellent idea that would give any commissions established by Congress greater legitimacy. A body of experts would be able to dispel the myth that the UCMJ and Manual for Court Martial do not provide a workable system of justice to try those accused of war crimes.

Mr. FIDELL. Expert panels such as those the New York City Bar Association have proposed can often play a useful role, but we believe such a panel in the present context would only put off some of the tough decisions Congress is going to have to make in the end anyway. The hearings Congress has already held have included many of the individuals and groups that would be involved in an expert panel. For these reasons, and given the indefensible delay that has already occurred since the first detainees arrived at Guantanamo Bay, we recommend against an expert panel.

Dr. CARAFANO. The executive and Congress have access to the expertise they need. To appoint a commission and wait for their findings would unnecessarily delay the effort to provide speedy due process.

Mr. KATYAL. This is an extremely important and good idea—whether along the lines of Mr. Mernin's proposal or that of Senator Levin, who has advocated a Code Committee review under the UCMJ provision. An expert panel would be helpful for studying the problems involved in trying detainees by military commission and developing useful empirical evidence about the effectiveness and security of the different models available. Indeed, an expert panel would go a long way towards ending the myth making and posturing that has dominated this process from the start. The administration has offered no empirical evidence, for example, that courts-martial fail to protect both the government's interests and the constitutional and human rights of the defendants. Moreover, the administration's arguments that the hearsay and chain-of-custody evidentiary rules are burdensome are vastly overstated. See my testimony at pages 7–11. Given the tremendous delays in getting military commissions off the ground thus far, devoting time and research to designing a viable commission system will cause no cognizable injury to our national security. There have been no military commissions in the past half-century, let alone since September 11, and, as the chairman eloquently pointed out, the eyes of the world are watching us. Getting it wrong again is simply too dangerous. That bell cannot be unrung.

Mr. SCHLUETER. I do not agree with the underlying recommendation that an expert panel be created in order to address the issue of rules of procedure for military commissions. That would simply bog Congress down in political debates about what rules should or should not be adopted. As I note in my answer to question 17, above, the task of drafting the rules should be left to the executive.

Mr. SILLIMAN. As I mentioned in my testimony, I believe the body of experts best suited to making such recommendations regarding military commissions are the Active-Duty JAGs, and they can easily and quickly be brought together for this purpose. That would not require legislation, only a willingness on the part of the executive department to convene such a "grass roots" panel and to share its findings openly with Congress so as to facilitate active and sincere joint participation in responding to the Court's decision.

ATTORNEY GENERAL GONZALES'S TESTIMONY ON *HAMDAN*

18. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that the existing military commissions that were struck down by *Hamdan* take into account the "situational difficulties" of the war on terrorism and "thus provide a useful basis for Congress's consideration of modified procedures." Do you agree with the suggestion that the commissions should be the starting point for legislation?

Ms. MASSIMINO. No. the military commissions struck down by the Supreme Court were so inherently flawed that they should be set aside in their entirety. Congress should start fresh in its consideration of whether military commissions are necessary, and, if it finds they are, what limited deviations from the courts-martial system are needed. There is no reason for Congress to take as the framework for its deliberations a system which completely failed to meet basic fair trial standards. Military commission prosecutors themselves have remarked that the military commissions were incapable of delivering a fair trial. As the Supreme Court found, they deprived defendants of the most basic rights, including the right of an accused to be present at trial and provided all of the evidence presented to the factfinder, and the right of the accused not to be convicted on the basis of unreliable evidence that was obtained through unlawful coercion. Furthermore, the military commissions system has been outperformed by the Federal court system. The Federal courts have prosecuted 261 terrorism cases since September 11 while the military commissions have not produced a single conviction. If Congress is looking for a successful model for terrorism prosecutions, perhaps it should also draw on the regular criminal justice system.

Ms. NEWELL BIERMAN. No. The commissions that the Attorney General continues to champion have failed to bring a single accused terrorist to justice in their 4 years of operation, even as the DOJ has reported having prosecuted over 260 terrorism cases in Federal court during the same time period. Moreover, the commissions' flaws are both structural and procedural—affecting the entire system—and cannot provide a useful starting point for legislation. Even the military commission's own prosecutors have complained that the commissions were unfair. The Appointing Authority convened the commission, brought the charges, selected the panel determining guilt or innocence, oversaw the prosecutor and decided dispositive issues of law that arose in the middle of trial. This is the equivalent as the executive acting

as judge, prosecutor, and jury. Moreover, as the Supreme Court concluded, the commissions denied the most basic fair trial rights to defendants, including the right to be present and to confront the evidence presented against them.

Mr. FIDELL. We do not agree with the Attorney General's suggestion. We have a robust military justice system. It is not perfect—and we would be pleased to discuss with the committee areas in which it could be improved—but it is the obvious starting point, and the burden should be placed squarely on those who contend otherwise. Indeed, the disturbing court-martial cases that have arisen in Iraq and Afghanistan in recent months demonstrate the military justice model's ability to function in the most adverse circumstances and yet earn public confidence. That is more that can be said of the military commissions with which the executive branch has been fumbling for years in the complete safety of the Guantanamo Bay enclave.

Mr. MERNIN. No. The existing commission procedures were drafted in a rush, modified without sufficient review, and never actually implemented. No trials resulted from the existing commissions. If there are trials to be conducted—rather than detentions dressed up under the guise of due process—then security, fairness, and our national values demand that a just, clear, and consistent trial system be implemented, without hiding behind facile and conclusory assertions of "situational difficulties."

Mr. CARAFANO. Yes and the ending point. As Justice Thomas stated in his dissent, the President's latitude in military and foreign affairs, especially when sanctioned by Congress in the form of an Authorization to Use Military Force, and in a more specific authorization, if necessary, is at its zenith.

Mr. KATYAL. No. The flaws with the existing military commissions—the flaws which contributed to their dismantling by the Supreme Court—went to the core of the system itself and reeked of self-serving by the administration. The commissions were plagued by years-long delays in appointing counsel and even in charging the defendants. Further, the commissions denied even the most basic trial rights to defendants, including the right to be present at trial and the right to question and confront the evidence presented against them. Even the military commission's own prosecutors complained that the system was unfair to defendants and designed to guarantee convictions, not fair trials. The Appointing Authority, who convened the commissions and brought the charges, was also responsible for selecting the panel determining guilt or innocence and exerted control over the prosecutor. Domestically, this is the equivalent of a judge initiating the case, picking the charges, directing the prosecution, and selecting the jury. It is unclear where the Attorney General would have Congress "start" in this system, because its flaws are embedded within its very structure.

The starting point—and ending point—for any proposed authorizing legislation is the court-martial system established by the UCMJ. For reasons explored in my testimony, the court-martial system has many significant advantages over any system that could be crafted out of the existing commissions. Chief among these advantages is the tremendous respect that has been accorded to the UCMJ since the time that it was written. Countries throughout the world have emulated the U.S. court-martial system, and it continues to be a model of how to achieve justice when sensitive information and special parties are involved. The court-martial system is flexible, secure, and effective. Best of all, it already exists.

Mr. SCHLUETER. I wholeheartedly agree that the baseline for further consideration of military commission procedures should be the existing rules adopted in November. In promulgating those procedures, the drafters considered a wide range of issues and I believe, got most of it right. The fact that some tweaking is required does not justify rejecting all of the rules.

Mr. SILLIMAN. I do not. The Supreme Court appropriately delineated the many legal deficiencies, both domestic and international, with regard to the President's commission system, and strongly implied that the UCMJ be at the core of any new system established in response to the Court's ruling. That Code, the UCMJ, should be the starting point.

19. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, why would someone suggest that the commissions and not the UCMJ should be the starting point for legislation?

Ms. MASSIMINO. There is no good reason why someone would make this suggestion. As the Supreme Court made clear, the default system is the UCMJ. Those who advocate deviating from the UCMJ have the burden of demonstrating why it is impracticable to adhere to this system. There are numerous advantages to using the UCMJ as a stating point for legislation. Unlike the military commissions system, the UCMJ has been approved by the Supreme Court. Therefore, its use will not lead

to another round of litigation challenging the legality of the system. Also, military judges, prosecutors, and defense counsel are well-versed in the UCMJ's procedures and, consequently, are better prepared to handle prosecutions under this system. As I noted in my testimony, one of the major deficiencies with the military commissions at Guantanamo was the lack of clarity as to what constituted "commission law." The absence of time-tested and court-adjudicated rules and procedures resulted in continual delays, and much less predictability and stability. Moreover, the efficacy of the UCMJ system has been reaffirmed with the recent court-martial cases that arose in Iraq and Afghanistan. These cases, which have required the gathering of evidence from the operational settings, prove that the UCMJ is fully capable of taking into account the "situational difficulties" of the war on terrorism.

Ms. NEWELL BIERMAN. It is unclear why someone would suggest this. When Senator Graham asked the ranking JAGs of each of the armed services: "We need to have military commissions as uniformed as possible with the UCMJ, because that's the root source of the law of military commissions. Is that correct?" (7/13, SASC), all answered "yes." Enacting legislation based on the military commissions—rather than the UCMJ—will undoubtedly lead to a whole new round of litigation. Military commissions rather than suspected terrorists remain on trial. The UCMJ, in contrast, is a tried and true system, approved by the Supreme Court, and created in response to concerns about the inadequacies of military commissions hastily put together during World War II. It provides the appropriate starting point for any congressional legislation.

Mr. FIDELL. It is difficult to speculate as to why anyone would choose the wrong starting point, as the executive branch has elected to continue to do. If the reason is a desire to stack the deck and ensure convictions, that would be incompatible with our national values. If the reason is to maximize the power of the so-called unitary executive, the easy answer is that in this area Congress enjoys its own express grant of authority under Article I, § 8 of the Constitution.

Mr. MERNIN. Someone acting on behalf of a prosecutor, given carte blanche, might follow an ill-advised tendency to create those procedures most likely to obtain convictions, in the belief that prosecutorial discretion would prevent abuse. That is not a recipe for due process, fairness, or honor.

Dr. CARAFANO. I do not know, given that it would be extremely unwise. I think it would be inappropriate to use UCMJ.

Mr. KATYAL. From the prosecutor's perspective, if Congress gives you the ability to write all the rules for trial and the ability to define the offenses and pick the judges, you are likely to be elated. It's just like appointing the fox to guard the hen house. Trying prisoners captured in the global war on terror no doubt poses unique challenges. For these reasons, the administration tends to argue that it needs a unique court system to try those captured in such unique circumstances. Nevertheless, different circumstances alone do not justify deviating from a set of laws that has been flexible enough to meet the needs of the military during a period where the nature of war, and the nature of the military, have both changed rapidly. The UCMJ is unfamiliar to most civilian lawyers and has its own system of precedent and procedure that government lawyers would themselves have to learn. Of course, it's easy to see why the administration would rather start from scratch and build a system where it has written all the rules and picked the judges. The administration, however, has failed to articulate a compelling explanation for why such a deviation from the existing system is necessary or prudent. Indeed, as the administration has pointed out elsewhere, the DOJ has been remarkably successful in using the existing Article III courts to obtain terrorism convictions—261 between September 11, 2001 and June 22, 2006 by its own count.

Mr. SCHLUETER. As I note in my answer to question 18, the drafters of those rules considered a wide range of issues and had considerable input from both civilian and military sources. Granted, the DOD ultimately rejected some recommendations from the uniformed lawyers but that fact alone does not warrant complete rejection of the rules. Instead, the DOD should be given the option of amending those rules found wanting by the Court in *Hamdan*, or by explaining why the UCMJ procedures are not applicable to commissions.

Mr. SILLIMAN. I believe the rationale for such a suggestion would be that the UCMJ is an unworkable system for prosecuting terrorists because it contains procedural protections which should not be afforded to those who mock and do not adhere to the rule of law. I do not agree with that rationale because I believe a military commission system under the auspices of the UCMJ is quite workable for such trials and has the added advantage of satisfying judicial muster and having a great measure of international credibility.

20. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that "no one can expect members of our military to read *Miranda* warnings to terrorists captured on the battlefield, or provide terrorists on the battlefield immediate access to counsel, or maintain a strict chain of custody for evidence. Nor should terrorist trials compromise sources and methods for gathering intelligence, or prohibit the admission of probative hearsay evidence." Mr. Gonzales suggests that each of these examples would happen if the UCMJ were used as the basis for detainee trials. Do you agree with Mr. Gonzales's assessment?

Ms. MASSIMINO. No. The administration's concerns reveal a lack of understanding of the flexibility of the court martial system for dealing with these issues. First, in no situation does the UCMJ require combatants captured on the battlefield to be given either *Miranda* warnings or immediate access to counsel. These rights are only required if the detainees are interrogated for law enforcement purposes, not for intelligence gathering purposes. Second, the UCMJ has a low threshold for the authentication of evidence. Evidence may be authenticated either directly or circumstantially; a rigid chain-of-custody need not be established. Third, the UCMJ has an adequate procedure to address the administration's legitimate concerns about sources and methods; prosecutors can introduce summarized or redacted versions. Fourth, the UCMJ has a wide array of hearsay exceptions which allow the admission of reliable hearsay evidence.

Ms. NEWELL BIERMAN. As described in my testimony, these are all red herrings. First, the UCMJ does not require the military to read *Miranda* warnings or provide counsel to those captured on the battlefield. Under the UCMJ, *Miranda* warnings and access to counsel are only required when an individual is being interrogated for law enforcement purposes. They are not required when an individual is questioned for interrogation purposes, and certainly are not required to be given when capturing suspected terrorists on the battlefield. Second, the UCMJ and MCM, which contains the rules of evidence, do not require strict chain of custody for evidence to be introduced at trial. They do, however, require some sort of showing that the evidence is what it is purported to be—a standard that should apply in any trial that is fair. Third, the UCMJ and MCM protect against the disclosure of any evidence that would compromise intelligence gathering and give the government broad latitude to introduce substitute forms of classified evidence to protect intelligence sources and methods. Fourth, the UCMJ and MCM include 24 exceptions to the prohibition against hearsay, including a residual exception designed to allow in statements of any witness who is "unavailable." These rules provide broad latitude to admit hearsay.

Mr. FIDELL. We do not agree with the Attorney General. Military justice jurisprudence already distinguishes between interrogations for law enforcement or disciplinary purposes and those for operational purposes. *United States* v. *Loukas,* 29 M.J. 385 (C.M.A. 1990); *United States* v. *Smith,* 56 M.J. 653 (A. Ct. Crim. App. 2001) (no warnings required where questions served to execute U.S. Disciplinary Barracks operational and security requirements); *United States* v. *Moses,* 45 M.J. 132 (C.A.A.F. 1996) (no warnings required during armed stand-off with suspect). Unwarned statements obtained in operational settings for security, intelligence, or other non-law-enforcement purposes would be admissible in evidence.

The Attorney General's concern about compromising sources and methods is readily handled under M.R.E. 505.

The admission of hearsay evidence would raise severe problems under the Confrontation Clause of the Sixth Amendment to the Constitution. *Crawford* v. *Washington,* 541 U.S. 36 (2004).

Chain-of-custody issues have not proven problematic in the normal course of military justice even in cases arising from operational settings. There are, moreover, various alternative ways to authenticate "real" (i.e., tangible) evidence without having to rely on chain-of-custody evidence. For example, a seized weapon can be marked by the seizing soldier with a knife.

Mr. MERNIN. No. The Association believes that the Attorney General's examples misrepresent the prosecutorial realities and the UCMJ, and we do not support the extreme departure from fundamental guarantees of fairness which the administration endorses. With respect to the notion of *Miranda* warnings in the battlefield, there would be no such requirement. The military law version of *Miranda* warnings provided by Article 31(b) of the UCMJ are applicable only with respect to law enforcement interrogations. Similarly, we have no understanding that any right to counsel ever attaches on the battlefield. The UCMJ already provides for a variety of alternate methods of authentication of evidence, taking into account the same sorts of evidentiary issues to which the Attorney General alluded. In sum, the texts

of the UCMJ and the Manual for Courts Martial dispel the Attorney General's assertions and contain necessary safeguards and exceptions to permit effective prosecution, providing necessary latitude to prosecutors while guaranteeing fundamental fairness.

Mr. CARAFANO. Yes. The UCMJ is a traditional legal system that puts the protection of the right of the individual foremost, and then adds accommodations for national security and military necessity. That system is appropriate for U.S. citizen-soldiers who may err. Such a system is not appropriate for unlawful, enemy combatants who want to destroy us in the long war in which we are engaged. For example, Article 31(b) of the UCMJ requires informing servicemen suspected of a crime of their *Miranda* rights.

Mr. KATYAL. My testimony goes at length into each of these issues at pp. 8–10. To summarize:

Miranda Warnings

Article 31(b) of the UCMJ does contain a *Miranda*-like requirement. But our Nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. See *United States* v. *Lonetree,* 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held that Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." See, e.g., *United States* v. *Loukas,* 29 M.J. 385, 387 (C.M.A. 1990). The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true.

Counsel

I know of no responsible scholar or lawyer who seriously contends that existing law requires "provid[ing] terrorists on the battlefield immediate access to counsel." Come to think of it, I do not know any irresponsible ones who seriously advocate this position either.

Chain of Custody

Military Rules of Evidence 901–903 deal with the admission of documents—and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., Military Rules of Evidence Manual 9–4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. Id. Under the identical Federal Rule 901(a), "[t]here is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a sine qua non to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States* v. *Holmquist,* 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), cert. denied, 514 U.S. 1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, supra, at 8–9; see also *United States* v. *Hudson,* 20M.J. 607 (A.F.C.M.R. 1985).

Hearsay

The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including the residual hearsay exception in Military Rule of Evidence 807, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

Mr. SCHLUETER. He is correct, if one were to take the rules governing courts-martial and apply them, without limitation, to military commissions.

Mr. SILLIMAN. No, I do not. We must be careful to separate issues regarding military operations from questions of the admissibility of evidence in a judicial forum. For example, most of the individuals captured in Afghanistan or Iraq, and thereafter detained at Guantanamo Bay and elsewhere, are being held because they were determined to be unlawful combatants, a status which denies them protection as prisoners of war under the Third Geneva Convention. Simply being an unlawful combatant is not, in and of itself, a violation of the law of war. Violating the law

of war requires some overt act contrary to that body of law which was committed within the context of a recognized armed conflict. Thus, with regard to the Article 31(b) requirement for an advice of rights upon suspicion of an offense, that would seldom be required upon initial capture. Further, that requirement has been interpreted in military courts as applying only to those acting in an official capacity (e.g. commanders, law enforcement personnel, CID, etc.), rather than just anyone who might suspect that an offense was committed. Also, choices often have to be made as to whether it is more important to detain an individual for purposes of acquiring needed intelligence (where one does not worry about evidentiary standards and advice of rights because there is no intent to go to trial) or whether it is clear from the beginning that there will be a prosecution and that any statements taken must necessarily be under circumstances which comply with Article 31 so that they can be used against the accused. Since perhaps up to 95 percent of those we have detained at Guantanamo Bay will never be prosecuted, and they have been held solely for intelligence purposes, invoking Article 31(b) as a "major problem," in my opinion, merely confuses the issue.

As to chain of custody considerations, there have been many cases where members of our Armed Forces have been prosecuted by court-martial for crimes committed on or near the battlefield, and chain of custody issues have neither precluded sending the case to trial or, where the weight of the evidence supports it, a conviction. Even if there are breaks in the chain of custody of a piece of evidence to be offered at trial, those breaks only affect the weight of the evidence, not its admissibility.

Finally, with regard to safeguarding classified information during trial proceedings or dealing with the admissibility of what some may consider less reliable evidence, such as hearsay, these "problems" are easily solved within a military commissions system under the UCMJ by making minor exceptions from regular court-martial procedures.

SPECIFIC TRIAL PROCEDURES

21. Senator McCain. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in testimony last week before the Senate Judiciary Committee, Steven Bradbury from the DOJ stated that "a good example to look to for an acceptable hearsay rule is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the factfinder, and as long as it is not outweighed by undue prejudice." Do you believe that this is an acceptable hearsay rule?

Ms. Massimino. Mr. Bradbury did not accurately describe the hearsay rule adopted by the ICTY and ICTR in this statement. Rule 92 *bis* allows the admission of hearsay evidence only for nonmaterial facts. Unlike the hearsay rule proposed by the administration, the ICTY and ICTR do not allow admission of hearsay evidence that goes to prove a material fact. Furthermore, the ICTY and ICTR mandate that judges, individuals with legal training, decide whether hearsay evidence should be admitted. Conversely, the military commissions would empower individuals who lack legal training to make these often complex and nuanced decisions on hearsay evidence. Thus, the disparity in legal knowledge between the international judges and the military commissions' jurors makes the admission of hearsay—for the limited purpose of establishing nonmaterial facts—appropriate for the ICTY and ICTR but not for the military commissions.

Ms. Newell Bierman. As explained in my testimony, on page 11, these rules cannot be considered in isolation. While the international tribunals allow the factfinder to admit any relevant evidence that he or she deems to have probative value, other rules protect against the use of unreliable evidence and the introduction of statements obtained through torture or coercion. Importantly, both the ICTY and ICTR contain an additional important protection, Rule 92 *bis*, which ensures that hearsay evidence can only be used as corroborating evidence, and cannot be used to establish the central facts of the case—acts or conduct of the accused that go to proof of the wrongdoing charged. Moreover, the ICC and ICTY both contain clear prohibitions on evidence that is obtained by a violation of internationally recognized human rights norms, such as a prohibition against evidence obtained through torture. These international tribunals are made up of legally trained judges who have experience making fine distinctions on the reliability and value of different forms of evidence that a jury or even a panel of non-lawyer officers simply won't have.

In sum, the ICTY and ICTR hearsay rule would not be acceptable unless accompanied by other critical protections, including, at a minimum, a prohibition against evidence obtained through torture and cruel, inhuman, and degrading treatment; a prohibition on the use of hearsay evidence to establish the central facts of the case; and a meaningful opportunity to challenge a statement's reliability.

Mr. FIDELL. Mr. Bradbury's assertion is misleading. Rule 92 *bis* (Proof of Facts other than by Oral Evidence) of the International Criminal Tribunals for the Former Yugoslavia and Rwanda limits the use of hearsay evidence to a statement "which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."

Mr. MERNIN. Mr. Bradbury's shorthand reference apparently seeks to raise the inference that hearsay was regularly used to prove a case against an accused in the cited international criminal tribunals. We understand him to refer, in particular, to the permitted use of written statements in lieu of live testimony. The suggestion is misleading. Rule 92 *bis* (*bis* is used for "(a)" or "A" in the text's numbering protocol) permits the introduction of written witness statements in certain circumstances, in lieu of live testimony. However, if such a statement concerns the acts or conduct of the accused, the witness is to be made available for live testimony; thus, the written statement alone is never admitted as evidence in chief. Moreover, it is always dangerous and difficult to cherry-pick rules from one set of procedures and attempt to overlay them onto another system. The issues raised are complex. If the committee desires, the Association would be able to make an expert on rules of evidence in the international criminal tribunals available for consultation.

Dr. CARAFANO. Yes, but it might be more generous than necessary, depending on how it is interpreted.

Mr. KATYAL. As my testimony explains at pages 7–11, this is actually not an accurate statement of the hearsay rules used in the international criminal tribunals. Those who would rely on ICTY/ICTR evidence rules would do well to consider that the factfinders in those tribunals are all legally-trained individuals and judges who are used to certain standards of evidence, and who know how to discount evidence that does not meet traditional indicia of reliability. The military commission, by contrast, consists of untrained, lay factfinders, all of whom may have differing assumptions about such matters. Rules of evidence are drafted, in part, to guide lay "jurors" and avoid evidence that might be inflammatory or probative in the minds of the untrained. In short, the hearsay standard adopted by the international criminal tribunals is acceptable for that court system, but not for military commissions to try detainees. As I understand it, the ICTY/ICTR can't adjudge death, whereas a military commission can, so there is reason to be even more cautious with respect to evidentiary rules for commissions than for international tribunals. Please also see my answer to question 22, below.

Mr. SCHLUETER. Although I am not familiar with the specific hearsay rules applied by the international criminal tribunals, that rule makes perfect sense. In our jurisprudence, we place a great deal of emphasis on the heasay rule, often citing English common law. However, in many countries, including England, the hearsay rule is essentially a requirement that the out of court statements be trustworthy, and relevant; the rule in those countries does not seem to carry the weight that we ascribe to it.

Mr. SILLIMAN. I do not think it is readily adaptable to a military commission system. The more flexible hearsay rules under the ICTY or ICTR are part of an integral evidentiary system which has other safeguards to guarantee authenticity. Therefore, we must be exceedingly cautious in simply borrowing, out of context, an evidentiary rule from an international tribunal.

22. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, is this how the hearsay rule used by the international criminal tribunals works?

Ms. MASSIMINO. See answer to question 21.

Ms. NEWELL BIERMAN. See answer to question 21.

Mr. FIDELL. Please see our response to question 21. Hearsay that would otherwise be inadmissible under *Crawford* v. *Washington,* 541 U.S. 36 (2004), is admissible in the ICTY and ICTR only on matters other than the accused's own acts and conduct. See *Prosecutor* v. *Galic,* No. IT–98–29–AR73.2, at 1 (ICTY June 7, 2002) (ICTY Jud. Supp. No. 34).

Mr. MERNIN. No. See response to question 21. In addition, while the rules for admission of hearsay evidence are broader under the international criminal tribunals, we understand that, for example, in the Milosevic trial, the defense was provided access to every adverse witness for cross-examination, whether that witness' initial testimony offered was written or oral.

Dr. CARAFANO. I don't know.

Mr. KATYAL. No. As I understand it, Assistant Attorney General Bradbury did not mention that the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay—to the point of making a comparison virtually irrelevant for the current military commissions debate. Under Rule 92 *bis* of both ICTY and ICTR rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan Milosevic emphasized that "regardless of how repetitive [written statement] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused." *Prosecutor* v. *Milosevic,* ICTY Case No. IT–02–54, P 8 (Mar. 21, 2002). If the administration seriously wants to play by ICTY/ICTR rules, it should play by all of them, and not hand pick a few divorced from context to suit its purposes.

Mr. SCHLUETER. As I note in question 21, I am not familiar with the specific hearsay rule applications in international criminal tribunals.

Mr. SILLIMAN. The "trier of fact" in an international criminal tribunal is a trial judge (rather than a panel of "lay" officers) who is well-versed in the fine points of the law regarding the admissibility of evidence. He or she therefore has sufficient legal training so as to be able, in deliberating guilt or innocence, to give the appropriate weight to evidence which, although it may be deemed technically admissible under the more flexible rule, is nonetheless far from reliable.

23. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, does the UCMJ and specifically Military Rule of Evidence 501, adequately protect classified evidence? If not, what do we need to do to enhance the protection of classified information in detainee trials?

Ms. MASSIMINO. Military Rule of Evidence 505 adequately protects classified evidence. Classified information whose disclosure is harmful to national security can be presented in alternative forms, including a redacted version or a summary of the information. This rule, which is highly regarded by military judges, prosecutors, and defense counsel, strikes an appropriate balance between the government's interest in protecting against disclosure of information that is damaging to our national security and the right of an accused to know and confront the evidence used against him.

Ms. NEWELL BIERMAN. Yes. There is widespread agreement among experienced practitioners, JAGs, and academics that the Military Rules of Evidence provide strong protections against the disclosure of classified evidence. If disclosure of classified evidence would harm national security, the government is entitled to submit a wide array of substitute forms of the same information, including a redacted version of the classified information, a summary of the information, or even a summary of the facts that the evidence would tend to prove. The rules ensure that no classified evidence is provided to the accused if its disclosure would in any way harm national security.

Mr. FIDELL. The question should refer to Rule 505, which adequately protects classified information and closely follows the Classified Information Procedures Act of 1980. No special provisions are needed to enhance Rule 505 for military commission cases. "Graymail" is much less of a concern in the military commission context than in other criminal cases because the government claims authority to continue to detain military commission accused who are acquitted.

Mr. MERNIN. The Military Rules of Evidence, in particular Rule 505, provide adequate procedural safeguards for both prosecution and defense with respect to classified evidence. We have not been persuaded that any other procedure is necessitated, certainly not by conclusory claims of "situational difficulties." The defense should have access to any evidence supporting the charges against the accused which is offered to the court, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence.

Dr. CARAFANO. No; we need to allow the President and future presidents to make such rules.

Mr. KATYAL. Please see my answer to question 6, supra, and my testimony at p. 11. There is no need to break from these rules without strong empirical evidence demonstrating such a necessity.

Mr. SCHLUETER. Yes, in my opinion, those rules would adequately protect classified information. If the DOD were to show that they are not, I am sure that those rules could be modified to meet the exigencies of military commissions.

Mr. SILLIMAN. The rules governing introduction of classified information into evidence are found in MREs 505 and 506 which basically mirror the provisions of the

Classified Information Procedures Act. I consider them more than adequate to protect classified information when requested by the accused for use in his defense. As to safeguarding critical classified information to be used by the government in detainee trials on the question of guilt or innocence, while still ensuring some measure of authenticity and at least a minimal level of access by the accused, specific rules could be adopted by amending the MREs in the Manual for Courts-Martial so as to provide for this. Perhaps the use of unclassified summaries specifically approved by the military judge might be one option, but there may be others which could deal with this issue. All this is easily accomplished in a military commission system under the UCMJ by justifying, via Article 36(b) of the Code, the need to deviate from the MRE procedures.

24. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in testimony before the Senate Judiciary Committee and the Senate Armed Services Committee last week, much was made of the potential problems posed by Article 31(b) of the UCMJ—which essentially sets up the military's *Miranda* rights—in the context of detainee trials. Is it the case that this article ties our hands with respect to intelligence gathering?

Ms. MASSIMINO. No. See answer to question 20. The UCMJ does not require *Miranda* warnings when the interrogation is carried out for intelligence gathering purposes. They are only required for interrogations with law enforcement purposes.

Ms. NEWELL BIERMAN. No. As stated in my testimony on pages 11–13 and in answer to question 20, *Miranda* warnings are not required when a detainee is being interrogated for intelligence purposes. They are only required when someone is being interrogated for law enforcement purposes. The claims that Article 31(b) would impose an obligation on troops to give *Miranda* warnings before they capture and question suspected terrorists on the battlefield is a straw man, put forth to mislead and confuse the committee.

Mr. FIDELL. No. Please refer to our response to question 20.

Mr. MERNIN. No. See response to question 20.

Dr. CARAFANO. Yes, among other problems.

Mr. KATYAL. Please see my answer to question 20, supra, as well as my testimony at pp. 8–9.

Mr. SCHLUETER. Yes, a requirement that military interrogators (or civilian employees working for the military) would have to give rights-warnings is not a frivolous concern or smoke screen. Under Article 31(b), all suspects being questioned must be advised of the offense, of the right to remain silent, and the fact that their statements may be used against them. Article 31 does not contain a counsel-rights component. But military case law and Military Rule of Evidence 305 also require *Miranda*-type counsel warnings if the suspect is in custody. More importantly, Military Rule of Evidence 304 contains an exclusionary rule that provides that unwarned statements may be excluded.

If authorities simply wish to gather information, but not introduce the statements into evidence, then arguably they can continue to gather information through interrogation.

Mr. SILLIMAN. No, it does not. As discussed more fully in my answer to a previous question (question 20), the law does not require that every soldier on the battlefield give an Article 31(b) advice of rights warning upon initial capture. If one is simply trying to acquire intelligence, rather than gathering evidence for use in a later trial, then no advice of rights would be necessary.

25. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, if the military's *Miranda* rule is truly problematic, how should we fix it?

Ms. MASSIMINO. The UCMJ's *Miranda* rule is not problematic and thus does not need fixing. Interrogators are not burdened by the *Miranda* rule since they need not provide detainees with *Miranda* warnings when interrogating for intelligence purposes. Furthermore, these statements are admissible in court so long as they were not obtained through the use of coercion, unlawful influence, or unlawful inducement.

Ms. NEWELL BIERMAN. The UCMJ *Miranda* rule is not problematic. It ensures that the accused are not coerced into incriminating themselves when being interrogated for law enforcement purposes, while leaving interrogators free to question detainees for intelligence purposes without issuing *Miranda* warnings. Moreover, any statements that are elicited during intelligence interrogations can still be admissible in court, even if no *Miranda* warnings have been given.

Mr. FIDELL. Article 31 has not been a problem and does not need to be fixed. Any legislation Congress enacts should, however, make clear that the existing suppression rule in Article 31(d) for statements obtained "through the use of coercion, unlawful influence, or unlawful inducement," currently applicable to courts-martial, also applies to military commissions.

Mr. MERNIN. The Association does not have any understanding that UCMJ Article 31 is "problematic" and needs to be fixed. If it were, it would need to be fixed generally, and not merely with respect to detainees.

Dr. CARAFANO. Let the President set the rules.

Mr. KATYAL. I would only "fix" any of the military's existing rules after the empirical evidence has demonstrated that they need fixing. On the other hand, statutory language codifying the case law exempting operational/intelligence questioning from the Article 31(b) rights warning requirement and the exclusionary rule for violating the rights warning requirement would do no harm—it would simplify codify the existing law.

Mr. SCHLUETER. One way to fix the *Miranda* issue is to create statutory exception (or in the Military Rules of Evidence, should a decision be made to apply the Rules of Evidence to military commissions) for certain trials or for those cases where it is determined that the interrogation was for important national security information.

Mr. SILLIMAN. Although I do not view Article 31(b) of the Code as problematic with regard to mere intelligence gathering, if there is concern that it might pose a problem as to gathering evidence for use in a later military commission, then the advice of rights requirement could be a provision which is deemed to be "impracticable" in the President's determination under Article 36(b) justifying deviations from normal court-martial procedures.

26. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, at the House Armed Services Committee hearing on *Hamdan*, Mr. Bradbury of the Justice Department's Office of Legal Counsel said the administration wishes to maintain flexibility in introducing evidence coerced from detainees. Specifically, he said, "We do not use as evidence in military commissions evidence that is determined to have been obtained through torture. But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I don't think you can make an absolute rule." Is Mr. Bradbury correct in his analysis of coercion and the need to introduce coerced evidence in detainee trials?

Ms. MASSIMINO. He is not. As explained in my testimony on page 8, if there is any lesson we should have learned over the past 4 years, it is that obtaining information through the use of force, coercion, or intimidation, is unnecessary and counter-productive. To enforce legal prohibitions against torture and cruel treatment, we must draw a bright line against the introduction of any evidence obtained through unlawful coercion. Admitting evidence acquired from coercive interrogation is a de facto sanctioning of that coercive conduct and would seriously undermine the prohibitions on torture and other cruel, inhuman, or degrading treatment found in Common Article 3 and the DTA. If we want to uphold these standards, we should not undermine them by admitting into court the fruits of their violations.

Ms. NEWELL BIERMAN. As Major General Scott C. Black, JAG of the Army, told the Senate Judiciary Committee: "I don't believe that a statement that is obtained under coercive, under torture, certainly, and under coercive measures should be admissible." (8/2, Senate Hearing). All of the other ranking JAGs agreed. This rule is particularly important given the administration's extremely narrow definition of torture, which does not even include waterboarding (a form of mock drowning). The government's proposed rule would allow the use of evidence obtained through a wide array of cruel and inhuman practices that don't meet the government's definition of torture—use of snarling dogs, naked pyramids of prisoners, prolonged exposure to extremes of heat and cold. Congress would be effectively sanctioning such practices, inviting their continued use. As Senator McCain stated in the August 2, 2006, hearing before this committee: "I think that if you practice illegal, inhumane treatment and allow that to be admissible in court, that would be a radical departure from any practice [of] this Nation."

Mr. FIDELL. NIMJ sees no basis for distinguishing between courts-martial and military commissions from the standpoint of suppressing evidence obtained through coercion. We believe the Nation would be profoundly offended if one of our GIs or civilian personnel were put on trial elsewhere and evidence obtained through coercion were admissible. We must apply that same standard to ourselves. What con-

stitutes coercion, of course, will have to be decided as a matter of law by the military judge in a military commission.

Where coercion has been applied, the resulting evidence (including fruits) would be inadmissible in a military commission trial, but could still be of value for intelligence purposes. At times, the executive branch may be put to difficult choices between the need for intelligence and the desire to invoke the criminal process.

Mr. MERNIN. According to the U.S. Army's Field Manual on Intelligence Interrogation and its predecessors, coercion and threats of coercion are illegal, immoral, and of little or no practical value in interrogations. Our Armed Forces have long understood that coerced evidence is unreliable. Even assuming that isolated coerced information were to prove worthwhile in the intelligence-gathering context, to conclude that such information was sufficiently reliable so as to be introduced as evidence would be a departure from well-established law and practice, contrary to what years of experience have taught our Armed Forces, and contrary to our Nation's values. The Association believes that Senator McCain and the testifying JAGs are inarguably correct on this fundamental issue.

Dr. CARAFANO. Yes.

Mr. KATYAL. As Senator McCain has stated, coerced confessions should be excluded. The Supreme Court has repeatedly recognized "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson* v. *Denno,* 378 U.S. 368, 386 (1964). The Supreme Court recognized this concept most recently in an opinion written by Chief Justice Roberts. See *Sanchez-Llamas* v. *Oregon,* 126 S. Ct. 2669 (2006) ("We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable.").

Article 31(d) of the UCMJ categorically excludes from courts-martial statements obtained by coercion. Article 31(a) of UCMJ extends this rule to compelling someone to answer questions. The commission version of Article 31(a), meanwhile, only speaks to testifying. When combined with the commission version of 31(b), which allows the admission of coerced statements, the result is that U.S. military members have an incentive to use coercion to gather information.

While it might be appropriate to include a definition of coerced statements in a statute applicable to commissions—a definition that does not appear in the UCMJ—coerced statements should be per se inadmissible.

Mr. SCHLUETER. I agree with Mr. Bradbury. That principle applies not only in military commissions but in both civilian and military law. The case law on this point is clear. Police may use trickery, deception, and even some mentally coercive means to obtain statements. The test is whether the suspect's will was overborne. The fact that a suspect is delusional or that interrogators appealed to a suspect's emotions or even religious beliefs are common and permissible tactics for law enforcement—as long as the accused's statements are voluntary.

Mr. SILLIMAN. First, I do not agree with Mr. Bradbury regarding his inability to define coercion short of torture. Those techniques which were approved for use in Army Field Manual 34–52 were clearly consistent with international law and, in the experience of many Army interrogators, yielded credible information. As to the need to introduce evidence obtained by coercive measures, I question whether there is any guarantee that such evidence would even be truthful since it is widely accepted that people will say anything to stop pain; and I also believe that allowing coerced evidence into a trial runs contrary to our national values and would further erode our standing in the international community as a nation under the rule of law.

SPECIFIC TRIAL PROCEDURES

27. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, in a letter dated July 10, 2006, and addressed to Chairman John Warner of the Senate Armed Services Committee and Chairman Arlen Specter of the Senate Judiciary Committee, a group of retired JAGs state that we should "bring accused terrorists to justice in military trials based on the UCMJ and MCM." The letter goes on to say that, in developing legislation to address the *Hamdan* ruling, "it should start from the premise that the United States already has the best system of military justice in the world" but that narrowly targeted amendments to the UCMJ to accommodate "specific difficulties in gathering evidence during the time of war" would be acceptable. If the current rules are not adequate, what changes need to be made to those rules?

Ms. MASSIMINO. The current rules for trials based on the UCMJ and MCM are adequate. The court-martial system was designed to prosecute prisoners in exactly

this type of setting and has a well-established track record. The burden is on those advocating for change to establish the necessity of substituted rules.

Ms. NEWELL BIERMAN. The claims that the UCMJ is not equipped to handle the difficulties of trying individuals captured during wartime are largely overstated. In fact, the UCMJ is designed explicitly to dispense military justice for conduct during armed conflict, including the prosecution of prisoners of war who commit abuses during times of war. Any changes to the UCMJ should be narrowly tailored, limited, and based on demonstrated necessity.

Mr. FIDELL. Whether or not the United States has "the best system of military justice in the world" aspects of it would not, for example, pass muster under the European Convention on Human Rights—that system is unarguably a dramatically better model from which to work than the dusted-off procedures President Roosevelt issued for the trial of the German saboteurs in 1942, to which the current generation of military commission rules have been traced. NIMJ is preparing a revised proposal that would set a due process "floor," exempt military commissions from some parts of the UCMJ, and afford the President carefully cabined residual rulemaking authority to depart from the general court-martial norm.

Mr. MERNIN. Fundamentally, the Association believes the rules for commissions should not depart materially from the UCMJ and Manual for Courts Martial. We believe that convening a panel of experts would guarantee that a thorough job of determining necessary circumscribed departures from the UCMJ would occur in a transparent and nonpartisan manner. This process would serve the twin goals of establishing a workable system to prosecute and punish our enemies who have committed breaches of the law of war, and establishing a system which reaffirms the United States' role as the world's pre-eminent advocate of the rule of law and justice. Moreover, it is also essential that the system crafted is worthy of the American men and women in uniform who will make it work, whether as prosecutors, defense counsel, or judges.

Dr. CARAFANO. They should more clearly and explicitly exempt military commissions that try illegal combatants.

Mr. KATYAL. Again, I do not believe that the rules for military commissions should deviate from the UCMJ rules for courts-martial until there is empirical evidence to demonstrate that such deviations are necessary. Please also see my answers to questions 6, 16–20, and 23 above.

Mr. SCHLUETER. That is very difficult to say. As someone with over 30 years of experience with military justice, I firmly believe that the system is fair. But I am also struck by the fact that for the first time in 30 years, those organizations and individuals who once questioned and challenged its fairness, now find it not only acceptable, but desirable. I understand that the administration has proposed a large number of changes to the UCMJ to accommodate military commissions. That draft should be a good start.

Mr. SILLIMAN. I wholeheartedly endorse the statements of the retired JAGs contained in their letter. A system for military commissions, based upon existing jurisdictional authority in Articles 18 and 21 of the UCMJ and employing most of the procedural protections afforded to our own service personnel under the UCMJ and the Manual for Courts-Martial, would not only be a proper prosecutorial forum for trying terrorists but would also be upheld in the courts and applauded by the global community. If exceptions from those procedural protections are to be taken, they would probably include a more flexible standard for the admissibility of evidence (but still prohibiting evidence acquired through torture or coercion); the elimination of a formal Article 32 pretrial investigation; a more streamlined appellate procedure, perhaps eliminating the need for an Article 66 review in a service court of criminal appeals prior to review in the U.S. Court of Appeals for the Armed Forces; and perhaps some modification to the threshold for giving advice of rights under Article 31(b).

28. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, how, in your view, can Congress best fashion legislation that will stand up to Supreme Court scrutiny?

Ms. MASSIMINO. The UCMJ and the Manual for Courts Martial already stand up to Supreme Court scrutiny. As the Supreme Court ruling in *Hamdan* requires, they provide a fair process in accordance with Common Article 3. Attempting to satisfy the requirements of Common Article 3 with an improvised military commissions system is a tall order and one that the administration has failed twice already to fill. Therefore, Congress would be best served by sticking with the UCMJ and MCM. However, to the extent that it deviates from the UCMJ and MCM, Congress should maintain the court-martial system as the basis for the new system and only sub-

stitute procedures when an imperative need is demonstrated and the substitution is narrowly tailored to fit that need.

Ms. NEWELL BIERMAN. The Supreme Court laid out a way forward. The UCMJ and MCM constitute a tried and true system and should serve as the starting point for any legislation. Any deviations from the UCMJ and MCM need to be narrowly tailored and carefully crafted to respond to an identified need.

Mr. FIDELL. Our proposal, which is in the course of revision, would be sustained by the Supreme Court. It would meet Common Article 3(1)(d)'s requirement for "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," would bar secret evidence and trials from which the accused was excluded, and would take account of the uniformity requirement currently found in Article 36(b) of the UCMJ.

Mr. MERNIN. Using the UCMJ as a starting point, and departing from it only to address demonstrable "situational difficulties," would likely be the best course to take in order to arrive at a workable system which would survive judicial review.

Dr. CARAFANO. Congress could fashion such legislation by explicitly authorizing the procedures set forth in the President's Executive Order of November 13, 2001 as it attempted to do in the DTA of 2005. The Court's reason for striking down the use of military tribunals was that the procedures were insufficiently authorized, including Congress's attempt to divest Federal courts of jurisdiction over them.

Mr. KATYAL. In my view, it is vital that Congress first to do no harm. No changes to the court-martial system should be made until there is empirical evidence demonstrating that such deviations are required. The administration's proposed legislation that was circulated by the Washington Post 10 days ago, for example, would quickly be invalidated by courts, and lead again to the terrible prospect of not having any convictions of detainees in the wake of September 11.

The court-martial system can meet the needs of the government while protecting our national security interests and fulfilling our constitutional and international obligations. Importantly, a court-martial is a decidedly legal proceeding and there is already substantial law on the books authorizing and governing them. The Supreme Court has on countless occasions recognized and affirmed such proceedings—most recently in the *Hamdan* opinion. Courts-martial satisfy all the conditions for trials of detainees that the *Hamdan* majority found the President's commissions lacking. They would eliminate the problems of uniformity that the Supreme Court found so problematic; they would provide assurances of independent proceedings and review that the commissions sorely lack; and they would satisfy Common Article 3's requirement of a "regularly constituted court"—a requirement that may be difficult, if impossible, to achieve by patchwork legislation.

Finally, any departures from the UCMJ must be coupled with an anti-abstention provision, along the lines of the McCain-Feingold campaign finance legislation. The system needs to be reviewed immediately, not years after the fact when convictions would have to be reversed and terrorist defendants potentially set free. Please also see my answer to question 2, above.

Mr. SCHLUETER. I do not see the decision in *Hamdan* as requiring a massive overhaul of either the UCMJ, MCM, or military commission rules. There was some indication that the commission rules might have been approved by the court, had the President complied with Article 36(b), UCMJ. As noted above, I think Congress should take a minimalist approach—enact legislation that explicitly grants authority to the President to convene military commissions and also remove the uniformity requirement from Article 36.

Mr. SILLIMAN. If Congress accepts the premise that any system for military commissions should use the UCMJ as the core, excepting such court-martial procedures as are determined and justified to be impracticable, then there is no question in my mind that it will withstand judicial scrutiny. That would entail a minimal amount of legislative amendments to the Code itself; the rest of the changes would be made to the rules for courts-martial and military rules of evidence, integral parts of the Manual for Courts-Martial, an executive order promulgated by the President. Congress could maintain oversight of these changes to the MCM through an appropriate reporting requirement.

29. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, the *Hamdan* court appeared to be concerned about an accused and his civilian counsel being excluded from, and precluded from ever learning what evidence was presented during, any part of the military commission trial. How should this concern be addressed?

Ms. MASSIMINO. A defendant must have the right to know the evidence being used against him, to respond to it, and to challenge its credibility or authenticity. Rule

505 of the MCM provides a method for the prosecution to use classified evidence without infringing on this right. See answer to question 23.

Ms. NEWELL BIERMAN. This concern is adequately dealt with in Rule 505 of the MCM, dealing with classified evidence. As explained in the answer to question 23, these rules allow for all kinds of substitute evidence to be provided in the place of classified evidence. But the bottom line rule still applies: Whatever substitute version of the evidence is shared with the accused is the same evidence that is presented to the factfinder. No one should be convicted on the basis of evidence that he was never provided and had no opportunity to contest.

Mr. FIDELL. Any legislation should put military commissions on a solid statutory basis and make it clear that the accused and his or her counsel must (a) have access to all evidence that is presented to the triers of fact, and (b) be present at all sessions unless they voluntarily (or through misbehavior) waive that right. The latter right would be similar to the right applicable to courts-martial under Article 39(b) of the UCMJ.

Mr. MERNIN. Such a situation should not be permitted. As I testified, the accused must ultimately have access to any evidence supporting the charges against him which is offered to the court, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence. UCMJ evidentiary rules accommodate these fundamental standards.

Dr. CARAFANO. With regard to illegal combatants, the administration's rules provide adequate protections, and more than international law ever required. Congress should simply authorize them.

Mr. KATYAL. The accused must be entitled to be present during all proceedings and the accused must be entitled to see all of the evidence that the members see. As former Rear Admiral Hutson pointed out, denying the accused this most basic of rights results in telling him, basically, "We know you're guilty. We can't tell you why, but there's somebody that says you're guilty." Denying this right to the accused, especially in light of the *Hamdan* majority's mandate, would be extremely dangerous, unjust, and unwise. As Senator Graham stated in the August 2 hearing:

> "So the question may become for our Nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue don't do the trial. Just keep him. Because it could come back to haunt us. I have been in hundreds of military trials. I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. We need not define ourselves by the one in a million."

Mr. SCHLUETER. The issue of access by the accused and his attorney to all proceedings is difficult. But it is one that has addressed the courts in the past anytime national security information was involved in the trial. Those rules should be applied to military commissions as well. The procedural aspects of Military Rules of Evidence 505 and 506 are good starting points for drafting such rules.

Mr. SILLIMAN. This concern only applies, I believe, to an accused being removed from his own trial when classified and other extremely sensitive national security information is being offered into evidence. As discussed in my answer to a previous question (question 23), Military Rules of Evidence 505 and 506 could be amended to provide for safeguarding critical national security information to be used by the government in detainee trials on the question of guilt or innocence, while still ensuring some measure of authenticity and at least a minimal level of access by the accused. Such a provision would then obviate the need to remove the accused from trial proceedings except when he is disruptive.

30. Senator MCCAIN. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schlueter, and Mr. Silliman, Dr. Carafano suggested in his testimony that to win the war of ideas in the war on terrorism Congress should essentially ratify the military commissions that have been overturned by the Supreme Court. I would suggest that there are some here who believe that the exact opposite is true: That to win the war of ideas we need to put in place a system that is based on the UCMJ and that respects Common Article 3, and that only that way will we show the world that we are truly different from our enemy in this war. Would the panel care to comment?

Ms. MASSIMINO. How we treat suspected terrorists—including how we try them—speaks volumes about who we are as a nation, and our confidence in the institutions and values that set us apart. The hallmark of the rule of law as applied by civilized nations is a system that is impartial and that is made up of procedures and rules that are consistent, predictable, and transparent. Our civilian courts and military

justice systems are the envy of the world—and for good reason. We have a system that is designed not just to convict those the government suspects are guilty, but to deliver justice. The Supreme Court has just reminded us that, even in the face of extraordinary threats to our security, our traditional values and institutions should be seen not as liabilities, but as assets—tools in the struggle to combat terrorism. These values and institutions—in particular here, the UCMJ and the Geneva Conventions—should again become the lodestar.

Ms. NEWELL BIERMAN. These trials will undoubtedly be some of the most scrutinized trials in the world. It is a chance for the United States to showcase to the world its respect for the rule of law, its principles of fair justice and humane treatment, and to win back the moral high ground. A system based on the UCMJ and MCM that respects the fair trial standards embodied in Common Article 3 is the right way forward.

Mr. FIDELL. We completely agree with Dr. Carafano that the war of ideas must not be overlooked. In our view, adhering to our Nation's high standards of the rule of law, fundamental fairness, and respect for the individual are better calculated to make progress in the battle of ideas than creating a third-rate system of justice that will never gain public confidence here, much less anywhere else.

Mr. MERNIN. The war of ideas will be won, in part, by demonstrating, without hedging, that American justice and values are not built on words without meaning. Putting in place a system which provides fundamental guarantees of due process and fairness will demonstrate to our enemies, to our allies, and to our friends, that the United States intends to lead the world and remain in the vanguard of respect for the rule of law and human dignity. The U.S. Military Academy, in preparing cadets for their role as the next commanders, requires instruction in military and constitutional law. These young men and women are training to be leaders in this war—a "Long War on Terror," as it is now characterized—and we owe them, and all our troops, support and gratitude. If we take the position that we can whittle away, for the sake of the moment, bits and pieces of our treaty obligations—the "supreme law of the land"—honored in letter and spirit for 50 years, we send the wrong message to those cadets, our troops, our enemies, our allies, and to the world. We send a message that the parsing of words for the sake of expediency trumps experience, honor, and law. If we slide down this slippery slope, we will be judged at the bottom by those left standing at the top.

Dr. CARAFANO. I stand by my original testimony. In addition, giving illegal combatants the same protections under the Geneva Conventions as soldiers who abide by the laws of war will only weaken the Conventions by removing an incentive to join. After all, if a nation or non-state actor can receive such protections without abiding by the Convention, why would they ever abide by its rules?

Mr. KATYAL. This question, more than any other in the thousands of words I have read since working on this issue for the past 5 years, states the precise problem. To answer it, I will quote from what another brave American, Justice Rutledge, said 60 years ago. In his dissent in the last significant military commission case (*Yamashita* v. *Styer* (1946)), Justice Rutledge said:

> "It is not too early, it is never too early, for the Nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.
>
> This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered."

Gilding over the existing, flawed military commission system, which the Supreme Court has found illegal and that other countries have found unconscionable, would dishonor our country's great constitutional tradition. The right to a fair trial is one of the foundational rights enshrined in our Constitution, one that has weathered every war this country has fought. Strict adherence to that tradition, and to the fundamental principle of rule of law, is what separates us from our enemies, and what makes America the best country in the world. The rule of law should not be another victim in the war on terror.

Mr. SCHLUETER. I do not agree with Dr. Carafano. The due process protections applicable in Federal, State, and military trials were not established to demonstrate to anyone that our system is better than any other system. To do so, suggests that there is an extant body of law that will appeal to terrorists who have vowed to de-

stroy America itself. If we are to expand the due process rights available to such terrorists, it should be for reasons other than public relations. I have no doubt that if Congress and the President were to try terrorists by military courts-martial—with all of the rights and protections available to American servicemembers—that domestic and foreign critics would still find fault.

Mr. SILLIMAN. I completely agree with your assessment; and I strongly disagree with Dr. Carafano. We can only win the "war of ideas" by proving to the international community that we are, in practice as well as rhetoric, a nation under the rule of law.

31. Senator MCCAIN. Mr. Schlueter, how would your proposed two amendments to the UCMJ be responsive to the *Hamdan* court's ruling that detainee trials must adhere to the requirements of Common Article 3 of the Geneva Conventions?

Mr. SCHLUETER. My reading of the *Hamdan* decision is not that the military commissions must in all circumstances comply with Common Article 3, which apparently speaks in broad terms. My proposal would address the new key features in the court's opinion—the authority of the President to convene commissions and the uniformity requirement in Article 36(b). According to the Court, Article 3 applies under the Supremacy Clause of the Constitution (Article VI). But, as with all treaties, Congress may enact a subsequent statute that would prevail over the treaty provision. Congress can do that by amending the UCMJ to recognize, what if any provisions in Article 3, are applicable to military commissions.

32. Senator MCCAIN. Mr. Schlueter, under your proposal, wouldn't it be possible and maybe probable for the President to promulgate procedures that are virtually identical to those set forth in Military Order No. 1?

Mr. SCHLUETER. Yes, the President could simply readopt procedures set out in the existing rules. I doubt that will happen, however.

33. Senator MCCAIN. Mr. Schlueter, how would your proposal achieve better the goal of avoiding Supreme Court rejection than proposals to modify the UCMJ to comply with the *Hamdan* ruling?

Mr. SCHLUETER. Unlike others, I do not read *Hamdan* to require that the UCMJ and the MCM must be the baseline for any further legislation or changes. My recommendations are intended to: (1) take a modest approach to reacting to *Hamdan*; (2) recognize the constitutional role of the President as commander in chief; (3) recognize the traditional and respective roles of Congress and the President in promulgating rules of procedure, as reflected in Article 36; and (4) remove the uniformity requirement in Article 36, which as far as I know, had never really been interpreted to apply to military commissions. If that were true, then the uniformity principle would apply to Provost Courts and any other military tribunal.

The plurality's approach was more modest than that suggested by Justice Kennedy in his concurring opinion. He, and not the plurality and not the dissenters, criticized the President for not applying the full range of protections available to those being tried. Nor did the Court say that only Congress can fix the problem.

The key to responding to *Hamdan* is not necessarily in amending the UCMJ, but in providing the basic protections to those being tried by military commissions. That can be accomplished just as easily by amending the commission rules themselves.

My minimalist approach would not necessarily provide any immunity against judicial review; but I cannot imagine that a wholesale review and changes to the UCMJ would be any more immune.

[Whereupon, at 1:40 p.m., the committee adjourned.]

CONTINUE TO RECEIVE TESTIMONY ON THE FUTURE OF MILITARY COMMISSIONS IN LIGHT OF THE SUPREME COURT DECISION IN *HAMDAN* V. *RUMSFELD*

WEDNESDAY, AUGUST 2, 2006

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 2:20 p.m. in room SH–216, Hart Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Sessions, Collins, Talent, Chambliss, Graham, Cornyn, Thune, Levin, Reed, Akaka, E. Benjamin Nelson, Dayton, Bayh, and Clinton.

Committee staff members present: Charles S. Abell, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: William M. Caniano, professional staff member; David M. Morriss, counsel; Robert M. Soofer, professional staff member; and Scott W. Stucky, general counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Jonathan D. Clark, minority counsel; Gabriella Eisen, professional staff member; Peter K. Levine, minority counsel; William G.P. Monahan, minority counsel; and Michael J. Noblet, staff assistant.

Staff assistants present: Jessica L. Kingston, Benjamin L. Rubin, and Pendred K. Wilson.

Committee members' assistants present: Richard H. Fontaine, Jr. and Pablo Chavez, assistants to Senator McCain; John A. Bonsell, assistant to Senator Inhofe; Mackenzie M. Eaglen, assistant to Senator Collins; Russell J. Thomasson, assistant to Senator Cornyn; Mieke Y. Eoyang, assistant to Senator Kennedy; Frederick M. Downey, assistant to Senator Lieberman; Elizabeth King, assistant to Senator Reed; Eric Pierce, assistant to Senator Ben Nelson; Luke Ballman, assistant to Senator Dayton; Robert J. Ehrich and Elizabeth Brinkerhoff, assistants to Senator Bayh; and Andrew Shapiro, assistant to Senator Clinton.

OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER. Good afternoon, ladies and gentlemen. We apologize for starting a little after 2:00, but we had a vote. That is the one thing that we have to do here.

The committee meets today to conduct the third in a series of hearings on the future of military commissions in light of the Supreme Court decision in *Hamdan* v. *Rumsfeld.*

We are privileged to have with us the Attorney General of the United States, the Honorable Alberto Gonzales; and the Deputy Secretary of Defense, the Honorable Gordon England. They are accompanied respectively by Steven Bradbury, acting head of the Justice Department Office of Legal Counsel, and Daniel Dell'Orto, Deputy General Counsel of the Department of Defense (DOD).

In two previous hearings we have had the benefit of testimony of the Judge Advocates General (JAGs) of the Armed Forces, retired JAGs, human rights groups, and bar association and academics who specialize in military law. Today we hear from the administration on its recommendations for legislation to create new military commissions—I emphasize, new military commissions—consistent with the issues raised by the Supreme Court in the *Hamdan* decision, both statutory and with respect to Common Article 3 of the Geneva Conventions.

We have been in regular consultation with Attorney General Gonzales and Secretary England. We have had excellent consultation here in the Senate with your respective departments all along.

We understand that the final draft administration proposal is still being worked upon, and that is for the good in my judgment. This is a very important thing. Given that we are about to go on recess, it is clear that it would be beneficial for the committee to receive their current status report on this particular piece of legislation.

Our committee intends to work with the administration during the August recess, with the strong possibility of additional hearings by the committee before we mark up a bill and report it to the bipartisan leadership of the Senate.

I reiterate what I have said before: Congress must get this right. We must produce legislation that provides for an effective means of trying those alleged to have violated the law of war, while at the same time complying with our obligations under international and domestic law. How we treat people in these circumstances will affect the credibility of our country in the eyes of the world.

Thank you.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT BY SENATOR JOHN WARNER

The committee meets today to conduct the third in a series of hearings on the future of military commissions in light of the Supreme Court's decision in *Hamdan* v. *Rumsfeld.* We are privileged to have with us the Attorney General of the United States, the Honorable Alberto Gonzales; and the Deputy Secretary of Defense, the Honorable Gordon England. They are accompanied, respectively, by Steven Bradbury, acting head of the Justice Department's Office of Legal Counsel, and Daniel Dell'Orto, Deputy General Counsel of the Department of Defense.

In two previous hearings, we have had the benefit of the testimony of the Judge Advocates General (JAGs) of the Armed Forces, retired JAGs, human rights groups and bar associations, and academics who have specialized in military law. Today we hear from the administration on its recommendations for legislation to create new military commissions, consistent with the issues raised by the Supreme Court in *Hamdan,* both statutory and with respect to Common Article 3 of the Geneva Conventions.

I and other Members of the Senate have been in regular consultation with the administration. While the final draft of the administration's proposal is still being

worked upon, it is clear that it would be beneficial to receive an update on its status from our witnesses. Our committee intends to work with the administration during the August recess, with the strong possibility of additional hearings before the committee marks up a bill and reports it to the full Senate.

I reiterate what I have said before: Congress must get this right. We must produce legislation that provides for an effective means of trying those alleged to have violated the law of war, while at the same time complying with our obligations under international and domestic law. How we treat people in these circumstances will affect the credibility of our country in the eyes of the world.

Chairman WARNER. Senator Levin, I understand that you have another matter and therefore you will combine your opening remarks with a question or two. Am I correct on that?

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. I would be happy to do that, but I thought we should get the statements first from our witnesses, and then if you would allow me to ask questions first I would appreciate it.

Chairman WARNER. I would be happy to do that.

Senator LEVIN. Thank you, Mr. Chairman.

First let me thank Attorney General Gonzales and Deputy Secretary England very much for being here. The Supreme Court's decision in the *Hamdan* case struck down the military commission procedures established by the administration because they did not meet the standards of the Uniform Code of Military Justice (UCMJ) or those of the Geneva Conventions. Congress has now begun the process of determining what needs to be done to ensure that our system for trying detainees for crimes meets the standards established by the Supreme Court as the law of the land.

We started this process where it should begin, with the military lawyers who are most familiar with the rules for courts-martial and the history and practice of military commissions. These officers also understand the practical importance of our adherence to American values and the rule of law in the treatment of others. If we torture or mistreat persons whom we detain on the battlefield or if we proceed to try detainees without fair procedures, we increase the risk that our own troops will be subject to similar abuses at the hands of others.

Today we continue our review by hearing the views of senior administration officials. Last week a copy of an early draft of an administration proposal was leaked to the press and has been widely circulated. This draft has now been posted on the Washington Post Web site. We understand that this draft is still evolving, so I will base my questions on the earlier leaked version of the document. I do not know what else to do. It is either that or on the evolving version, which apparently we have had some briefing on, but I think it is wiser to base questions on what we know was a draft rather than to speculate. So the draft and the process through which it was developed will provide some insight into the administration's approach to this issue.

First, the administration seems to have used the UCMJ as a starting point for its draft. While there are extensive departures from the UCMJ without any demonstration of practical necessity in my judgment, I do welcome the administration's apparent acknowledgment that the UCMJ is, in fact, the appropriate starting point for military commission legislation.

As the Supreme Court held in the *Hamdan* case, the regular military courts in our system are the courts-martial established by congressional statutes, and a military commission can be regularly constituted by the standards of our military justice system only if some practical need explains deviation from the courts-martial practice.

Second, the *Hamdan* court also ruled that "the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable," to use their words. Unfortunately, the administration draft takes just three sentences to dismiss both the Manual for Courts-Martial and the Military Rules of Evidence. The draft authorizes the Secretary of Defense to prescribe procedures, including modes of proof for trials by commissions. It then provides that "evidence in a military commission shall be admissible if the military judge determines that the evidence is relevant and has probative value," and further "hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value."

That is virtually unchanged from the evidentiary standard that the Supreme Court rejected in the *Hamdan* case. There are undoubtedly parts of the Manual for Courts-Martial and the Military Rules of Evidence that would be impractical to apply to military commissions for the criminal trial of detainees. In accordance with the Supreme Court's ruling, however, these areas should be identified by exception rather than by a wholesale departure from all procedures and all rules of evidence applicable in courts-martial.

Mr. Chairman, I believe our committee should now ask our military lawyers to systematically review the Manual for Courts-Martial and the Military Rules of Evidence and make recommendations as to the areas in which deviations are needed on the basis of the Supreme Court's test of impracticability. We already have a Joint Service Committee on Military Justice which is responsible for reviewing proposed changes to the UCMJ and the Manual for Courts-Martial, and it would be well-suited to this new task should our chairman make that decision to assign that task or request them to undertake it.

Third, we have been told that the administration's working draft has now been provided to the JAGs of the Military Services and that some of their comments have already been incorporated into the draft. This is a considerable improvement over the manner in which the administration adopted its previous order on commissions, when, we have been told, none of the recommendations of the JAGs were adopted. But it still puts the cart before the horse. Rather than asking the JAGs to comment on a draft that was prepared by a limited circle of political appointees, the administration should have allowed the experts, the military lawyers, to prepare the initial drafts of the proposal.

Mr. Chairman, regardless of whether the administration will listen to the concerns of the JAGs on these issues, we should. So far this committee has addressed this issue in a systematic, deliberative manner. I commend our chairman for doing so and I know we are going to continue to do so.

I hope that as soon as we receive a formal proposal from the administration that we will reconvene the panel from our first hear-

ing so that those distinguished military officers will have a full opportunity to provide us their views on the administration proposal and their own recommendations as to how we should proceed on this issue.

Finally, the draft on the Washington Post Web site contains some of the same objectionable language regarding coerced testimony as the original military order. The draft language states: "No otherwise admissible statement obtained through the use of"—and then there is a word that is blacked out—"may be received in evidence of the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value."

Given the administration's longstanding position on this issue, it seems likely—and I will ask the Attorney General about this—that the word that has been blacked out is "coercion" and that this provision is intended to expressly permit the use of coerced testimony under the circumstances identified in that draft. If so, the provision leaves the door open for the introduction of testimony obtained through the use of techniques such as waterboarding, intimidating use of military dogs, and so forth, techniques which our top military lawyers have said are inconsistent with the standards of the Army Field Manual and Common Article 3 of the Geneva Conventions.

The use of evidence obtained through such techniques in a criminal trial would be inconsistent with the Supreme Court's ruling in the *Hamdan* case, inconsistent with the requirements of the Geneva Conventions, inconsistent with our values as Americans, and not in the best interest of U.S. service men and women who one day may be captured in combat. If the administration insists on including this provision in its draft legislation, I hope that we will reject that language.

Mr. Chairman, we need to develop a workable framework for the trial of detainees by military commissions consistent with the ruling of the Supreme Court in *Hamdan,* and that is what we are about. As you say, Mr. Chairman, it is important that we develop a workable framework for the trial of detainees by military commission. It is important that we be consistent with the ruling of the Supreme Court, and it is important that we do it right.

This will be a very difficult endeavor, requiring us to address a series of controversial issues, such as the use of classified information, the use of hearsay evidence, the applicability of Manual for Courts-Martial and the Military Rules of Evidence, and the definition of substantive offenses triable by military commissions. I hope we will not open up other issues, as important as they are, because this task is difficult enough. The proper treatment of detainees, the role of Combatant Status Review Tribunals, and habeas corpus rights of detainees, that are very difficult issues and that were debated in the context of last year's Detainee Treatment Act (DTA), need to be addressed, but not, it seems to me, if we are going to make progress on this critical issue that is before us.

So I hope that we will avoid that pitfall by keeping our legislative focus on the issues that we must address, which is to establish a workable framework for military commissions.

Thank you again, Mr. Chairman, for your position that you have taken in this matter that we are going to do this thing thoroughly, properly, and thoughtfully. I think it is the right way to go.

[The prepared statement of Senator Levin follows:]

PREPARED STATEMENT BY SENATOR CARL LEVIN

The Supreme Court's decision in the *Hamdan* case struck down the military commission procedures established by the administration because they did not meet the standards of the Uniform Code of Military Justice (UCMJ) or those of the Geneva Conventions. Congress has now begun the process of determining what needs to be done to ensure that our system for trying detainees for crimes meets the standards established by the Supreme Court as the law of the land.

We started this process where it should begin—with the military lawyers who are most familiar with the rules for courts-martial and the history and practice of military commissions. These officers also understand the practical importance of our adherence to American values and the rule of law in the treatment of others: if we torture or mistreat persons whom we detain on the battlefield, or if we proceed to try detainees without fair procedures, we increase the risk that our own troops will be subject to similar abuses at the hands of others.

Today we continue our review by hearing the views of senior administration officials—the Attorney General and the Deputy Secretary of Defense. Last week, a copy of an early draft of an administration proposal was leaked to the press and has been widely circulated. This draft has now been posted on the Washington Post Web site. We understand that this draft is still evolving. In fact, my staff was briefed last night on a more recent draft of the legislation. Because this is an internal document that the administration is not yet ready to release, however, I will base my questions today on the earlier, leaked version of the document.

Both the draft and the process through which it was developed provide insight into the administration's approach to this issue.

First, despite the testimony of various administration officials over the last month that it would be impractical to use the UCMJ as the basis for draft legislation, the administration seems to have used the UCMJ as a starting point for its draft. While there are extensive departures from the UCMJ without any demonstration of practical necessity, I welcome the administration's apparent acknowledgment that the UCMJ is in fact the appropriate starting point for military commission legislation.

As the Supreme Court held in the *Hamdan* case, "'[t]he regular military courts in our system are the courts-martial established by congressional statutes'" and "a military commission 'can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice.'"

Second, the *Hamdan* Court also ruled that: "the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable."

Unfortunately, the administration draft takes just three sentences to dismiss both the Manual for Courts-Martial and the Military Rules of Evidence. The draft authorizes the Secretary of Defense to prescribe procedures, including modes of proof for trials by commissions. It then provides that "evidence in a military commission shall be admissible if the military judge determines that the evidence is relevant and has probative value." Moreover, "Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value." This is virtually unchanged from the evidentiary standard that the Supreme Court rejected in the *Hamdan* case.

There are undoubtedly parts of the Manual for Courts-Martial and the Military Rules of Evidence that would be impractical to apply to military commissions for the criminal trial of detainees. In accordance with the Supreme Court's ruling, however, these areas should be identified by exception, rather than by a wholesale departure from all procedures and all rules of evidence applicable in courts-martial.

Mr. Chairman, our committee should now ask our military lawyers to systematically review the Manual for Courts-Martial and the Military Rules of Evidence and make recommendations as to areas in which deviations are needed on the basis of the Supreme Court's test of "impracticability." We already have a Joint Service Committee on Military Justice, which is responsible for reviewing proposed changes to the UCMJ and the Manual for Courts Martial and should be well-suited to this new task.

Third, we have been told that the administration's working draft has now been provided to the Judge Advocates General (JAGs) of the Military Services, and that some of their comments have already been incorporated into the draft. This is a con-

siderable improvement over the manner in which the administration adopted its previous military order on commissions—when, we have been told, none of the recommendations of the JAGS were adopted—but it still puts the cart before the horse. Rather than asking the JAGs to comment on a draft that was prepared by a limited circle of political appointees, the administration should have allowed the experts—the military lawyers—to prepare the initial drafts of the proposal.

Mr. Chairman—regardless of whether the administration will listen to the concerns of the JAGs on these issues, we should. So far, this committee has addressed this issue in a systematic, deliberative manner, and we should continue to do so. I hope that as soon as we receive a formal proposal from the administration, you will reconvene the panel from our first hearing, so that these distinguished military officers will have a full opportunity to provide us their views on the administration proposal and their own recommendations as to how we should proceed on this issue.

Finally, the draft on the Washington Post Web site contains some of the same objectionable language regarding coerced testimony as the original military order. The draft language states: "No otherwise admissible statement obtained through the use of [word blacked out] may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value." Given the administration's longstanding position on this issue, it seems likely that the word that has been blacked out is "coercion" and that this provision is intended to expressly permit the use of coerced testimony.

If so, the provision leaves the door open for the introduction of testimony obtained through the use of techniques such as waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, forced nudity, and forced wearing of women's underwear—techniques which our top military lawyers have said are inconsistent with the standards of the Army Field Manual and Common Article 3 of the Geneva Conventions. The use of evidence obtained through such techniques in a criminal trial would be inconsistent with the Supreme Court's ruling in the *Hamdan* case, inconsistent with the requirements of the Geneva Conventions, inconsistent with our values as Americans, and not in the best interest of U.S. service men and women who may one day be captured in combat. If the administration insists on including this provision in its draft legislation, Congress should soundly reject the proposal.

Mr. Chairman, we need to develop a workable framework for the trial of detainees by military commission, consistent with the ruling of the Supreme Court in the *Hamdan* case. This will be a very difficult endeavor, requiring us to address a series of controversial issues, such as the use of classified information, the use of hearsay evidence, the applicability of the Manual for Courts-Martial and the Military Rules of Evidence, and the definition of substantive offenses triable by military commissions.

We will quickly make this task impossible if we open up other issues at this time—such as the proper treatment of detainees, the role of Combatant Status Review Tribunals, and the habeas corpus rights of detainees—that we fought over long and hard last year in the context of the Detainee Treatment Act. Any one of these issues is controversial enough that it could sink the entire endeavor of establishing a workable framework for military commissions. I hope that we will avoid this pitfall by keeping our legislative focus on the issues that we must address.

I look forward to the testimony of our witnesses.

Chairman WARNER. I want to say that I cannot account for all of the Web sites and various things that are popping up, but the purpose of this hearing is to receive the work in progress and the current status of the thinking of the administration from the two most qualified people, the Attorney General and the Deputy Secretary of Defense, to give us the facts. I do not want to start prejudging this situation based on what might be in Web sites and other things.

Senator McCain, you have taken the lead on this from the very beginning. Do you have a few opening comments you would like to make?

Senator MCCAIN. No, Mr. Chairman. I would like to repeat what I said at the beginning of this odyssey that we are on, and that is that we have to look at the best way we can protect America as our first and foremost priority. I believe we also should comply as

much as possible with the United States Supreme Court's decision so that we will not have a situation evolve where we pass legislation that the Supreme Court then bounces back to us. It is not good for the process, it is not good for America.

Third of all, I do not think we can ignore in our discussions and in our deliberations the damage that has been done to the image of the United States of America because of allegations, either true or false, about our treatment of prisoners. If we are in a long struggle, part of that struggle is a psychological one, and we must remain the Nation that is above and different from those of our enemies. I think that is important to keep that in mind as we address this issue in its specifics.

But the other fact is that we are in a struggle that engages us in every way and without the moral superiority that this Nation has enjoyed for a couple of hundred years we could do great damage to our effort in winning this struggle that we are engaged in.

I thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator.

Senator Graham, you likewise have taken a lead on this. Do you have any comments for the opening?

Senator GRAHAM. No, sir.

Chairman WARNER. Any other colleagues seeking recognition?

Senator DAYTON. Mr. Chairman, I just want to salute Senator McCain for his comments. I think they are perfectly said.

Chairman WARNER. I thank the Senator.

Mr. Attorney General, delighted to have you here today, and fully recognize that this is an interim report on your part and, as Senator Levin suggested, we will certainly have additional hearings, at which time you will be given the opportunity to come before us.

STATEMENT OF HON. ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES

Mr. GONZALES. Thank you, Mr. Chairman, Senator Levin, and members of the committee. I am pleased to appear today on behalf of the administration to discuss the elements of legislation that we believe Congress should put in place to respond to the Supreme Court's decision in *Hamdan* v. *Rumsfeld.*

Let me say a word about process first. As this committee knows, the administration has been working hard on a legislative proposal that reflects extensive interagency deliberations as well as numerous consultations with Members of Congress. Our deliberations have included a detailed discussion with members of the JAG Corps, and I have personally met twice with the JAGs. They have provided multiple rounds of comments and those comments will be reflected in the legislative package that we plan to offer for Congress's consideration.

Mr. Chairman, first and foremost, the administration believes that Congress should respond to *Hamdan* by providing statutory authorization for military commissions to try captured terrorists for violations of the laws of war. Fundamentally, any legislation needs to preserve flexibility in the procedures for military commissions while ensuring that detainees receive a full and fair trial. We believe that Congress should enact a new Code of Military Commis-

sions modeled on the courts-martial procedures of the UCMJ, that would follow immediately after the UCMJ as a new chapter in title 10 of the U.S. Code.

The UCMJ should constitute the starting point for the new code. At the same time, the military commission procedures should be separate from those used to try our own servicemembers, both because military necessity would not permit the strict application of all courts-martial procedures and because there are relevant differences between the procedures appropriate for trying our servicemembers and those appropriate for trying the terrorists who seek to destroy us.

Still, in most respects the new Code of Military Commission can and should track closely the UCMJ.

We would propose that Congress establish a system of military commissions presided over by military judges, with commission members drawn from the Armed Forces. The prosecution and defense counsel would be appointed from the JAG Corps and the accused may retain a civilian counsel in addition to military defense counsel. Trial procedures, sentencing, and appellate review would largely track those currently provided under the UCMJ.

Because of the specific concerns raised by the Supreme Court in *Hamdan* and elsewhere, the new Code of Military Commissions should depart in significant respects from the existing military commission procedures. In particular, we propose that the military judge would preside separate and apart from the other commission members and make final rulings at trial on law and evidence, just as in courts-martial or civilian trials. We would increase the minimum number of commission members to 5 and require 12 members for prosecutions seeking the death penalty.

Now, while military commissions will track the UCMJ in many ways, commission procedures should depart from the UCMJ in those instances where the UCMJ provisions would be inappropriate or impractical for use in the trial of unlawful terrorist combatants.

The UCMJ provides Miranda-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit evidence obtained during the interrogation of terrorist detainees. I have not heard anyone contend that terrorists should be given the Miranda warnings required by the UCMJ.

The military commission procedures also should not include the UCMJ's Article 32 investigations, which is a pre-charging proceeding that is akin to but considerably more protective than a civilian grand jury. Such a proceeding is unnecessary before the trial of captured terrorists, who are already subject to detention under the laws of war.

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, the commission should permit the introduction of all probative and reliable evidence, including hearsay evidence. It is imperative that hearsay evidence be considered because many witnesses are likely to be foreign nationals, who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death.

The UCMJ Rules of Evidence also provide for circumstances where classified evidence must be shared with the accused. I be-

lieve there is broad agreement that in the midst of the current conflict we must not share with captured terrorists the highly sensitive intelligence that may be relevant to military commission proceedings.

A more difficult question is posed, however, as to what is to be done when that classified evidence constitutes an essential part of the prosecution's case. In the courts-martial context, our rules force the prosecution to choose between disclosing the evidence to the accused or allowing the guilty to evade prosecution. It is my understanding that other countries, such as Australia, have established procedures that allow for the court under tightly defined circumstances to consider evidence outside the presence of the accused. The administration and Congress must give careful thought as to how the balance should be struck for the use of classified information in the prosecution of terrorists before military commissions.

Mr. Chairman, the administration also believes that Congress needs to address the Supreme Court's ruling in *Hamdan* 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. Yet because of the Court's decision in *Hamdan* we are now faced with the task of determining the best way to do just that.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, some of its terms are inherently vague, as this committee already discussed in its recent hearing on the subject. Common Article 3 prohibits outrages upon personal dignity, a phrase susceptible of uncertain and unpredictable application. If left undefined, this provision will 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, because the Supreme Court has said that courts must give respectful consideration and considerable weight to the interpretations of treaties by international tribunals and other state parties, 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.

We believe that the standards governing the treatment of detainees by United States personnel in the war on terror should be certain and those standards should be defined clearly by U.S. law, consistent with our international obligations.

One straightforward step that Congress can take to achieve that result is to define our obligations under Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress. Last year, after a significant public debate, Congress adopted the McCain amendment as part of the DTA. That amendment prohibits cruel, inhumane, or degrading treatment or punishment, as defined by reference to the established meaning of our Constitution. Congress rightly assumed that the enactment of the DTA settled questions about the baseline standard that would govern the treatment of detainees.

The administration believes that we owe it to those called upon to handle detainees in the war on terror to ensure that any legislation addressing the Common Article 3 issue will bring clarity and certainty to the War Crimes Act, and the surest way to achieve this in our view is for Congress to set forth a definite and clear list of offenses serious enough to be considered war crimes punishable as violations of Common Article 3 under 18 U.S.C. 2441.

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.* I look forward to discussing these subjects with the committee this afternoon.

[The prepared statement of Attorney General Gonzales follows:]

PREPARED STATEMENT BY HON. ALBERTO R. GONZALES

Thank you, Mr. Chairman, Senator Levin, and members of the committee. I am pleased to appear here today on behalf of the administration to discuss the elements of legislation that we believe Congress should put in place to respond to the Supreme Court's decision in *Hamdan* v. *Rumsfeld.*

Before I get into the details of the legislation, let me say a word about process. As this committee knows, the administration has been working hard on a legislative proposal that we have developed through extensive interagency deliberations, as well as numerous consultations with Members of Congress. Our deliberations have included detailed discussion with and input from the military lawyers in all branches of the Armed Services, including the members of the Judge Advocate General's (JAG) Corps. I have personally met with the JAGs on two occasions to discuss the elements of the legislative proposal. They and their staffs have provided multiple rounds of comments on all aspects of the proposed legislative language, and they have been active participants in our deliberations and discussions. Their comments have been heard, and many are reflected in the legislative package that we plan to offer for Congress's consideration.

MILITARY COMMISSION PROCEDURES

Mr. Chairman, first and foremost, the administration believes that Congress should respond to the Supreme Court's decision in *Hamdan* by providing statutory authorization for military commissions to try captured terrorists for violations of the laws of war. Fundamentally, any legislation needs to preserve flexibility in the procedures for military commissions while ensuring that detainees receive a full and fair trial.

We believe that Congress should enact a new Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice (UCMJ) but adapted for use in the special context of military commission trials of terrorist unlawful combatants. To this end, we would propose that Congress create a new chapter for military commission procedures in title 10 of the U.S. Code, which would follow immediately after the UCMJ. We have carefully reviewed the procedures of the UCMJ, and we believe that dozens of articles of the UCMJ have relevance for military commissions and should be used as the starting point for developing the new Code of Military Commissions.

At the same time, we believe it is important that the military commission process for unlawful terrorist unlawful combatants be separate from the courts-martial process that is used to try our own servicemembers, both because military necessity would not permit the strict application of all courts-martial procedures, and because there are relevant differences between the procedures appropriate for trying our servicemembers and those appropriate for trying the terrorists who seek to destroy us.

Still, in most respects, the new Code of Military Commissions can and should track closely the procedures and structure of the UCMJ. We would propose that Congress establish a system of military commissions, presided over by a military judge, with commission members drawn from the Armed Forces. The prosecution and defense counsel would be appointed from the JAG Corps, with an opportunity for the appointment of Justice Department prosecutors and with the ability of the accused to retain a civilian counsel, in addition to assigned military defense counsel. Trial procedures, sentencing, and appellate review would largely track those currently provided under the UCMJ (albeit with Federal court review in the DC Circuit, as provided for under the Detainee Treatment Act (DTA) of 2005.)

Because of the specific concerns raised by the Supreme Court in *Hamdan,* and because of comments from Members of Congress and from within the Department of Defense (DOD), we would propose that the new Code of Military Commissions depart in significant respects from the existing military commission procedures established by the President in 2001 and 2002.

In particular, we propose that the presiding officer would be a certified military judge with the traditional authority of a judge to make final rulings at trial on law and evidence, just as in courts-martial. As with courts-martial, the military judge would not be a voting member of the commission.

We would also propose to increase the minimum number of commission members to 5, from 3, and to require 12 members of the commission for any case in which the death penalty is sought. As is the case under the current military commission procedures, and just as in courts-martial, the Government would bear the burden of proving the accused's guilt beyond a reasonable doubt, and a conviction would require a vote of two-thirds of the commission members in a non-death penalty case. As under the UCMJ, the death penalty would require a unanimous vote of the commission members present.

In addition, we would propose to create a formal military appellate process that parallels the appellate process under the UCMJ. We propose that Congress establish a Court of Military Commission Review within the DOD to hear appeals on questions of law. We would retain the judicial review of final military commission judgments in the same Article III court, the DC Circuit, that currently would hear those judgments under the DTA. We would propose, however, to give all convicted detainees an appeal as of right to the DC Circuit, regardless of the length of their sentence, as opposed to the current system under the DTA of discretionary review for sentences under 10 years. The Supreme Court could review the decisions of the DC Circuit through petitions for certiorari.

Although military commissions will track the UCMJ in many ways, we also believe that the military commission procedures should depart from the court-martial procedures in those instances where applying the UCMJ's provisions would be inappropriate or impractical for use in the trial of terrorist unlawful combatants.

The UCMJ provides Miranda-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit the collection of intelligence during the interrogation of terrorist detainees. I am not aware of anyone who contends that terrorist unlawful combatants must be given Miranda warnings before interrogations. The Code of Military Commissions therefore would not include such Miranda requirements, but at the same time it does provide a military defense counsel to each accused as soon as charges are brought and recognizes the accused's privilege against self-incrimination during the actual commission proceeding.

The military commission procedures also should not include the UCMJ's Article 32 investigation, which is a pre-charging proceeding that is akin to, but considerably more protective than, the civilian grand jury. Such a proceeding is appropriate when applied to U.S. military personnel, but is unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war.

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence where such evidence is reliable. Like a civilian judge, the military judge may exclude such evidence if the probative value is substantially outweighed by unfair prejudice. But we believe it is important that the Code of Military Commissions provide a standard of admissibility that is broader than that applied in court-martial proceedings.

Court-martial rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions concern not battlefield conduct, but everyday violations of the military code of conduct. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death.

The UCMJ rules of evidence also provide for circumstances where classified evidence must be shared with the accused. I believe there is broad agreement that in the midst of the current conflict, we must not share with captured terrorists the highly sensitive intelligence that may be relevant to military commission proceedings. A more difficult question is posed, however, as to what is to be done when that classified evidence constitutes an essential part of the prosecution's case.

In the court-martial context, our rules force the prosecution to choose between disclosing the evidence to the accused or allowing the guilty to evade prosecution. It

is my understanding that other countries, such as Australia, have established procedures that allow for the court, under tightly defined circumstances, to withhold evidence from the accused that would otherwise be subject to disclosure. Neither those procedures, nor any procedure under consideration, would permit "secret trials" outside the presence of the accused. Nonetheless, it may be possible to ensure fair and accurate commissions proceedings, while protecting our Nation's most sensitive information from its enemies. The administration and Congress must give careful thought as to how the balance should be struck for the prosecution of terrorists before military commissions.

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

Mr. Chairman, the administration also believes that Congress needs to enact legislation in light of the Supreme Court's ruling in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. It is fair to say that the United States military has never before been in a conflict in which it applied Common Article 3 as the governing detention standard. The military has been trained to apply the special protections that the Geneva Conventions apply to regular and lawful combatants who are captured as prisoners of war. But we do not train specifically and separately to Common Article 3, and the United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists.

Yet because of the Court's decision in *Hamdan,* we are now faced with the task of determining the best way to do just that. Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "murder," "mutilation," "torture," and the "taking of hostages," it is undeniable 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 will 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.

We believe that the standards governing the treatment of detainees by United States personnel in the war on terror should be certain, and that those standards should be defined clearly by U.S. law, consistent with our international obligations.

Congress can help by defining our obligations under section 1 of Common Article 3, with the exception of the obligations imposed by 1(b) and 1(d), by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which we believe to be a reasonable interpretation of the relevant provisions of Common Article 3.

Last year, after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists, Congress adopted the McCain amendment, part of the DTA. That amendment 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. Indeed, the same provision was used to clarify similarly vague provisions in another treaty—the Convention Against Torture. 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. We view the standard established by the McCain amendment as consistent with, and a useful clarification of, our obligations under the relevant provisions of Common Article 3.

Defining the terms in Common Article 3, however, is not only relevant in light of our treaty obligations, but is also important because the War Crimes Act, 18 U.S.C. § 2441, makes any violation of Common Article 3 a felony offense.

The administration believes that we owe it to those called upon to handle detainees in the war on terror to ensure that any legislation addressing the Common Article 3 issues created by the *Hamdan* decision will bring clarity and certainty to the War Crimes Act. The surest way to achieve that clarity and certainty, in our view,

is for Congress to set forth a definite and clear list of offenses serious enough to be considered "war crimes," punishable as violations of Common Article 3 under 18 U.S.C. § 2441.

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*.

JUDICIAL REVIEW OF DETAINEE CLAIMS

Finally, Mr. Chairman, the administration believes that any legislation in this area should also clarify how the judicial review provisions of the DTA apply. Some have argued that *Hamdan* makes the DTA inapplicable to the hundreds of habeas petitions brought by the Guantanamo detainees to challenge their detention as enemy combatants. Although we disagree with that reading, we think that the legislation should make clear that the detainees may not challenge their detention or trial before a final judgment of a military commission or a final order of a Combatant Status Review Tribunal. Moreover, we think that, once such a final judgment or order is in place, the detainees should be able to raise challenges only as provided for in the DTA itself.

We believe that that was Congress's original intent under the DTA. We also believe that it makes sense, as in the civilian justice system, to restrict the accused's ability to pursue appellate remedies until after the trial has been completed and after the commission has returned a guilty verdict on one or more charges.

I look forward to discussing these subjects with the committee this morning.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Mr. Attorney General. It seems to me to be a statement that is a good way to start this hearing. You have laid it out, I think with some clarity here now.

Mr. GONZALES. Thank you, Mr. Chairman.

Chairman WARNER. Secretary England.

STATEMENT OF HON. GORDON R. ENGLAND, DEPUTY SECRETARY OF DEFENSE

Secretary ENGLAND. Chairman Warner, Senator Levin, members of the committee: First of all, thanks for the opportunity to be here. This is indeed a crucial subject. This is also a critical time for America. We are in a real and a daily war against terrorist adversaries who are determined to destroy our way of life and that of our friends and allies. The terrorists are relentless. They oppose the very notion of freedom and liberty and they are committed to using every possible means to achieve their end.

America did not choose this fight and we do not have the option of walking away. As a Nation, we must be clear in our thoughts, candid in our words, and rock solid in our resolve.

The security challenges this Nation faces in the wake of September 11 are both complex and in some respects fundamentally new. The Supreme Court's *Hamdan* decision provides an opportunity for the executive and legislative branches to work together to solidify a legal framework for the war we are in and for future wars. The legal framework we construct together should take the law of war, not domestic civilian criminal standards of law and order, as its starting point.

I propose the following seven criteria against which any proposed legislation should be measured.

First, all measures adopted should reflect American values and standards.

Second, persons detained by the Armed Forces should always be treated humanely, without exception.

Third, our men and women in uniform must have the ability to continue to fight and win wars, including this war on terror. The Nation must maintain the ability to detain and interrogate suspected terrorists, to continue to detain dangerous combatants until the cessation of hostilities, and to gather and protect critical intelligence.

Fourth, war criminals need to be prosecuted and in a full and fair trial.

Fifth, our soldiers, sailors, airmen, marines, and Coast Guardsmen need adequate legal protections, as do the civilians who support them.

Sixth, the rules must be clear and transparent to everyone.

Lastly, we should be mindful of the impact of our legislation on the perceptions of the international community.

I thank this committee for taking time to thoughtfully consider this very important set of issues, and I thank you for your strong, unwavering support for the brave men and women serving every day at home and abroad to protect and defend this truly great Nation.

[The prepared statement of Secretary England follows:]

PREPARED STATEMENT BY HON. GORDON ENGLAND

Chairman Warner, Senator Levin, members of the committee, it is an honor to appear here today with my friends and colleagues, especially the Honorable Alberto Gonzales.

I do thank this committee for the invitation to meet with you to discuss the implications of the Supreme Court's *Hamdan* decision. As we work together to develop the additional legislation our Nation needs, let me provide some perspective from the Department of Defense about the broader national security context for these discussions and decisions.

This is a critical time for America. We are in a real and deadly war against terrorist adversaries who are determined to destroy our way of life—and that of our friends and allies. On September 11, 2001, terrorists attacked the World Trade Center and the Pentagon, and took the lives of other heroic Americans on Flight 93. The terrorists killed 3,000 people of 60 different nationalities that day. They would have killed many more, if they had had the means to do so, and they are still trying. These terrorists are relentless, they oppose the very notion of freedom and liberty, and they are committed to using every possible means to achieve their ends.

America did not choose this fight—and we don't have the option of walking away. Only if America continues to provide global leadership in the fight against these terrorists can we succeed.

The security challenges this Nation faces in the wake of September 11, 2001, are both complex and, in some respects, fundamentally new, and in many ways the Nation is still grappling with how best to address them.The terrorists our forces detain are not common criminals. At the same time, they are not lawful enemy combatants—among other things, they do not fight as members of the Armed Forces of sovereign states, they do not have a regular command structure, they do not wear uniforms, they do not carry their arms openly, and they do not obey the laws of war.

The Supreme Court's *Hamdan* ruling provides the opportunity for the executive and legislative branches to work together to solidify a legal framework for the war we are in, and for future wars.

A major part of America's effort in the war on terror is the fearless warfighting by our courageous men and women in uniform in Iraq and Afghanistan, but in fact, Iraq and Afghanistan are only part of a larger struggle. The perceptions and views of people of all nations are critical to the success of our campaign against al Qaeda and its affiliates. People will listen to our words—and watch our actions—and decide, and their decisions could be very important in tipping the scales.

We also need to be conscious that any new rules put in place today may live on for many years to come. Just as the global context has changed markedly over the last 50 years, we need to consider how well the rules deemed most applicable today will endure.

It is profoundly important that we come together as a U.S. Government—that we send a unified signal to the rest of the world about this Nation's determination, commitment, and resolve to push forward in the war on terror. We must be clear in our thoughts, candid in our words, and rock solid in our resolve.

The legal framework we construct together should take the law of war, not domestic civilian criminal standards of law and order, as its starting point.

I propose the following seven criteria against which any proposed legislation should be measured:

- All measures adopted should reflect American values and standards.
- Persons detained by the Armed Forces should always be treated humanely, without exception.
- Our men and women in uniform must have the ability to continue to fight and win wars, including this war on terror. The Nation must maintain the ability to detain and interrogate suspected terrorists, to continue to detain dangerous combatants until the cessation of hostilities, and to gather and protect critical intelligence.
- War criminals need to be prosecuted—in a full and fair trial.
- Our soldiers, sailors, airmen, marines, and coastguardsmen need adequate legal protections, as do the civilians who support them.
- The rules must be clear and transparent to everyone.
- We should be mindful of the impact of our legislation on the perceptions of the international community.

I thank this committee for taking time to thoughtfully consider this very important set of issues. I thank you for your strong, unwavering support for the brave men and women serving every day, at home and abroad, to protect and defend this truly great Nation.

Chairman WARNER. Thank you, Mr. Secretary. I think your statement is very helpful and we are off to a good start.

I put my first question to you, Secretary England, which is in reference to the Army Field Manual. It seems to me that that has some relevance to those of us, both in the administration and in Congress, that are working towards drawing up this statute. It would be in the interest of all parties to have that before we finalize such proposals as we write into law.

Secretary ENGLAND. Mr. Chairman, we do have an Army Field Manual today. It is the version of the Army Field Manual I think that goes all the way back to 1992.

Chairman WARNER. I am familiar with that, yes.

Secretary ENGLAND. We are in the process of frankly updating that. I believe we are very close. But each time it seems that something else comes up—we need to consider in this case, of course, it is the *Hamdan* decision.

I would expect we would now finalize it when this law is complete and on the books.

Chairman WARNER. You would want the law to be adopted by Congress before you promulgate the revised edition, is that your thought?

Secretary ENGLAND. That is at least my initial thought, Senator. I guess I have to consider it. But sitting here, it would seem logical to me, based on where we are today, to complete this discussion of Common Article 3 and to make sure we are all in agreement in terms of how we go ahead. That said, I will tell you we are very close on the field manual. But at this point that would be my initial reaction. I would be happy to get back with you and discuss it further, but at least initially that would seem logical to me, Senator.

Chairman WARNER. I think it does require further discussion and consideration, because I anticipate that at some point in time—and

let us work back from the fact that we are out of here on the 30th of September, and it is the desire of this committee, and we are supported by the bipartisan leadership of the Senate, to get this bill enacted by the Senate and hopefully over to the House, such that it can become law.

The men and women of the Armed Forces need this. Now, I will just take this under advisement. I will accept your statement as it is now and we will discuss this further.

I just wonder what view you might have on that, Attorney General, the desirability of waiting until we are finished on this prior to finalizing the revision of the field manual.

Mr. GONZALES. Sir, I am not privy to the process in terms of the finalization of the Army Field Manual. I can only imagine, however, that those involved in that process have likewise been involved in the process of this legislation, and we have received and are continuing to receive input about what these procedures for the military commissions should look like, and we have received and are continuing to receive input with respect to our obligations under Common Article 3.

So I do not know whether or not we need to have one completed before the other, quite frankly. I think—and I will obviously defer to this committee in terms of what you need. But I am not sure that they are necessarily intertwined in terms of moving forward.

Chairman WARNER. Let us all deliberate on this.

Did you wish to have anything further to say, Secretary England?

Secretary ENGLAND. No, sir, except that I did not understand the relationship between this field manual and this pending legislation. I guess I still do not understand that relationship. We are working on the field manual.

Chairman WARNER. I understand that.

Secretary ENGLAND. That was really an independent action from this legislation. So I am not quite sure how they are connected. I mean, if they are related then we will definitely work those in some coherent manner.

Chairman WARNER. I think there is a relationship, and we will discuss this further.

Secretary ENGLAND. Okay, we will be happy to do that, Mr. Chairman.

Chairman WARNER. Let us turn to the question of the classified information. The present military commission rules allow the appointing authority or the presiding officer of a commission to exclude the accused and his civilian counsel from access to evidence during proceedings that these officials decide to close to protect classified information or for other named reasons.

In your opinion, can a process that passes constitutional and statutory muster—and that is the bottom line; we have to pass that. We do not wish to have a Federal court set aside this law once we put it in action. So I repeat: In your opinion, can a process that passes constitutional and statutory muster be constructed without giving the accused and counsel possessing the necessary clearances access to such material in some form?

Mr. GONZALES. Of course, Mr. Chairman, we are not proposing that classified information be denied to cleared counsel. I think it

would be an extraordinary case where classified information would be used and would not be provided to the accused. Based upon conversations that have occurred with you individually and I understand based upon a hearing that occurred in the Senate Judiciary Committee, I think it is fairly obvious that this is one of the remaining points of discussion, major points of discussion, within the administration, is how to resolve this issue.

I think we all agree that we cannot provide terrorists access to classified information. So how do we go about moving forward with the prosecution? Because sure, we have the option to continue to hold them indefinitely, for the duration of the hostilities, but we may choose to bring someone to justice and the classified information may be crucial to that prosecution.

So there are various things that are being discussed with the administration. We could have, for example, the military judge make a finding that moving forward without providing the classified information to the accused is absolutely warranted. We could have a finding that the military judge—the military judge could make a finding that substitutes or summaries are inadequate. We could require the military judge to make a finding that moving forward without having the accused present is warranted given the circumstances.

So there are various things I think that we can do, certain procedures that have to be followed, so that we make this an extraordinary case. But, Mr. Chairman, it cannot be the case that in making a decision to move forward with the prosecution that we have to provide classified information to a terrorist. So this is an issue that we are wrestling with, there is no question about that, and I think that this is something we will value the committee's input.

Chairman WARNER. We have not reached a final decision on how we are going to handle it, but I pointed out I think the importance of having this statute be able to survive any subsequent Federal court review process.

Mr. GONZALES. If I could make two final points. Again, the counsel would have access, cleared counsel would have access to the information, and there could be a mechanism again where we could provide either redacted summaries or something as a substitute to the accused, that would not jeopardize the national security of our country.

Chairman WARNER. On the subject of hearsay evidence, given the difficulties of locating and obtaining witnesses in cases of this sort, do you believe that it would be reasonable to admit hearsay if it were not coerced and in the opinion of a military judge or other judicial officer there were sufficient guarantees for its veracity? In your opinion, would the admission of such evidence raise constitutional questions?

Mr. GONZALES. In my judgment it would be permissible. The admission of hearsay evidence has been used in other international tribunals in Yugoslavia and Rwanda. This is a different kind of conflict. It is an ongoing kind of conflict, where oftentimes it is hard to verify or hard to have firsthand access to the witness or the evidence. The witness may be out of the country and therefore we cannot serve process. For security reasons we may not want to bring the witness into Guantanamo. The witness may be dead. The

witness may be on the front line, and do we want to be bringing our soldiers off the front lines?

So I think that there are very good reasons, practical reasons, necessary reasons, to deviate from the UCMJ with respect to the use of hearsay. It is vitally important, however, that the information be probative and that it be reliable. These decisions will be made by military judges who have been trained, and I think we all have great confidence in their wisdom and judgment.

But I think the use of hearsay is absolutely important in these kind of proceedings.

Chairman WARNER. Thank you very much.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

The Supreme Court in *Hamdan* held that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda. Secretary England, on July 7 you issued a memorandum acknowledging this holding and said that the Supreme Court has determined that Common Article 3 applies as a matter of law to the conflict with al Qaeda. The Court found that the military commissions as constituted by the DOD are not consistent with Article 3.

Then you went on to say the following, that "all DOD personnel adhere to these standards." Do you stand by that memorandum?

Secretary ENGLAND. Yes, sir, I do.

Senator LEVIN. Attorney General Gonzales, do you agree with that memorandum?

Mr. GONZALES. Sir, I cannot admit to having read the entire thing. But I agree with what you have read, yes, sir.

Senator LEVIN. Would you agree, in light of the Supreme Court's ruling, that legislation authorizing the use of the commissions and procedures for such commissions must be consistent with the requirements of Common Article 3?

Mr. GONZALES. Yes, sir, I would.

Senator LEVIN. Mr. Attorney General, do you believe that the use of testimony which is obtained through techniques such as waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, and forced nudity would be consistent with Common Article 3?

Mr. GONZALES. Sir, I think most importantly, I cannot imagine that such testimony would be reliable, and therefore I find it unlikely that any military judge would allow such testimony in his evidence.

Senator LEVIN. That would be because it is hard for you to contemplate or conceive of such testimony being consistent with Common Article 3?

Mr. GONZALES. Sir, it would certainly be—in my judgment, there would be serious questions regarding the reliability of such testimony and therefore it should not be admitted and would not be admitted under the procedures that we are currently discussing.

Senator LEVIN. Secretary England, if such procedures were used against our own soldiers, testimony that was obtained through the use of those kind of techniques, would you accept such judgment if it were rendered against one of our troops?

Secretary ENGLAND. Again, I would concur with the Attorney General. Hopefully that would not be permissible in a court, Senator Levin, so hopefully it would not be used against them.

Senator LEVIN. In terms of the rule of evidence, Mr. Attorney General, Justice Kennedy assessed that it be feasible to apply most, if not all, of the conventional military evidence rules and procedures. Would you agree that most at least of the conventional military evidence rules and procedures are feasible for use in these commissions?

Mr. GONZALES. Certainly, sir. First of all, let me make one observation. I think there is a difference of opinion about how to read some of these opinions. I think what the Court was saying is that if the President wants to deviate, wants to use procedures inconsistent, that are not uniform with the UCMJ, then he has to have practical reasons for doing so.

The UCMJ is a creature of Congress. If Congress wants to change a procedure, I think Congress has the authority under the Constitution to do that.

I am sorry, Senator, I forgot your question and I apologize.

Senator LEVIN. Do you believe it would be feasible, the way Justice Kennedy uses the word "practicability," for most if not all, let us say most, of the conventional military everybody rules and procedures to be followed in commissions?

Mr. GONZALES. Again, Senator, without going through an itemized list of the procedures or rules that you are referring to, the objective that we would hope to achieve is the ability to get into evidence information that may be, quite frankly, not admissible in the UCMJ, not admissible in our criminal courts, because we are fighting a new kind of war and we are talking about information that may be much more difficult to obtain.

So again, that would be our objective, and obviously we are willing to sit down, would be happy to sit down with you to talk about specific procedures.

Senator LEVIN. We were told by I think one of our colleagues a week or so ago that there is a list of items in the rules of evidence which are not practical to be followed. Is there such a list that has already been created? Do either of you know?

Mr. GONZALES. I am not aware of such a list, Senator. But I do know that, obviously, we have looked very hard at the UCMJ, to look to see what makes sense, what continues to make sense in fighting, bringing to justice al Qaeda, and what things should change in order to successfully prosecute——

Senator LEVIN. But is there a list of items?

Mr. GONZALES. Sir, I am not aware of a specific list that you are referring to.

Senator LEVIN. I think it was referred to here by one of our colleagues. Secretary England, are you familiar with the list?

Secretary ENGLAND. No, sir, I am not.

Senator LEVIN. If you could check it out, if there is such a list, could you share it with us?

Mr. GONZALES. Sir, there may be a list——

Senator LEVIN. Would you share it with us?

Mr. GONZALES. I will be happy to see what we can do, sir.

Senator LEVIN. Attorney General Gonzales, in your prepared statement you say that military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Would you agree that legislation should allow or require the presence of a witness if that witness is available, instead of using hearsay?

Mr. GONZALES. Sir, it depends on what you mean, if the witness is available.

Senator LEVIN. You gave examples of, you know, witnesses may not be available. You talk about incarceration. Say incarceration is in our jail. Should that person be presented?

Mr. GONZALES. I think that would be an instance where I think it would be more difficult certainly to argue this person is not available. I am talking about someone who is in a foreign country and we cannot reach.

Senator LEVIN. So that you would prefer the presence of a witness to hearsay?

Mr. GONZALES. Absolutely, sir. But again, if it means we take one of our soldiers off the front lines, I question whether or not that is the right approach that this Congress should be considering.

Senator LEVIN. My time is up. Thank you very much, both of you.

Chairman WARNER. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

As I have said before, I respect the judgment of you as chairman and the majority members of this committee to hold these hearings, although my feeling is it is premature and we should not even be having this hearing today. Senator Levin in his opening remarks referred to information that we are working on as a work in progress or leaked information. I would prefer to have something in front of me that conforms to the successes that we have had in the commissions and tweaked to take care of the problem with the United States Supreme Court.

So I really do not have any questions for you. I just would like to have you keep in mind as you continue with this, as one member of this committee who does not believe we should be doing this, and yet I realize we have to come up with something, that you keep in mind that my wishes would be that we want to make sure that the President is able to effectively and successfully execute this next generation international war.

I want to equip and protect our military as it carries out the war. I want to enact legislation that is designed to help us win. I want terrorists destroyed and locked up for good.

Senator Warner brought up something on the courts of the world in a previous hearing. I agree with that. He said that: I do not trust our national interests and security in the hands of some of these national courts.

I am interested in terms of the attorney-client privileges, that we want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given

to the detainees, at least not to the extent that they be to American citizens.

As far as the right to trial of terrorists, I know the UCMJ Article 10 requires immediate steps to be taken to charge and try detainees and, if not, release them. On the other hand, we know that the third Geneva Convention allows countries to hold prisoners of war (POWs) until the end of the conflict and it does not require a trial. I kind of agree to something that Senator Clinton said during the last hearing. She said, hey, we can just hold them; we do not have to try them.

The right to classified information, I just feel that I still have to be convinced that the terrorists will truly be prevented from seeing or hearing classified information. I think you made that pretty clear in your opening remarks, both of you. But I concur in that.

So I guess in summary, I just think that if we would take what I think has been working well up to now, put that down, figure out a way to offset the objections that came in the Supreme Court ruling, and get on with this thing.

Thank you, Mr. Chairman.

Chairman WARNER. Senator Dayton.

Senator DAYTON. Thank you, Mr. Chairman.

Mr. Attorney General, in your written statement, on page 7, you say, "It is fair to say that the United States military has never before been in a conflict in which it applied Common Article 3 as the governing detention standard"?

Mr. GONZALES. Against international terrorists.

Senator DAYTON. That is not what your statement says, sir.

Mr. GONZALES. That is my statement, sir.

Senator DAYTON. All right. So now the Supreme Court's ruling, do you concur, extends that requirement?

Mr. GONZALES. Sir, I believe the Supreme Court has told us that Common Article 3 does apply to the United States conflict with al Qaeda, and now Congress and the President need to decide, what does that mean for the United States moving forward. I happen to believe, as I indicated in my opening remarks, that there is a degree of uncertainty because of some of the language in Common Article 3. I personally feel that we have an obligation, for those folks who are fighting for America, to try to eliminate that uncertainty as much as we can.

One way to do that is to define what our obligations are under Common Article 3, by tying it to a U.S. constitutional standard, which was recognized by Congress in connection with the McCain amendment and the DTA. So that is the proposal of the administration.

Senator DAYTON. Secretary England, your directive that you issued on July 7 of this year, summarizing here, confirms DOD's obligation to comply with Common Article 3. It makes clear that DOD policies, directives, executive orders, and doctrine already comply with the standards of Common Article 3.

When the JAGs of the Armed Forces were asked about this directive at one of our hearings on July 13, Admiral McPherson stated, "It created no new requirements for us. We have been training to and operating under that standard for a long, long time." General Romig stated: "We train to it. We always have."

Is that an accurate reflection of both your directive and your understanding of prior training and procedures?

Secretary ENGLAND. Senator, yes, it is. The fact is in my July 7 letter I had commented that it was my understanding that, aside from the military commission procedures, that all the orders, policies, directives were already in compliance with Common Article 3. I then asked everyone throughout the DOD to look at their own procedures, policies, et cetera that they were implementing and to provide an answer back to the DOD to reaffirm that they were indeed in compliance with Common Article 3.

At this point we have had responses from perhaps three-quarters of all the entities within the DOD and they have all complied in the affirmative, and I expect that the rest of the DOD will also reply in the affirmative. But we have not heard back from everybody at this time, Senator.

Mr. GONZALES. Senator, may I add something if you do not mind?

Senator DAYTON. Yes, sir.

Mr. GONZALES. It is my understanding—and obviously the Deputy Secretary would know much better than I—but reading the transcript when the JAGs were up before this committee, I think they all said: We train to Geneva. They did not say that they train to Common Article 3. They said they train to the standards of Geneva, which are higher than Common Article 3. I believe at least one of the JAGs responded when asked, are there any manuals or booklets or anything relating to Common Article 3, the answer was no because they do not train to Common Article 3. I think they train to something higher.

So when you ask them, what are your obligations, what is the standard under Common Article 3, I do not think they can give you an answer.

Senator DAYTON. Sir, if they train to a higher standard, then all the better, it seems to me, and I am glad to clarify that; also to clarify your written statement here, because I just was very surprised that you would say that we have never before been in a conflict in which it applied, the United States military, Common Article 3 as the governing detention standard, including conflicts against irregular forces such as the Viet Cong and those in Somalia and other places. So I think that is an important clarification. I thank you for that.

Mr. GONZALES. Thank you for the opportunity.

Senator DAYTON. Thank you.

May I ask you also, Mr. Attorney General, in your——

Chairman WARNER. Let me interrupt. Have you had sufficient opportunity to correct what you feel is an omission in that statement?

Mr. GONZALES. I have. Thank you.

Chairman WARNER. Fine.

Mr. GONZALES. Thank you, Mr. Chairman.

Senator DAYTON. Mr. Attorney General, in your testimony you stated here, if I am quoting you correctly, that you do not want to allow the accused to escape prosecution. I would certainly concur with that statement. We were also told—and I am not an attorney, so forgive me here, but the JAGs told us that even if somebody for

any reason cannot be prosecuted, they can be detained indefinitely until the cessation of hostilities. That is explicitly provided for in the Geneva Convention and that is a standard practice elsewhere.

So I just wanted to clarify because I think, not yourself, sir, but others around this subject have created a false impression that if these individuals cannot be prosecuted then they are going to be released back to their countries or into the general population.

Mr. GONZALES. That is an excellent point, Senator. This was again another issue that was raised when the JAGs were last here. I think Senator Graham was the one that actually pointed it out in connection with an exchange with Senator Clinton.

Clearly, we can detain enemy combatants for the duration of the hostilities, and if we choose to try them that is great. If we do not choose to try them, we can continue to hold them.

Senator DAYTON. You are correct, sir. I should have properly credited my colleague Senator Clinton for pointing that out. It brings up the old adage that if you take it from one person it is plagiarism; from many persons, it is research. So I am glad you clarified that.

There is an article in last Friday's Washington Post that leads off: "An obscure law approved by a Republican-controlled Congress a decade ago has made the Bush administration nervous that officials and troops involved in handling detainee matters might be accused of committing war crimes and prosecuted at some point in U.S. courts. Senior officials have responded by drafting legislation that would grant U.S. personnel involved in the terrorism fight new protections against prosecution for past violations of the War Crimes Act of 1996. The law criminalizes violations of the Geneva Conventions governing conduct in war."

Is that part of your formal proposal to Congress in this matter? Is that going to be made part of this proposal?

Mr. GONZALES. It will be made part of the proposal. I think here we have agreement with the JAGs which that there should be certainty. If we are talking about prosecution for war crimes, there should be certainty and the legislation should include a specific list of offenses so everyone knows what kinds of actions would in fact result in prosecution under the War Crimes Act.

Senator DAYTON. But as I understand, if this article is correct, you are talking about a retroactive immunity provided for prior possible violations committed.

Mr. GONZALES. Senator, that is certainly something that is being considered, again. That is not inconsistent with what is already in the DTA when it talks about providing a good faith defense for those who have relied upon orders or opinions. It seems to us that it is appropriate for Congress to consider whether or not to provide additional protections for those who have relied in good faith upon decisions made by their superiors. That is something obviously that I think Congress should consider.

Senator DAYTON. My time has expired. Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

I want to thank the witnesses for being here and I want to thank them for literally thousands of hours of work that has been done by them and their staffs in trying to fix the problems that exist and comply with the Supreme Court decision. I appreciate very much their efforts.

Secretary England, it was 8 months ago that we passed the law requiring for interrogation techniques to be included in the Army Field Manual. It is time we got that done, Mr. Secretary. I know we have come close on several occasions. It is not right to not comply with the law for 8 months which specifically says that interrogation techniques have to be included in the Army Field Manual.

Second of all, it is a disservice to the men and women in the field who are trying to do the job. They should have specific instructions. It was the judgment of Congress and signed by the President that we should do that. Now, I hope that I can—and we have been working with you, and I hope that you will be able to accomplish this sooner rather than later.

Can we anticipate that?

Secretary ENGLAND. Yes, you can, Senator. In the meantime, we have gone back to the prior field manual. So we are definitely in compliance today with that field manual. But we did want to expand. You are absolutely right, we do need to do that, and we will work to bring that to a conclusion, and we will work with you, sir.

Senator MCCAIN. Thank you. I hope we can do that as soon as possible, 8 months I think is a sufficient period of time.

Mr. Attorney General, I respectfully disagree with your testimony where you say we do not train specifically and separately to Common Article 3 and the United States has never before applied Common Article 3. I was present at that hearing and the question that was asked of the JAGs—and I would like to point out again for the record, the reason why we rely on the JAGs is because they are the military individuals in uniform who have been practicing the UCMJ and these laws and they are the ones that are going to be required to carry out whatever legislation we pass.

We admit they are not all perfect. We have Senator Graham on this committee to prove that. [Laughter.]

But the fact is we do rely on them to a great degree.

Mr. Attorney General, the JAGs were asked about Common Article 3, and I quote Admiral McPherson. He said: "It created no new requirements for us." He said: "We have been training to and operating under that standard for a long, long time." General Romig said: "We train to it. We always have." I am just glad to see that we are taking credit for what we do now. I have had conversations where they say they are training to Common Article 3.

So I hope you will engage them in some dialogue so we can clear up your statement here. Please respond, sir.

Mr. GONZALES. Sir, I may be mistaken, but whether or not I am mistaken about the previous testimony, I do know that they believe, at least from them telling me, we need clarification about what our obligations are under Common Article 3. They may be training to Common Article 3, but they believe that it would be wise to have additional clarification about what that means.

Senator MCCAIN. I do not want to parse with you, but here is a quote from the hearing: "General Black, do you believe that Deputy

Secretary England did the right thing in light of the Supreme Court decision in issuing a directive for DOD to adhere to Common Article 3, and in so doing does that impair our ability to wage the war on terror?" General Black: "I do agree with the reinforcement of the message that Common Article 3 is the baseline standard, and I would say that, at least in the United States Army and I am confident in the other Services, we have been training to that standard and living to that standard since the beginning of our Army. We continue to do so."

Admiral McPherson: "It created no new requirements for us. As General Black had said, we have been training to and operating."

They were pretty specific about it, and I have had conversations with them. So we may have a difference of opinion that I am sure we can get——

Mr. GONZALES. Sir, I think what is important again is I think that—there is—perhaps I am mistaken and I will admit to that. But again, the important point I believe is that nonetheless they believe we need clarification as to what Common Article 3 requires.

Senator MCCAIN. Thank you.

A draft of the proposal that we have been all referring to that is on various Web sites, et cetera, indicates that statements obtained by the use of torture as defined in Title 18 would not be admissible in a military commission trial of an accused terrorist. Mr. Attorney General, do you believe that statements obtained through illegal inhumane treatment should be admissible?

Mr. GONZALES. Senator, again, I will say this. The concern that I would have about such a prohibition is what does it mean, how do you define it. If we could all reach an agreement about the definition of cruel, inhumane, and degrading treatment, then perhaps I could give you an answer.

I can foresee a situation where, depending on the definition, I would say no, it should not be admitted. But depending on your definition of something that is degrading, such as insults or something like that, I would say that information should still come in.

Senator MCCAIN. I think that if you practice illegal, inhumane treatment and allow that to be admissible in court, that would be a radical departure from any practice that this Nation——

Mr. GONZALES. Sir, I do not believe that we are currently contemplating that occurring. I do not believe that that would be part of what the administration is considering.

Senator MCCAIN. I might add that the JAGs this morning testified before the Senate Judiciary Committee that coerced testimony should not be admissible. How do you feel about that?

Mr. GONZALES. Sir, again our current thinking about it is that coerced testimony would not come in if it was unreliable and not probative. Again, this would be a judgment made by the military judge, again certified, a certified military judge, and it would be quite consistent with what we already do with respect to Combatant Status Review Tribunals. This was reflected in the DTA, that evidence that was coerced could be considered and is being considered so long as it is reliable and probative.

Senator MCCAIN. I assume that the Department of Justice (DOJ) has produced their analysis of the interrogation techniques permitted under the DTA. Is that true?

Mr. GONZALES. We have provided legal advice, yes, sir.

Senator MCCAIN. But in your statement you want Congress to do that?

Mr. GONZALES. I am sorry, Senator?

Senator MCCAIN. In your statement, "Congress can help by defining our obligations under section 1 of Common Article 3."

Mr. GONZALES. Clearly, sir, I think it would be extremely helpful to have Congress, with the President, define what our obligations are under Common Article 3. It is quite customary for the United States Congress through implementing legislation to provide clarity to terms that are inherently vague in a treaty, and so this would be another example where I think that makes sense.

Senator MCCAIN. On this issue of inhumane treatment, I think we are going to—my time has long ago expired—have an extended discussion about that aspect of this issue, Mr. Attorney General. I want to thank both you and Secretary England for the hard work you have done on this issue.

I thank you, Mr. Chairman. I did mention to Secretary England that I hope that we could get the field manual done, since it has been 8 months since we passed the law.

Secretary ENGLAND. Mr. Chairman, I responded affirmatively.

Chairman WARNER. Good. I just wanted to make the record reflect that.

Secretary ENGLAND. Yes, sir.

Chairman WARNER. Senator Clinton.

Senator CLINTON. Thank you, Mr. Chairman.

Welcome, Attorney General Gonzales, Secretary England. Secretary England, I appreciate very much your being here because I think it is important, and I assume you agree, to have our civilian leadership testify before this committee.

Secretary ENGLAND. Yes, I do.

Senator CLINTON. Secretary England, I am not sure you are aware, but the leadership of this committee, Chairman Warner, formally invited Secretary Rumsfeld to appear before us in an open hearing tomorrow alongside General Pace and General Abizaid because of the pressing importance of the issue to be discussed, namely Iraq, Afghanistan, the Middle East, our country's policies affecting each of those areas.

Unfortunately, Secretary Rumsfeld has declined to do so. He has instead opted to appear only in private settings. I understand yesterday he appeared behind closed doors with the Republican Senators. I am told tomorrow he will be appearing, again behind closed doors, with all Senators.

But I am concerned, Mr. Secretary, because I think that this committee and the American public deserve to hear from the Secretary of Defense. We are going to be out in our States for the recess. Obviously these matters are much on the minds of our constituents, and I would appreciate your conveying the concern that I and certainly the leadership which invited the Secretary to be here have with his inability to schedule an appearance before this committee to discuss the most important issues facing our country.

I appreciate your agreement that it is important to have our civilian leadership appear and obviously we will look forward to having our military leadership tomorrow. But I think it is hard to un-

derstand why the Secretary would not appear in public before this committee, answer our questions, answer the questions that are on the minds of our constituents.

Chairman WARNER. If you would yield, Senator, on my time, not to take away from yours. You are accurate, Senator Levin and I did, as we customary do, wrote the Secretary, as well as the Chairman of the Joint Chiefs and General Abizaid. The Secretary made a special effort to get General Abizaid over here such that he could appear before the committee.

It was the intention of myself as chairman that tomorrow's very important hearing focus on the military operations being conducted in Iraq and Afghanistan and the impact of other military operations by other countries in the theater of Israel, Lebanon, and Palestine.

I discussed with the Secretary and at no time did he refuse to come up here. I simply had to coordinate this with the leadership of the Senate, most importantly my leader, and he felt it would be desirable for the whole Senate to have a panel consisting of the Secretaries of State, Defense, Chairman of the Joint Chiefs, and General Abizaid. Given that option, the decision was made that we would do that one as opposed to both, given the Secretary's schedule.

Senator CLINTON. Mr. Chairman, I appreciate the explanation. I think it is abundantly clear, however, to the members of this committee, as it is to countless Americans, that the Secretary has been a very involved manager in the military decisionmaking that has gone on in the last 5 years, and in fact in recent publications there is quite a great deal of detail as to the Secretary's decisionmaking, one might even say interference, second-guessing, overruling the military leadership of our country.

I, for one, am deeply disturbed at the failures, the constant, consistent failures of strategy with respect to Iraq, Afghanistan, and elsewhere. I do not think that those failures can be appropriately attributed to our military leadership. So although the Secretary finds time to address the Republican Senators, although he finds time to address us behind closed doors, I think the American people deserve to see the principal decisionmaker when it comes to these matters that are putting our young men and women at risk. More than 2,500 of them have lost their lives, and this Secretary of Defense I think owes the American people more than he is providing.

So I appreciate the invitation that you extended, as is your wont. You worked very hard, I know, to create the environment in which we would have the opportunity to question the Secretary. Unfortunately, he chose only to make himself available to us behind closed doors, out of view of the public, the press, our constituents, our military, and their families. I think that is unfortunate.

Chairman WARNER. I would only add that we have under consideration a press conference following his appearance before the Senators tomorrow; and further, we have under discussion as soon as the Senate returns in September an overall hearing on many of the issues which the distinguished Senator from New York raises.

Senator CLINTON. I thank you, Mr. Chairman.

Attorney General Gonzales, I want to follow up on the line of questioning from Senator McCain, because I am frankly confused. You have testified with respect to Common Article 3, and I think we have clarified that perhaps your statement was not fully understood, because you stated the U.S. military had never before been in a conflict in which it applied Common Article 3 as the governing detention standard.

You acknowledge, however, that we have frequently applied the higher standard of the Geneva Conventions to regular and lawful combatants who are captured as prisoners of war, and in fact you agree with the JAGs who appeared before us that that is the standard that our military trains to. Now, why not then apply the higher standard? Why go seeking another standard? Apply the standard to which we are already training our troops, rather than trying to come up with a different, perhaps even lower, standard that would provide for less protective treatment of detainees.

Mr. GONZALES. Senator, that is certainly a policy decision that one could adopt. The Court, however, did not say that all of the protections of Geneva apply to our conflict with al Qaeda. The Court simply said that Common Article 3 applies to our conflict with al Qaeda. That is the problem or issue or challenge that has been created as a result of the *Hamdan* decision, and that is what we are trying to do in this legislation, is trying to address that particular issue that has been created as a result of that decision.

Senator CLINTON. Do you anticipate that the legislation will include United States citizens as enemy combatants?

Mr. GONZALES. No, ma'am. First of all with respect to the procedures under Military Commission Order 1, there was never any question that it would not apply to trials of American citizens. I can say with confidence that there is agreement within the administration that the commission procedures that we would have Congress consider would not relate to American citizens.

Senator CLINTON. Now, I know that we keep coming back to this distinction that seems to be at the heart of the disagreement over the treatment of these people, whatever we call them. Some in the administration as I understand it have argued that there should be a distinction between unlawful enemy combatants, those who act in violation of the laws and customs of war, and so-called lawful enemy combatants, who might be, for example, full members of the regular Armed Forces of a state party.

How do those categories, the lawful enemy combatant, differ from what is commonly known as prisoners of war? Is there a difference between a lawful enemy combatant and a prisoner of war?

Mr. GONZALES. Yes, Senator, there is a difference. I think if you are a prisoner of war you get the protections under the Geneva Convention that we would normally think of with respect to the Geneva Convention. Our soldiers are entitled to those protections because they fight according to the laws of war. They carry weapons openly, they wear uniforms, they operate under a command structure. So they would be entitled to all of the protections under the Geneva Convention.

But the Geneva Convention is a treaty between state parties and, for example, the President made a determination that in our conflict with al Qaeda the requirements of the Geneva Conventions

would not apply because al Qaeda is not a signatory party to the Geneva Convention, and therefore they would not be entitled to all of the protections of the Geneva Convention. However, the President made a decision that nonetheless they would be treated humanely, consistent with the principles of the Geneva Convention.

The President also made a determination that, with respect to the Taliban, Afghanistan was a signatory to the Geneva Convention. However, because they did not fight according to the requirements of the Geneva Convention, they too would not be afforded the protections of prisoners of war under the Geneva Convention.

Senator CLINTON. Just to finish, you would then make the argument that during the Vietnam War we would have treated a North Vietnamese prisoner different from a Viet Cong prisoner?

Mr. GONZALES. I would hesitate to answer that question. It is conceivable, given their status. My recollection about the governing or ruling government in that country makes it difficult for me to answer that question. But it is conceivable, yes, ma'am.

Senator CLINTON. Thank you.

Chairman WARNER. I would like to invite Senator McCain to address that question.

Senator MCCAIN. We did not treat them differently.

Chairman WARNER. Thank you, Senator.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

This is a very interesting area of the law and I think it is important we go over it, because I was the one asking the questions of the JAGs of what you are trained to. I will try the best I can, and, please, the legal people here that know this better than I do, just chime in if I get it wrong. But what we train our folks to do is when they capture someone on the battlefield that they do not become a military lawyer, they are just a soldier. What we tell everybody in uniform, that if you capture somebody apply POW, Geneva Convention standards to the captive.

Is that correct?

Mr. GONZALES. Yes, sir.

Senator GRAHAM. That is higher than Common Article 3. Part of the POW Geneva Convention standards that Senator McCain probably knows better than anyone else is a reporting requirement. If you are a lawful combatant—and Mr. Attorney General, I think I disagree with your answer to Senator Clinton. A lawful combatant is a POW.

One of the things that we have tried to ensure in the Geneva Convention is as soon as someone is captured, the host country has an obligation to inform the international community that that prisoner has been captured and their whereabouts and their physical condition. I do not know how Senator McCain's family found out about him being captured, but everybody in his situation, the North Vietnamese were not exactly the best people to use as a model here when it comes to Geneva Convention compliance. But eventually we were informed about who was in their capture.

The problem we have as a Nation, if you capture Sheik Mohamed do we want to tell the world within 48 hours we have him? I would argue that we would not, because it might compromise our war operations.

I think what the JAGs were telling us is that from the soldier's point of view, do not confuse them. Saddam Hussein was treated as a POW. If we caught bin Laden tomorrow, if a Marine unit ran into bin Laden tomorrow, my advice to them would be to treat him as a POW.

However, I do not believe that bin Laden deserves the status of POW under Common Article 3. Common Article 3 applies to all four sections of the Geneva Convention. Common Article 3 says this is the minimum standard we will apply to a person in your capture, regardless of their status. So I would argue, Mr. Chairman, that there is a significant distinction between a lawful combatant and an unlawful combatant and our law needs to reflect that for national security purposes.

But I would also like to associate myself with Senator McCain: How we treat people is about us. Even if you are an enemy combatant, unlawful irregular enemy combatant, I think the McCain amendment is the standard which we should adhere to, because it is about us, not them.

The problem we have is not the soldier on the front line who captures Osama bin Laden. It is that when you turn them over to the Central Intelligence Agency or military intelligence the question becomes then, are the interrogations of unlawful enemy combatants bound or bordered by Common Article 3? I would argue, colleagues, that there is not one country in this world that conducts terrorist interrogations using Common Article 3 standards, because that means you cannot even say hello to them hardly.

The purpose of this endeavor is to get military commissions right with *Hamdan* and right with who we are as a Nation. So I am going to be on the opposite side of you on classified information. Reciprocity is the key guiding light for me. Do not do something in this committee that you would not want to happen to our troops.

The question becomes for me, if an American servicemember is being tried in a foreign land would we want to have that trial conducted in a fashion that the jury would receive information about the accused's guilt not shared with the accused and that person be subject to a penalty of death? I have a hard time with that.

Telling the lawyer does not cut it with me either, because I think most lawyers feel an ethical obligation to have information shared with their client. I would ask you to look very closely at the dynamic of whether or not you can tell a lawyer something and the lawyer cannot tell the client when their liberty interest is at stake. I think you are putting the defense lawyers in a very bad spot.

So the question may become for our Nation, if the only way we can try this terrorist is to disclose classified information and we cannot share it with the accused, I would argue do not do the trial; just keep them, because it could come back to haunt us.

I have been in hundreds of military trials and I can assure you the situation where that is the only evidence to prosecute somebody is one in a million, and we need not define ourselves by the one in a million.

Now, when it comes to hearsay, there are 27, I think, exceptions to the military hearsay rule. I am willing to give you more. The International Criminal Court (ICC) does not have a hearsay rule, so the international standard is far different than the standard we

have in Federal Rules of Evidence, Military Rules of Evidence. But I think it would do us well as a country, serve us well as a country, to set down and come up with a hearsay rule that has an exception for the needs of the war on terror, not just ignore the hearsay rule in general.

So I have not asked one question yet. I made a lot of speeches and I am sorry to take up the committee's time. I would end on this thought.

Chairman WARNER. We will give you a little extra time to ask one question.

Senator GRAHAM. This is very complicated. It means a lot to all of us and we have a chance to start over. Mr. Attorney General, Secretary England, I appreciate what you have done with Mr. Bradbury and others. I am very pleased with the collaborative process.

Here is where I think we have come to. The political rhetoric is now being replaced by sensible discussions. Mr. Attorney General, do you believe it is wise for this country to simply reauthorize Military Commission Order 1 without change?

Mr. GONZALES. I think the product we are considering now is better.

Senator GRAHAM. So the testimony that was given to the House by a member of the DOJ, that it sounds good to me just to reauthorize Military Commission Order 1, would probably not be the best course of conduct?

Mr. GONZALES. Again, I think what we are considering now is the better product.

Senator GRAHAM. Do you agree with the evolving thought that the best way to approach a military commission model is start with the UCMJ as your baseline?

Mr. GONZALES. That is what we have done.

Senator GRAHAM. I think we are making great steps forward, I really, really do. I could not agree with you more that when it comes to title 18—now, the committee needs to really understand this. If you are in charge of a detainee and you are a military member, two things govern your conduct, title 18 and the UCMJ, I think it is Article 93. It is a crime in the military to slap a detainee. A simple assault can be prosecuted under the UCMJ through Article 15, nonjudicial punishment, or a courts-martial of a variety of degrees.

What we do not want to happen, I think, is to water down the word "war crime." We need to specify in title 18 what is in bounds and what is not, because our people in charge of these detainees could be prosecuted for felony offenses. Mr. Attorney General, I think you are correct in wanting to get more specificity, be more specific, instead of just using Common Article 3, and I would like to work with you to do that.

The last thing is inherent authority. I had a discussion with you several months ago and I asked you a question in the Senate Judiciary Committee: Do you believe that Congress has authority under our ability to regulate the land and sea and naval forces and air forces to pass a law telling a military member, you cannot physically abuse a detainee, the McCain amendment? Do we have the authority to do that?

Mr. GONZALES. I think you do have the authority to pass regulations regarding the treatment of detainees, yes, sir, I do.

Senator GRAHAM. We are making tremendous progress. Thank you.

Chairman WARNER. Thank you very much.

I see no colleagues on this side who have not had the opportunity to speak, so I now turn to Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Secretary England, I am trying to reconcile your actions in response to the Court's decision with the testimony of the Attorney General today. In response to the Court's decision, on July 3 you issued an official memorandum which applied all aspects of Common Article 3 to detainees. Is that correct?

Secretary ENGLAND. That is correct.

Senator COLLINS. I applaud you for doing that and taking action quickly to comply with the Supreme Court's decision.

Now, Mr. Attorney General, in your testimony today you say that some of the terms in Common Article 3 are too vague. For example, you cite "humiliating and degrading treatment," "outrages upon personal dignity." If it is too vague, how is it that Secretary England is able to apply those same standards to the treatment of detainees?

Mr. GONZALES. I think that even though the Secretary's actions were the correct actions, even the JAGs believe that, because now we are talking about prosecution for commission of a felony, there does need to be absolute certainty or as much certainty as we can get in defining what it is, what would constitute a violation of Common Article 3. It is one thing to engage in conduct that may violate the UCMJ. It is another thing if that same conduct all of a sudden becomes a felony offense, which the DOJ is now involved in.

I think we all agree, there is universal agreement, that if there is uncertainty, if there is risk, we need to try to eliminate that uncertainty and we need to try to eliminate that risk.

I think that there are certain actions that we all agree would violate Common Article 3—murder, rape, maiming, mutilation, no question about it. But there are some foreign decisions that provide a source of concern, and the Supreme Court has said in interpreting our obligations under the treaty we are to give respectful consideration to the interpretations by courts overseas and also to give weighty consideration—to give respectful consideration to the adaption or the interpretation by other state parties to those words.

So what we are trying to do here, again working with the JAGs, is trying to provide as much certainty as we can, so that people are not prosecuted by the DOJ for actions that they did not realize constituted a war crime.

Senator COLLINS. Secretary England?

Secretary ENGLAND. Senator, this has been a significant issue for the DOD. As a matter of fact, it was part of the discussion of the field manual in 8 months and part of that. It is all part of this discussion in terms of trying to define these terms. Now it is very important because, while we have complied in the past and trained to it, it is now a matter of law, and as a matter of law there is

consequences, because—is it the War Crimes Act, Mr. Attorney General?

Mr. GONZALES. Right.

Secretary ENGLAND. The War Crimes Act now makes U.S. personnel—they can be prosecuted if they do not comply with Common Article 3. So those words now become very important. So degrading treatment, humiliating treatment, those are culturally sensitive terms. What is degrading in one society may not be degrading in another, or it may be degrading in one religion, not in another religion.

Since it does have an international interpretation which is generally, frankly, different than our own, it becomes very relevant. So it is vitally important to the DOD that we have legislation now and clarify this matter, because now that it is indeed a matter of law that has legal consequences for our men and women and civilians who serve the United States Government.

Senator COLLINS. Mr. Attorney General, I want to follow up on a comment that Senator Graham made in his questioning of you. He pointed out the dilemma of giving access to classified information to a detainee who is being brought to trial, and he says what happens now is that if it were an American citizen who is a member of the Armed Forces and you needed to protect that information then the trial does not go forward. Senator Graham suggested that in this case the result is that the detainee is not tried, but simply held.

But I wonder if you are troubled by that outcome. It seems to me if the result is that the detainee is held without trial for an unending amount of time that that raises real concerns as well. I wonder if that is a fair outcome, that the result of not having access to classified information is he does not get his time in court, but he is held. That is punishment, to be held.

Mr. GONZALES. I do not know whether or not I can comment on whether or not it is a fair result. I do know that at the end of the day I do not think the United States, this administration, I do not believe the DOD—and Deputy Secretary England can comment on this—want to remain the world's jailers indefinitely. Obviously, we hold people because we are engaged in a conflict with al Qaeda and there is a military necessity to hold people.

I think generally the American people would like to see some kind of disposition sooner as opposed to later. They do not want these people released, but if in fact they can be prosecuted for committing crimes against America I think the American people would like to see that happen.

So it may make sense to at least have that opportunity available. That is the whole reason why we want to have military commissions. Obviously, there is a great deal of political pressure on this administration to close Guantanamo. We have to do something with the folks at Guantanamo. We can return them back to their home countries. Sometimes that is difficult to accomplish. We can release them, but we can only release them if we are confident they are not going to come back and fight against America, and we already know that there have been some instances where that has happened.

So that is a decision that is one that is very weighty and we have to exercise with a great deal of care. Another alternative is to try to bring them to justice through military commissions. Again, I think it is going to be an extraordinary case when we will absolutely need to have classified information to go forward with a prosecution that we cannot share with the accused. But I think it is something that we really ought to seriously consider to have remaining as an option.

To get back to one final point for Senator Graham, we contemplate a provision in the legislation which would make it quite clear that the provisions, the procedures of the military commissions, would not be available, could not be used against anyone that the President or the Secretary of Defense determined was a protected person under Geneva or a prisoner of war or qualified for prisoner of war status under Geneva. Therefore, if another country captured an American soldier and they said, okay, we are going to use your military commission procedures that you passed on this American soldier, according to the very terms of the military commission procedures that we are contemplating they could not do that.

Senator COLLINS. Thank you.

Senator GRAHAM. Could I, Mr. Chairman?

Senator MCCAIN [presiding.] Go ahead.

Senator GRAHAM. I guess what I was trying to say, only 10 percent or less I believe of the enemy combatants have been scheduled for military commission trials. Is that correct?

Mr. GONZALES. Today, but there is a reason for that, Senator.

Senator GRAHAM. I think there is a good reason. Every enemy combatant is not a war criminal, and I do not want us to get into a situation where every POW is a criminal. If you are fighting lawfully and you get captured, you are entitled to being treated under the Geneva Conventions. Every enemy combatant is not a war criminal. So we do not want to get in the dilemma that you have to prosecute them or let them go, because that is not a choice that the law requires you to make.

But once you decide to prosecute somebody, the only point I am making, Mr. Attorney General, when you set that military commission up it becomes a model. It becomes a standard. The question that I have is that we have some Special Forces people who are not in uniform, that may fall outside the convention, that may be relying on Common Article 3. That may be the only thing left to them in foreign hands. So what we do with irregular enemy combatants could affect the outcome of our troops who are in the Special Forces field. That is what we need to think about.

Senator MCCAIN. Senator Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman.

I want to thank the witnesses as well for being here today to help us understand this effort to come into compliance with the Supreme Court decision and the importance of doing it in a lawful way in handling enemy combatants.

Now, if my colleague from South Carolina is right that not every enemy combatant is a war criminal and not every enemy combatant has to be tried, is it your opinion, Mr. Attorney General, that someone could be held for the duration even though not tried, how-

ever long the duration is, even in a war against terror as opposed to a more traditional war that typically has a beginning and to date has always had some sort of an ending?

Mr. GONZALES. Senator, not only is that my opinion; that is a principle that has been acknowledged by the Supreme Court.

Senator BEN NELSON. So the only purpose of trying to have commissions in effect is to try people who are enemy combatants, as an example, who we believe have committed war crimes, that we want to bring war crime prosecution against them and hold them as war criminals; is that correct?

Mr. GONZALES. It is an additional tool that I believe is necessary and appropriate for a commander in chief during a time of war, yes, sir.

Senator BEN NELSON. Mr. Secretary, does your memo on Common Article 3 extend to contractors who are performing interrogations, as opposed to just simply members of the military who might perform interrogations of enemy combatants or people who are suspected of being enemy combatants? In other words, outside contractors, non-uniformed individuals, do they fall under Common Article 3 as well?

Secretary ENGLAND. Senator, I will have to get back with you. Frankly, at the time I put out the memo I was not thinking of contractors. I was thinking of people in the DOD.

Senator BEN NELSON. There would not be any question about a translator, for example. But there could be a question about contractors, because was that not one of the questions in Abu Ghraib and other circumstances, where there were others performing interrogations?

[The information referred to follows:]

Yes. DOD policy is clear that all DOD interrogations of detained personnel, including those conducted or supported by contractor personnel, will be conducted in accordance with applicable law and policy. Therefore, actions by DOD contractor personnel must meet the requirements of Common Article 3, since, at a minimum, the standards articulated in Common Article 3 shall be observed by all DOD personnel and contractor employees in detention and interrogation operations, without regard to a detainee's legal status.

Senator BEN NELSON. Then if we turn over any detainees to other governments, let us say Pakistan or Afghanistan, are they subject to Common Article 3 for their protection?

Mr. GONZALES. Sir, we have an obligation not to turn them over to a country where we believe they are going to be tortured, and we seek assurances whenever we transfer someone that, in fact, they will not be tortured.

Senator BEN NELSON. So are we fairly clear or crystal clear that in cases of rendition that has not happened?

Mr. GONZALES. Of course, Senator, rendition is something that is not unique to this conflict or to this administration or this country.

Senator BEN NELSON. Oh, no, I am not trying to suggest that. I am just trying to get clarification.

Mr. GONZALES. I cannot—we are not there in the jail cell in foreign countries where we render someone. But I do know we do take steps to ensure that we are meeting our legal obligations under the Convention Against Torture and that we do not render someone to a country where we believe they are going to be tortured.

Senator BEN NELSON. So we would want to see Common Article 3 applied in every situation where we may turn a detainee over to another country. We would take every action we could be expected to take to see that that was complied with, or is that expecting more than we can commit to?

Mr. GONZALES. Sir, the Supreme Court made no distinction in terms of military contractors or military soldiers. The determination was that Common Article 3 applies to our conflict with al Qaeda.

Senator BEN NELSON. Thank you for your answers. Thank you, Mr. Chairman.

Chairman WARNER [presiding]. Thank you, Senator Nelson.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Secretary England, Attorney General Gonzales, welcome and thank you for being here today. Let me congratulate the DOJ and the DOD on the diligence with which you have undertaken this challenge to try to address the concerns and the decision of the Supreme Court in the *Hamdan* case.

My questions do not have so much to do with the nature of the trial, because to me that seems like that is the easiest part of this to deal with. In courtrooms in cities all across this Nation. We have trials going on, civil and criminal trials. We have courts-martial proceedings. We kind of understand sort of the basic parameters of what a fair proceeding looks like.

The Supreme Court said that it was appropriate that the general rules that would apply to a fair trial could be adjusted and adapted as appropriate to the nature of the military commission and the exigencies of trying individuals, unlawful combatants, during a time of war.

But I think that, based on the questions that Senator Graham asked and the answers that you gave, I do not think that is that hard, and I think that the work that the administration has done, the proposals that have been discussed, we can do that.

What concerns me the most is when I look at the nature of the intelligence that has been obtained through interrogation of detainees at Guantanamo, it includes the organizational structure of al Qaeda and other terrorist groups, the extent of terrorist presence in Europe, the United States, and the Middle East, al Qaeda's pursuit of weapons of mass destruction, methods of recruitment and locations of recruitment centers, terrorist skill sets, including general and specialized operative training, and how legitimate financial activities can be used to hide terrorist operations.

Those are the sorts of things that have been gleaned through interrogation of unlawful combatants at Guantanamo Bay. If you agree with me, and I am sure you do, that we ought to use every lawful means to obtain actionable intelligence that will allow us to win and defeat the terrorists, the question I have for you is: Why in the world—and not just you. The question I would ask rhetorically is: Why would we erect impediments to our ability to gain actionable intelligence over and above what is necessary to comply with the Supreme Court's decision in *Hamdan*?

While we have heard a lot of testimony during the course of these hearings about the nature of the proceeding that is required

by the Supreme Court decision, what we have not heard enough about in my view is what concerns that we should have about erecting additional impediments, maybe not required by the Supreme Court decision, but if we are not careful raising new barriers to our ability to get actionable intelligence.

I would like to ask Secretary England if he would address that, and then Attorney General Gonzales.

Secretary ENGLAND. Senator Cornyn, I am listening, but I am not aware of these additional barriers that we are constructing.

Senator CORNYN. Let me try to be clear. There has been some suggestion, and I think—the Supreme Court held that the Geneva Conventions broadly speaking apply to al Qaeda. Senator Graham said and in previous testimony I believe Attorney General Gonzales has addressed his belief that that is not true, even though Common Article 3 would apply, that Geneva Conventions broadly speaking do not apply to confer POW status on al Qaeda.

What I am speaking about particularly is Article 17 of the Third Geneva Convention says that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. What I am concerned about is if we somehow through an act of Congress in effect hold that unlawful combatants like al Qaeda are entitled to protections such as Article 17 of the Geneva Conventions, what that would do to our ability to gather intelligence if they could not be exposed to unpleasant or disadvantageous treatment. I hope that helps clarify.

Secretary ENGLAND. I guess my understanding is the legislation deals specifically with Common Article 3. That is, it does not elevate to full POW status. So it deals with basically the law that was addressed in *Hamdan,* that is that Common Article 3 applies, and that is what the nature of this legislation is. So I will let the Attorney General expand, but I believe that we have limited this legislation specifically to Common Article 3 and the application of Common Article 3 to military commissions.

Senator CORNYN. That is my understanding as well.

Mr. GONZALES. Senator, you raise a very important point. We are engaged in an ongoing conflict. A lot of people refer to procedures and proceedings of other tribunals that occurred after the conflict was over, when there was a lot less concern about access to classified information, sharing of information. Clearly, in this kind of conflict gathering of information, of intelligence, is critical. It is so important.

It is one reason why we suggest that we not use or have Article 31 of the UCMJ as part of the procedures for military commissions, which requires Miranda rights as soon as someone is under suspicion of having committed some kind of crime. That makes no sense when you are on the battlefield and you want to grab someone. You know that already they are a suspect, but you need more information. It is important to be able to question them, and the notion that you would have to read them the rights and give them lawyers at the outset of course makes no sense.

But more to your point about the application of Geneva, clearly I think that there are consequences that follow from a decision that al Qaeda should be afforded all the protections under Geneva Con-

ventions. It will affect our ability to gather information. There is no question about that.

Clearly, the requirements of Common Article 3 place some limits, but they are limits very consistent with what the President has already placed upon the military since February 2002, and we believe that we can continue to wage this war effectively under Common Article 3, assuming that Congress provides some clarity about what those obligations are, because there are some words that are inherently subject to interpretation and I think it makes sense once again to have Congress provide clarity about what our obligations are under Common Article 3.

Senator CORNYN. Attorney General Gonzales, of course Congress has spoken on the DTA, providing appropriate but limited judicial review in a habeas corpus setting for these detainees. Is it your opinion that we can, consistent with the Supreme Court decision, if we were to apply the provisions of the DTA, including the McCain amendment for treatment of detainees that provide proceedings for the trial of the detainees by military commission as you have proposed, that that would be sufficient to comply with the concerns raised by the court?

Mr. GONZALES. Of course the Court really took no action with respect to—when I say "the Court," five members of the Court, a holding of the Supreme Court of the United States. There were not five members of the Court that said this particular provision is unconstitutional or unlawful. What the Court said: Mr. President, if you want to use procedures that are not uniform with the UCMJ, you cannot do that unless there are practical reasons for doing so. Otherwise, you have to use the procedures of the UCMJ or have Congress codify what those procedures will be.

So again, the UCMJ is a creature of Congress. If Congress wants to change that or use those procedures or deviate from those procedures, I think Congress has the authority to do so.

Senator CORNYN. My last question has to do with the application of the DTA to pending cases that are in the Federal court system. Obviously Congress intended the DTA would provide an exclusive method of judicial review of habeas petitions emanating out of Guantanamo, but it was not expressly in the legislation applied to all pending cases. Is it your judgment and recommendation to Congress that we apply in the course of the legislation that we file here, whatever we pass, that would apply to all pending cases, including the provisions of the DTA?

Mr. GONZALES. That would be the recommendation of the administration, Senator. We are currently burdened by hundreds of lawsuits for all kinds of matters relating to conditions of cells, conditions of recreation, the types of books that people can read. So again, we believe that the process that we had set up, the Combatant Status Review Tribunal Process, combined with the Annual Review Boards, combined with appeal up to the DC Circuit, we believe that these provide sufficient process to detainees, and we believe that all of this litigation should be subject to the DTA.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman WARNER. Senator Sessions.

Senator SESSIONS. Thank you very much.

So, our JAGs, we train to Common Article 3. But I used to train soldiers in the Army Reserve and I had to teach them the Geneva Conventions. What we were training to were for lawful prisoners of war. We were training to deal with people who complied with the Geneva Conventions, were entitled to the protections of the Geneva Conventions.

Now, I just want to say I respect the JAG officers. I held a JAG slot for a short period of time, but I never had my Charlottesville training, so I do not claim to be anything like a legitimate JAG officer. But I would just say that, with regard to these unusual areas, unlawful combatants who renounce all principles of warfare, who openly behead people, who take it as their right to kill innocent men, women, and children to further their agenda, this is an unusual thing for the military to deal with, and I think the President—I just want to be frank—had every right to call on his counsel and the DOJ to ask what authorities and powers he had, and I do not believe he was constrained to follow the UCMJ in handling these.

Secretary England, would you agree with that?

Secretary ENGLAND. Yes, sir, I agree with that.

Senator SESSIONS. Mr. Attorney General, you have been in the middle of that. Would you not agree with that?

Mr. GONZALES. Certainly, Senator, based upon our reading of precedent and previous court decisions, we believe the President did have the authority to stand up these commissions with these procedures, which provided much more process than any other commission process in history. But the Supreme Court has now spoken in *Hamdan*.

Senator SESSIONS. I agree. I would just ask you, from my reading of it, it appears to me that the Supreme Court to reach the conclusion it did really had to reverse the existing authority of the U.S. Supreme Court, Ex Parte Quirin. Would you agree with that?

Mr. GONZALES. Again, Senator, there are many aspects of the opinion that I would question and that I would love to have discussion——

Senator SESSIONS. I will just ask you this. You believed, did you not, that these procedures complied with the Supreme Court authority in Ex Parte Quirin and you attempted to follow Supreme Court authority when you set up these commissions, did you not?

Mr. GONZALES. No question about it, Senator, that lawyers at the DOJ and certainly at the White House believed that the President had the authority and that these procedures would be consistent with the requirements under the Constitution.

May I just say one thing, Senator?

Senator SESSIONS. Yes.

Mr. GONZALES. Because I have heard a lot of people say, how could you be surprised, how could you guys get this wrong? These are hard issues, and we were right all the way up until June 29, 2006. We had a DC Circuit opinion that said: You are right, Mr. President.

I also would remind everyone that six of the eight justices wrote in that case, six of the eight. There was 177 pages worth of analysis. So for those people who say this was such an easy issue, I beg to differ. If you look, it is easy to criticize after the fact, but these

were very hard issues, and assuming that Justice Roberts would have stayed with his position on the Supreme Court, he voted on the DC Circuit opinion—it would have been a five-to-four decision.

This is a very tough, very close issue.

Senator SESSIONS. I could not agree more, and I just do not think the President and the DOJ or the DOD need to be hung out there suggesting that you are way off base. It was a five to four opinion, very complex, and even then it was not harshly critical of the DOJ. It just set some standards that now we have to figure out how to comply with.

Now, let us talk about this UCMJ. This is a trial procedure and sets the standards for treatment of American soldiers who have been charged with crimes, is it not? This is the standard—this is the manual for trying soldiers who may have committed crimes, American soldiers.

Mr. GONZALES. An overwhelming number of those crimes, as I believe to be the case, do not relate to crimes that were committed in battle or on the battlefield.

Senator SESSIONS. Absolutely, whether they committed an assault or a theft or anything of those things that are tried. We give them in many ways more protections than an American would get tried in a Federal court for a crime in the United States of America.

Mr. GONZALES. There is no question about that, that the procedures and rights that are provided to our servicemen are greater in many respects than you or I would receive in an Article III court.

Senator SESSIONS. We just cannot transfer that to the trial of the Nazi saboteurs that were described in the Ex Parte Quirin case, many of whom were tried and executed in fairly short order by President Franklin Roosevelt or under his direction.

Now, let us take the question of coercion. The Federal law on coercion in criminal cases, that used to be my profession. I spent more time prosecuting than I have done anything else in my professional career. It is very strong. For example, if a police officer hears an alarm going off and someone running away and he grabs them and says, what were you doing and who was with you, and the guy says "My brother Billy," that would be stricken as a coercive statement because he was in custody of the police officer and he did not know he had a right not to answer.

If a military officer questions a lower ranking individual, they are protected. That is considered coercion because they may feel they have an obligation to answer that officer when they have a right not to give it. I remember the Christian burial speech, where the officer got the murderer to take him to the body of the little girl by saying: She is lying out there in the snow; you ought to tell us where she is so we can get a Christian burial. Five to four, the Supreme Court said that was an involuntary confession.

Then you have the exclusionary rule. That is not required by the Constitution to the degree that we give it in the United States or any fair system of law. Most nations do not create the exclusionary rule that says that if a soldier out on a battlefield improperly seized evidence, that that cannot be utilized, or if a soldier apprehends somebody on the battlefield and they confess to being in-

volved in terrorism that if that would violate coercion by our standards surely we are not going to make that excluded from evidence in a commission trial for a terrorist charge. You see what I am saying?

Mr. GONZALES. Yes, sir.

Senator SESSIONS. So I want to be sure when you study this language, and you are going to have to take the lead on it and think all this through. But I would like to say to you, we need you to help us, because I have great confidence in the lawyers' skills of the members of this committee and their commitment to doing the right thing, but we do not know all these details. We have not studied that 170-page opinion, I hate to tell you. Some of them like to make you think we have all read it, but we have not.

So I guess I am calling on you to do that, and let us be sure that these extraordinary protections that we provide to American soldiers and American civilians because we live in such a safe Nation, that we can take these chances and give these extra rights, that we do not give them to people who have no respect for our law and are committed to killing innocent men and women and children.

Mr. GONZALES. Senator, you have raised some good points. I would urge the committee to also consider that as we talk about whether or not coerced testimony should come in—and again, I would remind the committee that our thinking is that if it is reliable and if it is probative as determined by a certified military judge that it should come in—that if you say that coerced testimony cannot come in, if I am a member of al Qaeda everyone is going to claim this evidence has been coerced, and so then we will get into, I think, a fight with respect to every prosecution as to what is in fact coerced and what is not coerced.

Senator SESSIONS. I guess questions of torture and things like that are what people think about when they think about coercion. But if we just adopt the UCMJ we will pick up all these other things that I just mentioned, that will often turn on the actions of an Army soldier who has never been trained like a police officer, and we have enough problems with police officers trying to do everything precisely right.

I think you will work on this correctly. I have confidence in it. I think we need to understand these things before we attempt to alter what I am sure you will come up with.

Mr. GONZALES. But let me be clear about this, Senator. There is agreement about this: evidence derived from torture cannot be used.

Senator SESSIONS. Yes.

Thank you, Mr. Chairman.

Chairman WARNER. Senator Talent.

Senator TALENT. Thank you, Mr. Chairman.

My main concern through these hearings has been to make certain that our men and women have the ability to get the actionable intelligence that they may suspect is there. Now, as I understand it, we already prohibited cruel and inhumane punishment, and the issue, just summing up, is what about degrading tactics, because there may be tactics that are not cruel and inhumane but are degrading. You have indicated you would like us to provide guidance and everybody here has said we want you to provide guidance.

What about if we came up with a list of what they could do? In other words, structure—and I am talking about interrogations now. I am not talking about trials afterwards, because at least when you get to the trial point you have gotten the intelligence and you have acted on it from a military standpoint, which is my main concern.

What about if between you and us here in Congress we came up with a list for our men and women about what they could do? You can play loud music, even if culturally the prisoner would feel degraded, you can have an all-woman interrogation team. A list of things that you could do, and then perhaps just say, look, if it is not on the list of things you could do, establish a process for signoff by somebody with some kind of oversight for other tactics that may or may not be degrading under the circumstances.

If you could answer that question, and then also maybe address, if we did that should the standard vary a little bit depending on how crucial the judgment is about the intelligence, because I know personally I would want our people to push more into a grey area if they felt the intelligence was really crucial to saving American lives.

Mr. GONZALES. Of course, the idea that you propose regarding lists I think is obviously one that could be considered. The concern that I always have about lists is what you forget to put on the list, but you proposed a possible solution to provide a mechanism where additional items could be included on the list.

I, for one, am worried about different baseline standards. We have already a baseline standard with the McCain amendment under DTA, and I think it may be wise to first consider whether or not that should not also be the standard with respect to our obligations under Common Article 3, which ties it to a U.S. constitutional standard. It would prohibit cruel and inhumane and degrading treatment that is prohibited under the 5th, 8th, and 14th Amendment.

Now, I do not know if that goes far enough, however, because you are talking about a test that is in and of itself still a little bit subjective. For that reason, because we are talking about possible criminal prosecution under the War Crimes Act, I do think it makes sense, and I think the JAGs agree, that it is appropriate to have a list in the War Crimes Act of those offenses, those activities, those actions, which if you have violated the War Crimes Act and you can be prosecuted for a felony.

So that sort of is our current thinking, Senator. I would be happy to take back your proposal and think about the benefits of it and whether or not there are other problems that I cannot think of right now. But our current thinking is that perhaps what we intend to propose to Congress is that, guys, let us just have one standard. Everyone seems to be comfortable with the McCain standard, which is tied to a U.S. constitutional standard, and let us just import it over to our obligation under Common Article 3, provide additional protections for our service men and women by defining what specific actions would constitute a war crime.

Senator TALENT. Now, are you certain that that standard would pass muster under Article 3 of the Geneva Conventions?

Mr. GONZALES. I am confident of that. Not only that, again having been, not brought to task, but highlighted by Senator McCain

that my recollection of the JAGs' testimony was incorrect, my recollection of the JAGs' testimony was that they felt comfortable that the McCain standard fits nicely, neatly within our obligations under Common Article 3, and I believe that to be true also.

Senator TALENT. I will go back and check that, too, because I thought that they believed more guidance was necessary on that point on what is degrading and what is not, because it certainly seems logical to me to believe that there may be interrogation tactics that are cruel and inhumane that are not degrading.

Mr. GONZALES. I think that they believed we needed additional clarification and certainly would welcome additional clarification through the McCain amendment as a possibility.

Senator TALENT. Of course, one of the problems with the list is that it is telling the enemy what we are going to do or not do, so they can prepare. But of course, it seems to me we are in that boat one way or the other. So at least my concern now is that our interrogators feel comfortable enough that they do not draw back from something we would want them to do.

Secretary ENGLAND. Senator, if I could make a comment here, the McCain amendment refers to the Army Field Manual as a part of law. So earlier in this discussion Senator McCain asked about the status of the Army Field Manual, and of course that is what we have been dealing with these months, is trying to articulate better, not a list per se, but to describe better for our men and women exactly what is permissible under the McCain amendment, which again is grounded in the Constitution. So there is now a grounding in some of these terms that we did not have before, and now we are trying to help interpret that for the men and women in the Army Field Manual.

We have been working on that some time, because you can well imagine, as complex it is for us to do, to also reduce this to words in the field manual. But I expect that ultimately, perhaps after we discuss this, that that core list shows up in the Army Field Manual and not in the legislation per se. I guess, Mr. Attorney General, I will know your views of that.

Senator TALENT. The attitude of our interrogators I think is very important, and I do not want them to be afraid that they are going to be hung out to dry for making a fair call under difficult circumstances. Maybe that is just, Mr. Chairman, the commitment of everybody on this end of Pennsylvania Avenue and on the other end of Pennsylvania Avenue that we are just not going to do that, that we are not going to, for whatever reason, hang these men and women out to dry if they make a reasonable call under difficult circumstances. I do not want us to forgo intelligence we should be getting because people are deterred in that way.

Chairman WARNER. I think that is a very fair statement and I associate myself with that statement.

Senator TALENT. Thank you, Mr. Chairman.

Chairman WARNER. Thank you.

Senator Thune.

Senator THUNE. Thank you, Mr. Chairman.

Mr. Attorney General, Mr. Secretary, thank you for appearing today and thank you for providing your insights. As has already been pointed out, these are very complex legal issues with lots of

different bodies of law, from the more recently passed DTA, to the Conventions, to the UCMJ, which is why I think you had six different people writing opinions on the Supreme Court when they looked at this. Not being a lawyer, a number of lawyers on the committee and obviously some great perspective and experience to bring to this issue. I know we count upon you to get this right within the legal framework and the parameters that have been established for us to operate within.

As a nonlawyer, I would hope that in looking at this issue we can at the end of the day accomplish a couple of objectives that are consistent with principles that I think the people that I represent would like to see accomplished in this debate. First and foremost, my main concern in this, and I think it has been voiced by others here, is the protection of our own men and women who serve beyond our shores, and the types of risks and jeopardy we put them in if we do not have our house in order here, so that colleagues like our colleague Senator McCain and the treatment that he endured when he was in detention for all those years, that is something that we really want to avoid. That first and foremost I think has to be a guiding principle when we look at this issue.

Second, that we do adopt treatment standards that reflect America's core values when it comes to the respect for human rights. I think that that is something that everybody probably is in general agreement on as well. So those are sort of two guiding principles.

Finally, as has been noted today as well, my concern would be that in doing that, that when we accomplish these things we not do it in a way that hamstrings our ability to inquire the intelligence that is necessary for us to prosecute and succeed and win the war on terror. That seems to be the real issue here in coming up with the legal framework, is how best to accomplish that and yet enable the people who we are relying on to get the information that is necessary for us to succeed in the war on terror able to accomplish that objective.

Secretary England, it seems to me too—and I listened to this whole discussion about lawful and unlawful combatants, and there are different sort of standards from the Geneva Conventions to the DTA. But Secretary England, in your opinion within the Geneva Convention is the definition of unlawful combatant adequately defined to encompass terrorist groups and how detainees from those groups are to be treated and the rights that they have under the convention?

Secretary ENGLAND. We know they are not prisoners of war. So in my understanding—and again, I am not the lawyer in this, like yourself, Senator. But my understanding is it does define unlawful combatant and Common Article 3 is common across all four Geneva Conventions. So when you apply it—I believe we do know how to apply Common Article 3 if it is properly defined.

So as the Attorney General stated earlier, and what we have wrestled with, there are particular words and particularly the outrages upon personal dignity and particularly humiliating and degrading treatment, which are very subjective. So that is of concern, which is one reason it is very important that we have a legal basis for Common Article 3 as we go forward, and the purpose for this legislation is hopefully to help clarify that.

So I believe when we have defining legislation for Common Article 3 then we will have an adequate basis to go forward in terms of applying Common Article 3 to unlawful combatants.

Mr. GONZALES. Senator, I think part of the problem we have is in 1949 the drafters and those who signed the Geneva Conventions did not envision this kind of conflict, where you have a superpower like the United States taking on a terrorist group that is not really tied to a state actor. So some of the provisions of the Geneva Convention, I think you have to ask yourself, do they continue to make sense. I think that is a legitimate question for the administration and for Congress.

I am not talking about those provisions that relate to basic humane treatment. Obviously those remain relevant today and very important and something that we believe is consistent with our values. But some of the provisions, quite frankly, are hard to square with the kind of enemy that we deal with today.

I know there have been discussions within the State Department. I have testified about the fact that this is an issue we have wrestled with for years within the administration, about should there be a formal evaluation of the Geneva Conventions. Now, I want to emphasize very quickly, having made that statement, I am not in any way suggesting a retreat from the basic principles of Geneva in terms of the humanitarian treatment. Obviously that remains eternal and we need to continue and we need to fight for that.

But there are certain provisions that I wonder, given the times that we currently live in and given this new enemy and this new kind of conflict, whether all the provisions continue to make sense.

Senator THUNE. My concern would be with respect to the way our own men and women are treated is, for state actors and those that follow the Conventions and rules of war, that we have standards that are fair and respectful of those basic human rights. But on the other hand, at the same time I am somewhat sympathetic to some of the comments that Senator Sessions was making, that you are not dealing with—I do not think the terrorist organizations could care less about what we do here. It does not mean anything to them. If they got in possession of some of our people, they are going to treat them the same way they treat, we have seen them treat them on our television screens and everywhere else, and that is to kill and destroy without conscience or remorse. I think that is a very different standard.

So that is what I am getting at, this whole distinction between lawful and unlawful combatants.

Mr. GONZALES. I agree with you. I do not think al Qaeda's actions would change one bit depending on how we deal with people that we detain. But quite frankly, they are not the audience that we should be concerned about. There are expectations of the United States in terms of how we treat people and so there are basic standards of humanity that need to be respected, irrespective of how brutal the enemy is.

Chairman WARNER. If you would like another question.

Senator THUNE. If I might, just one last question. I think I should direct this to Secretary England. Has there been any concern within the DOD that the legislation that is being considered will actually create an incentive for combatants that the United

States will face in the future to ignore the laws of war because either way they are going to be treated as if they were legal combatants? What I am saying, that terrorist groups that might, instead of following the Conventions and rules of war, if they figure they are going to be treated as legal, lawful enemy combatants, as opposed to unlawful or terrorist organizations; is that a concern?

Mr. GONZALES. I do not think that that is a concern. We are contemplating, again as I indicated in response to an earlier question, a provision that makes it clear that if the President or the Secretary of Defense determined you are a prisoner of war, so if you are fighting by the rules, you are not going to be covered under these proceedings. So I would hope that that would provide an incentive, quite frankly, for people to fight according to the laws of war, so they would receive all the protections under the Geneva Convention.

Senator THUNE. Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator.

Gentlemen, we have had a good hearing and I am going to wrap up here very shortly. But I must say I was quite interested, Senator Thune, in the question and answer reply and really the colloquy that you had with our distinguished panel of witnesses. I could not agree more. I remember 1949 very well. I had spent the last year of World War II in uniform and had come out and actually had just joined the Marine Corps in 1949, and nobody envisioned the situation that faces the world today, and particularly those nations which I am so proud of, our Nation, fighting this war on terror.

I think you are exactly right, that was never envisioned. But there is language in that Convention that I am sure we are going to incorporate and follow, because the Court has spoken to it, the Supreme Court, and that is the law of the land, and you and I as lawyers should respect that.

That brings me to, as I look back over the work that we have done so far and I look back at the UCMJ, that has a relatively small amount of statutory language and a considerable amount of codification of rules and so forth and a lot of presidential rulemaking. Now, how should we approach this statute? Should Congress, given the importance of the Supreme Court decision and other things, adopt more legislative and less rulemaking?

If you want to reflect on that, please do so. I think it is something we should discuss further, the two of us, and with other colleagues as we go along.

Mr. GONZALES. All right, Mr. Chairman.

Chairman WARNER. You see my point there?

Mr. GONZALES. No question about it. Obviously that is probably always a discussion or a debate with respect to a piece of legislation, how much flexibility or discretion to give to the executive branch. Obviously, when you are talking about discretion to the commander in chief in a time of war, that seems to make some sense.

Some people believe that the more that Congress codifies, the more likely it is to bulletproof it from a bad decision in the courts. I think in this particular case, quite frankly, there are things it would be helpful to have codified, but there are certain areas, quite

frankly, that I think leaving flexibility to the commander in chief through the Secretary of Defense makes sense.

I think that our thinking on it reflects that kind of balance, where again it is helpful to have some clarity, but also provide some flexibility to the Secretary of Defense.

Chairman WARNER. At the moment I share those views. We want to establish the four corners and the Constitution is very clear that the President is the commander in chief. Yet there is the other provision, we make the rules with regard to the men and women of the Armed Forces. So somewhere in between those two constitutional provisions is our challenge.

But I am enormously pleased with this hearing. I think we have made great progress, and I commend both of you. I wonder if you would like for purposes of the record to have the names of those individuals who accompanied you here today and who presumably have worked hard on this, included in this record.

Mr. GONZALES. Thank you, Mr. Chairman. I am accompanied by, whom you know well, Steve Bradbury, who is the Acting Assistant Attorney General for the Office of Legal Counsel. He has a strong, able team—have been really at the forefront of the drafting——

Chairman WARNER. Around the clock, 7 days a week.

Mr. GONZALES.—and negotiation. I am also here with Carol Sampson, my Chief of Staff, and Wilma Shella, who is my Legislative Director, as well as Decia Scalinas—I do not know if she is still here—who is head of my Public Affairs Office.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much.

Secretary England.

Secretary ENGLAND. He has been working all the hard work and literally every night and every weekend, Dan Dell'Orto, who has been working with all the folks in the DOJ. But also all the people in the DOD.

I do want to comment, Mr. Chairman, that we have had the general counsels from all of our Services, we have had the JAGs, we have had our service chiefs, we have had our service secretaries, we have had staff within the DOD General Counsel's Office, and Dan Dell'Orto has been coordinating all of that, along with, by the way, all our combatant commanders have been involved in all this. So we have been fully vetting and coordinating all of these discussions, all these iterations, as we have gone along. Dan Dell'Orto has been doing a wonderful job in the DOD, and I do thank him and his team for that great effort.

Chairman WARNER. Thank you very much, and we thank you, recognizing that you are not a lawyer, but you have done your very best, and I think you have held your own quite well.

Secretary ENGLAND. Thank you.

Chairman WARNER. Not too late to get that degree.

Secretary ENGLAND. It is far too late, Mr. Chairman. [Laughter.]

Chairman WARNER. You have a little extra time. Senator Byrd came to the United States Senate and was a Senator and went to night law school for a number of years and got his law degree.

Thank you very much. The hearing is now concluded, and we shall have further hearings of this committee on this important subject. We are adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

TORTURE

1. Senator MCCAIN. Attorney General Gonzales and Secretary England, a draft of the administration's proposal that was leaked and has been made widely available indicates that statements obtained by the use of torture, as defined in title 18, section 2340, U.S.C., would not be admissible in a military commission trial of an accused terrorist. Why would you choose to use this definition of torture rather than the definition of "cruel, inhuman, or degrading treatment or punishment" in the Detainee Treatment Act (DTA)?

Mr. GONZALES. The administration draft relied on the same definition of torture that Congress enacted to implement United States treaty obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). The DTA's standard, by contrast, does not refer specifically to torture, nor does it purport to define torture. Rather, it prohibits "cruel, inhuman, or degrading treatment or punishment" based on established standards of the United States Constitution. Because the United States has a specific treaty obligation under the CAT to preclude the use of statements obtained by torture, it made sense for the administration's proposal to rely upon the CAT's definition of torture.

Since the testifying, Congress has enacted the Military Commissions Act (MCA) of 2006. The administration worked with you and other members of the Armed Services Committee on this specific provision, and the final law specifically addresses the admissibility of statements obtained through torture or alleged coercion. 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 DTA, which was enacted on December 30, 2005. See 10 U.S.C. § 948r(d).

As for other statements obtained before the DTA or in compliance with the DTA, 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).

Secretary ENGLAND. I would refer you to the Attorney General's response to this question. I would also point out that the Department of Defense (DOD) recently completed the Manual for Military Commissions. The Manual implements the requirements of the MCA of 2006, and, consistent with that Act, excludes the use of statements obtained by torture, as defined under United States law, as well as statements obtained in violation of the DTA. For statements obtained before the passage of the DTA, the military judge is given the discretion to determine whether, based on the facts of the situation, a particular statement appears to be reliable and possessing sufficient probative value, and whether the interests of justice would be served by admission of the statement into evidence.

2. Senator MCCAIN. Attorney General Gonzales and Secretary England, do you believe that statements obtained through illegal inhumane treatment, even if it is deemed reliable and probative, should be admissible? If so, why?

Mr. GONZALES. As discussed above, the MCA provides that statements shall not be admitted if they are obtained through torture or cruel, inhumane, or degrading treatment after the enactment of the DTA. As for other statements, the MCA provides that the statements shall be admitted if the military judge, in his sound discretion and expertise, finds that the statements are reliable and the interest of justice favors their admission. That standard would not prevent the judge from considering allegations of mistreatment in making such a ruling. As Military Commission Rule of Evidence 304 makes clear, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the statement. We support this approach.

Secretary ENGLAND. No. As noted above, the MCA of 2006 prohibits the admission of statements obtained through torture or cruel, inhuman, or degrading treatment in violation of the DTA. For statements which were not obtained through means illegal under United States law, the Act provides that the statements shall be admissible if the military judge presiding over the trial finds that the statement is reliable and of sufficient probative value and the interests of justice would best be served

by its admission. The DOD has implemented the procedures found in the MCA of 2006 in its Manual for Military Commissions.

COERCION

3. Senator MCCAIN. Attorney General Gonzales and Secretary England, the same section of the draft proposal states that evidence obtained through coercion could be introduced at trial if it is reliable and has probative value. How would the administration define coercion for the purpose of admitting evidence into military commission trials?

Mr. GONZALES. Coercion is a concept that is notoriously difficult to define under the law, and any interrogation is to some degree coercive. Indeed, the Supreme Court created prophylactic warnings in *Miranda* v. *Arizona,* 384 U.S. 436, 457 (1966), precisely because of the difficulty in clearly defining "coercion." As noted, the MCA specifically excludes statements obtained by torture or in violation of the DTA. As for other statements allegedly obtained by "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. Indeed, an al Qaeda training manual obtained by the United States specifically instructs its members to claim abuse when captured. Accordingly, 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 reliable and whether the interests of justice would be served by the admission of the statement. See 10 U.S.C. § 948r(c).

Secretary ENGLAND. The MCA does not require the military judge to make a specific finding of coercion. Rather, the question is whether under the circumstances, the statement is reliable and its admission would be in the interests of justice. The Discussion note to the relevant section in the Manual on Military Commissions provides further guidance on this issue. That note states, in relevant part, "[T]he MCA requires military judges in military commissions to treat allegedly coerced statements differently, depending on whether the statement was made before or after December 30, 2005. See 10 U.S.C. § 948r (c), (d). For statements made on or after that date, the military judge may admit an allegedly coerced statement only if the judge determines that the statement is reliable and possessing sufficient probative value, that the interests of justice would best be served by admitting the statement, and that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment or punishment prohibited by the DTA. If a party moves to suppress or object to the admission of a proffered statement made before December 30, 2005, the military judge may admit the statement if the judge determines that the statement is reliable and possessing sufficient probative value, and that the interests of justice would best be served by admitting the statement. In evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement."

4. Senator MCCAIN. Attorney General Gonzales and Secretary England, are there coercive techniques that constitute cruel, inhuman, or degrading treatment under the DTA?

Mr. GONZALES. There certainly may be coercive techniques that also would constitute cruel, inhuman, or degrading treatment under the DTA. For instance, torture is an extreme form of coercion, and it would clearly violate both United States prohibitions on torture and the DTA. The United States does not engage in torture, and the United States also complies with its obligations under the DTA.

Secretary ENGLAND. I imagine there could be. But, as noted above, the MCA of 2006 prohibits the use of statements obtained through torture, and it prohibits the use of statements obtained through cruel, inhuman, or degrading treatment where those statements were obtained after the enactment of the DTA.

The DTA of 2005 contains the following provision:

> "No person in the custody or under the effective control of the DOD or under detention in a DOD 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 (FM) on Intelligence Interrogation."

I issued a directive to the Department on December 30, 2005, informing the field of this legal requirement under the DTA.

The interrogation approaches and techniques contained in recently released FM 2–22.3, Human Intelligence Collector Operations, comply with the law and are well within the humane treatment requirements of Common Article 3. The FM also prohibits certain specific actions or activities related to the interrogation of detainees.

5. Senator MCCAIN. Attorney General Gonzales and Secretary England, why does the administration disagree with the Judge Advocates General (JAGs) who testified this morning before the Senate Judiciary Committee that coerced testimony should not be admissible?

Mr. GONZALES. The JAGs were involved in the formulation of the President's proposed military commissions legislation, and they agreed that military commissions should be able to consider a broad range of evidence. There is room to debate whether the President's initial proposal would have permitted coerced testimony, as the focus in that proposal was on the reliability of the evidence under the totality of the circumstances, which includes but need not have been limited to the factor of coercion. It is our understanding, however, that the JAGs reviewed and did not object to the final version of 10 U.S.C. § 948r.

Secretary ENGLAND. The JAGs were instrumental in providing guidance and assistance during all aspects of the development and now implementation of the MCA and the Manual for Military Commissions. For their current thoughts on particular provisions of the MCA and the Manual for Military Commissions, I would refer you back to them.

6. Senator MCCAIN. Attorney General Gonzales and Secretary England, could a statement that is obtained through the use of cruel, inhuman, or degrading treatment or punishment that does not rise to the level of torture as defined in title 18, U.S.C., be reliable and have probative value? If so, why?

Mr. GONZALES. The MCA provides for the exclusion of statements obtained by torture or in violation of the DTA. With respect to statements obtained prior to the enactment of the DTA, Congress has appropriately placed the admissibility decision in the hands of experienced and impartial military judges. If the military judge finds the statement reliable, and if he finds that the interests of justice would be served by the commission considering the statement, then we believe that the evidence should be admitted. It would be inappropriate for us to speculate about hypothetical scenarios; rather, military judges should have the discretion to consider specific factual situations and to make evidentiary determinations under the totality of the circumstances. We hasten to emphasize that it is not now—nor has it ever been—the policy of the United States to collect statements through the use of cruel, inhuman, or degrading treatment. The administration remains fully committed to complying with its obligations under the DTA, MCA, and other sources of domestic and international law.

Secretary ENGLAND. Without specific circumstances, it is not possible to answer such a broadly stated hypothetical question. Regardless, I applaud Congress's decision to leave evidentiary matters to the sound discretion of qualified military judges acting on a case-by-case basis.

7. Senator MCCAIN. Attorney General Gonzales and Secretary England, should a suspected terrorist who has no compelling evidence against him other than a coerced statement be convicted—and potentially put to death—based solely on that coerced statement?

Mr. GONZALES. Under the MCA, every suspected terrorist enjoys the presumption of innocence, and the Government bears the burden of proving the accused's guilt beyond a reasonable doubt, the highest standard of proof recognized by our law. See 10 U.S.C. § 9491(c)(1). Nondeath penalty cases will be tried before a minimum of five military commission members, two-thirds of whom must agree to convict the accused. See id. § 949m(a). As under the Uniform Code of Military Justice (UCMJ), death penalty cases will be tried before 12 commission members, who must agree unanimously that the accused has committed an offense triable by military commission, and that the death sentence is an appropriate punishment. See id. § 949m (b), (c).

Obviously we cannot speculate in the abstract as to what evidence may or may not persuade the members of a military commission in a hypothetical case. It bears emphasizing, however, that the procedural protections built into the MCA—including that the accused is presumed innocent unless guilt is proven beyond a reasonable doubt, see 10 U.S.C. § 949*l*(c)—would make it highly unlikely than an accused terrorist would be convicted and sentenced to death "based solely on [a] coerced statement." Nonetheless, when you are talking about trying individuals for the murder of American citizens, we do believe that it is important that commissions be able

to consider all reliable and probative evidence, and that where the interests of justice favor consideration of the evidence, the accused should not be able to prevent the commission from considering reliable evidence based on allegations of "coercion."

Secretary ENGLAND. If there is "no compelling evidence" against an individual other than a "coerced statement," it is virtually impossible to think the impartial members of the military commission would find that trial counsel has carried his burden of proving guilt beyond a reasonable doubt. The MCA provides that a statement allegedly obtained by coercion is not admissible if (for statements made before December 30, 2005) the military judge finds that the circumstances under which the statement was made render it unreliable or not possessing sufficient probative value, or not in the best interests of justice. Military Commission Rule of Evidence 304(c), requires the military judge to conduct a test to determine the reliability of the statement in question, its probative value, and whether the interests of justice would be met by its admission. In evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge will consider the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement. The MCA did not contain a requirement that confessions by defendants must be corroborated, and the DOD did not include such a rule in the Manual for Military Commissions.

TREATMENT OF CLASSIFIED EVIDENCE

8. Senator MCCAIN. Attorney General Gonzales and Secretary England, a plurality of the Supreme Court in *Hamdan* along with Justice Kennedy in his concurrence found troubling the possibility of a conviction and sentence based on evidence that a defendant has not seen or heard. Admiral John Hutson also found this possibility troubling. He recently said the rules would allow the government to tell a prisoner, "We know you're guilty. We can't tell you why, but there's a guy, we can't tell you who, who told us something. We can't tell you what, but you're guilty." Do you also find such a possibility troubling? If not, why not?

Mr. GONZALES. We do not believe that such a possibility existed under the President's proposed legislation, which provided only for the exclusion of the accused where the judge found the exclusion to be so limited as to not deprive the accused of a fair trial. Admiral Hutson's description of the procedures certainly would not appear to have met that standard and thus contrary to his statement, would not have been possible under the proposed legislation. In any event, the MCA provides for a different mechanism to protect our Nation's secrets from disclosure to the enemy. The MCA recognizes the accused's right to be present for all military commission proceedings. See 10 U.S.C. § 949d(b). At the same time, the MCA provides for robust protection for classified information, including intelligence sources and methods. See id. § 949d(f).

Secretary ENGLAND. The MCA precludes the possibility Admiral Hutson posed. Section 949d(b) of title 10 permits the accused to be present for all proceedings unless he engages in disruptive behavior. Section 949d(f) provides for the protection of classified information and materials, and the Rule for Military Commissions 701(f) and Military Commission Rule of Evidence 505 strike the proper balance between the need to protect classified information and materials and the accused's ability to both discover information within the government's possession and to be tried using.the most practicable and adequate substitutes for classified information. Section 949a(b)(A) permits the accused to "examine and respond to all evidence admitted against him on the issue of guilt or innocence and for sentencing."

9. Senator MCCAIN. Attorney General Gonzales and Secretary England, why isn't military rule of evidence 505—which deals with the treatment of classified evidence—good enough for military commissions?

Mr. GONZALES. The MCA strikes an appropriate balance between the rights of the accused and the 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(b). Moreover, the accused will have access to all the evidence admitted before the trier of fact, see § 949a(b)(1)(A), and to all exculpatory evidence, see id. § 949j(d). 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).

As you note, Military Rule of Evidence 505, which tracks the Classified Information Procedures Act, provides procedures that allow the Government to seek judicial approval for the substitution of classified evidence with redacted or summarized evi-

dence. These procedures generally apply in cases where the accused himself has had access to the classified information, and the primary goal of these procedures is to permit the trial to go forward in public without the unnecessary disclosure of classified evidence. By contrast, military commission cases may involve a considerable amount of classified evidence to which the accused, an alleged terrorist, has never had access and cannot safely be given access in the middle of the present armed conflict. For this reason, we believed, and Congress concluded that the MCA needed to provide alternative procedures for handling classified information in military commission proceedings.

Although some of Rule 505's 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. Accordingly, the Manual for Military Commissions contains elaborate procedures that ensure the accused will receive a fair trial, while also protecting our national security.

Secretary ENGLAND. Military Rule of Evidence 505 is useful with respect to handling classified evidence when the United States tries a person in our courts for something he has done with evidence already accessed with authorization, e.g., a servicemember who has a clearance but has somehow misused it. Under those circumstances, the person charged has already seen that evidence, so the issue is not that the individual charged cannot see the evidence, but that the public cannot see it. In the case of military commissions, we are trying alleged terrorists. In the midst of the current conflict, we cannot share with these alleged terrorists highly sensitive intelligence.

HEARSAY RULE

10. Senator MCCAIN. Attorney General Gonzales and Secretary England, would the administration object to a strengthening of the hearsay rule contained in the draft of the military commissions proposal that has been leaked by adopting Rule 807 of the Federal Rules of Evidence, which permits hearsay testimony if: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the interests of justice will best be served by admission of the statement into evidence?

Mr. GONZALES. The Supreme Court has read Rule 807 narrowly in light of the Constitution's Confrontation Clause. See *Crawford* v. *Washington,* 541 U.S. 36 (2004). Military commissions, however, like other international war crimes tribunals, will have a strong need to consider reliable hearsay evidence, and therefore, we would be reluctant to rely solely on Rule 807 as the governing hearsay rule. The MCA provides that hearsay evidence may 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). That MCA rule further provides, like Rule 807, that the opponent of the evidence be given advance notice of the statements in question so as to have a fair opportunity to meet the evidence. We believe that this rule is appropriate for military commission proceedings.

Secretary ENGLAND. The MCA allows for hearsay evidence "unless the military judge finds that the circumstances render it unreliable or lacking in probative value." We support the standard adopted by Congress. We are engaged in an ongoing conflict, and often witnesses and evidence will not be readily available. Given that fact, there are practical reasons to deviate from the UCMJ with respect to the use of hearsay as long as the information is probative and reliable. Given that, we believe Congress struck the proper balance in § 949a(b)(2)(E) (i) & (ii).

PROSECUTING TERRORISTS

11. Senator MCCAIN. Attorney General Gonzales, in June, the Department of Justice (DOJ) issued a press release announcing its success in prosecuting terrorists in our Federal courts. The press release states, "Since the Sept. 11 attacks, and as of June 22, 2006, 261 defendants have been convicted or have pleaded guilty in terrorism or terrorism-related cases arising from investigations conducted primarily after September 11, 2001. Those cases have an international connection, including certain investigations conducted by the FBI's Joint Terrorism Task Forces and other cases involving individuals associated with international terrorists or foreign terrorist organizations." Did the DOJ's experience in these prosecutions influence the

administration's draft legislative proposal to establish military commissions for the trial of suspected terrorists?

Mr. GONZALES. Yes, the administration certainly drew upon the Department's experience when seeking military commission legislation. As the press release indicates, the prosecution of terrorists and the supporters of terrorism has been, and will remain, an important legal weapon in the war on terror. In some cases, these terror prosecutions do not differ considerably from other criminal prosecutions: the accused may have been arrested in the United States based upon local evidence uncovered through traditional police work.

At the same time, our experience has demonstrated in some cases the difficulties of prosecuting international terrorists in Federal court. The evidence against some suspects may include classified information, or the witnesses may be located abroad and not subject to Federal court jurisdiction. Moreover, these difficulties are likely to be even greater when it comes to prosecuting many of the enemy combatants now detained at Guantanamo Bay. Most of these individuals were captured in Afghanistan, and the prosecutions will proceed based on evidence obtained from the battlefields in Afghanistan or terrorist safe houses located throughout the world. For these reasons, it was both necessary and appropriate for Congress to establish military commissions under the MCA, and we look forward to those prosecutions going forward.

12. Senator MCCAIN. Attorney General Gonzales, given the DOJ's success in prosecuting suspected terrorists under rules of procedure that, for example, do not permit the prosecution of defendants with classified information that defendants do not see in some form, why do you believe that we need military commissions with rules that permit coerced testimony and hearsay evidence, and feature other departures from the UCMJ?

Mr. GONZALES. As explained in the previous answer, even our successful cases can illustrate the difficulties associated with using the civilian justice system to prosecute terrorists. Prosecutions in Federal court may well be possible for some individuals, but at the same time, there will be many cases where military commissions will be essential to permitting an effective prosecution. Congress recognized in the MCA that many provisions of the UCMJ are neither necessary nor appropriate for military commission prosecutions, such as Articles 31 and 32, the hearsay rule, and Rule 505. At the same time, many provisions of the MCA closely track those of the UCMJ. We believe that Congress struck the appropriate balance in enacting the MCA.

DETAINEE TREATMENT ACT

13. Senator MCCAIN. Attorney General Gonzales, you have said that our troops require certainty in law. Would you say that the DTA, which relies on the 5th, 8th, and 14th Amendments, provides our troops with greater clarity than Common Article 3?

Mr. GONZALES. Yes. The Federal courts have given meaning to these constitutional protections through U.S. caselaw. In contrast, Common Article 3 contains inherently vague terms and is subject to the evolving interpretations of foreign governments and international tribunals. In addition, our forces already must comply with the DTA standard without regard to how Common Article 3 is interpreted. Therefore, the Administration advocated implementing United States treaty obligations by making clear that the DTA standard, which reflects the treatment standard for United States citizens under our Constitution, meets or exceeds the international standards governing the treatment of unlawful combatants under Common Article 3.

Congress, however, has provided clarity as to our Nation's obligations under Common Article 3 through the MCA. The MCA defines the grave breaches of Common Article 3, identifies the DTA standard as a relevant prohibition under Common Article 3, and reaffirms and reinforces the President's authority to interpret further United States obligations under the Geneva Conventions. The DOD has provided further clarity for our forces by promulgating the revised Army FM on Interrogation and the DOD Detention Directive.

14. Senator MCCAIN. Attorney General Gonzales, you said in today's hearing that DOJ has produced a definitive analysis of the interrogation techniques permitted under the DTA. Has this analysis been shared with the JAGs? If not, how are you able to get their input regarding the equivalence between Common Article 3 and the DTA if they do not know how the DTA is defined? If the analysis has been

shared, are they comfortable with using the administration's definition as the definition of Common Article 3?

Mr. GONZALES. In formulating the President's military commission proposal, the administration engaged in a lengthy consultation process with all interested departments and agencies, including the JAGs. We certainly did discuss with military lawyers our proposal to rely on the constitutional standards of treatment, as embodied in the DTA, as one way of understanding the baseline humanitarian standards of Common Article 3. Congress ultimately agreed that the DTA standard is relevant to the interpretation of Common Article 3, but did not declare the equivalence between Common Article 3 and the DTA for all purposes. Rather, Congress provided that the President should have the authority to interpret the meaning and application of Common Article 3 beyond the grave breaches criminalized under the War Crimes Act.

We cannot comment publicly on any specific classified interrogation practices, beyond stating that authorized interrogation practices are reviewed for compliance with applicable United States legal obligations, including the DTA. In my testimony, I did not state that DOJ has produced "a definitive analysis" of the interrogation techniques permitted under the DTA, but rather agreed that we had provided legal advice on the subject. With respect to the JAGs' views on the meaning of the DTA standard, we would refer you to the DOD, which is in a better position to answer your question.

15. Senator MCCAIN. Attorney General Gonzales, are they, and are you, comfortable with all of the interrogation techniques permitted by this definition being used on Americans who might be covered by Common Article 3?

Mr. GONZALES. Under international law, in traditional armed conflicts, American military personnel would be entitled to the higher protections owed to prisoners of war under the Geneva Conventions, rather than the lower baseline protections of Common Article 3. In our current armed conflict with international terrorist organizations like al Qaeda, of course, our enemies show no respect for any standards whatsoever under the law of war. Indeed, the prohibitions of Common Article 3—including murder, mutilation, and torture—are precisely the sort of acts members of al Qaeda regularly commit upon individuals in their custody. Nonetheless, we recognize that a U.S. interpretation or application of Common Article 3 may have reciprocity implications for U.S. personnel in certain circumstances in future conflicts. We believe that Common Article 3 can be reasonably interpreted by the United States, including through clarifications provided by the MCA, to allow the Central Intelligence Agency (CIA) to operate a safe and professional program of interrogation of high-value terrorist detainees in order to protect the United States and its allies and countless innocent civilians from further catastrophic terrorist attacks, and that we can do so consistent with legitimate reciprocity concerns.

WAR CRIMES ACT

16. Senator MCCAIN. Attorney General Gonzales, in the War Crimes Act in title 18, U.S.C., violations of Common Article 3 are criminalized. The administration proposes to rewrite this statute, replacing it with a list of offenses—a list that does not include cruel, inhuman, and degrading treatment. Why do you want to decriminalize cruel, inhuman, and degrading treatment, no matter how severe?

Mr. GONZALES. The administration never proposed to decriminalize cruel, inhuman, or degrading treatment, because the DTA standard is not a criminal standard under United States law. At the same time, there is no dispute that many acts that violate this standard, such as torture, cruel treatment, and severe physical abuse, would also violate United States criminal laws, including the War Crimes Act. Those acts continue to be criminal under the War Crimes Act, as amended by the MCA. Our goal in clarifying the War Crimes Act has always been to provide clear guidance to United States personnel as to the specific acts that would give rise to criminal liability. Although the DTA standard of "cruel, inhuman, or degrading treatment" has a meaning based on constitutional principles developed in the Supreme Court's jurisprudence under the 5th, 8th, and 14th Amendments, we believed that such a constitutional standard would not provide the appropriate clarity and certainty to serve as a criminal standard applicable to the individuals most closely involved in handling detainees. The MCA therefore reaffirms that the DTA establishes a prohibition under United States law, but it does not adopt that as a criminal standard for criminal liability.

TREATMENT OF DETAINEES

17. Senator MCCAIN. Attorney General Gonzales, at a hearing of the Senate Judiciary Committee on February 6, Senator Graham asked you: "Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane, and degrading treatment of a detainee intrudes on the inherent power of the President to conduct the war?" You answered: "Senator, I don't know whether or not we have done that specific analysis." Have you conducted that specific analysis yet?

Mr. GONZALES. It was the policy of the United States even before enactment of the DTA that we would not engage in cruel, inhuman, or degrading treatment, as defined by the constitutional standards incorporated into the U.S. reservation to Article 16 of the CAT, and now since the passage of the DTA in December 2005, that policy has been the law of the land. The Constitution does confer upon the President the authority to defend the Nation as the Commander in Chief, and separation of powers principles do impose some limits on congressional authority to regulate the President's actions pursuant to that power. Because, however, the President firmly supports both the law and the policy at issue in the DTA, we do not foresee any separation of powers question arising here.

18. Senator MCCAIN. Attorney General Gonzales, is there a circumstance in which a government employee could legally engage in cruel, inhumane, or degrading treatment?

Mr. GONZALES. The law of the United States and the policy of this administration prohibit cruel, inhuman, or degrading treatment, as defined in the DTA, and we do not foresee any circumstance under which such acts would be justified.

19. Senator MCCAIN. Attorney General Gonzales, in the same February 6 hearing, Senator Graham asked you: "Do you believe it's lawful for Congress to tell the military that, "You cannot physically abuse a prisoner of war"? You answered: "I'm not prepared to say that, Senator." What is your answer today?

Mr. GONZALES. United States military personnel are subject to the UCMJ, which prohibits the mistreatment of prisoners of war, including the physical abuse of detainees, and the UCMJ is a valid exercise of Congress's authority to regulate the Armed Forces. We would also note that prisoners of war would be subject to the Third Geneva Convention, which provides them with protections above and beyond those afforded to unlawful combatants under Common Article 3. Because the United States does not permit the physical abuse of detainees in violation of the DTA and the UCMJ, we do not wish to speculate on a separation of powers question not presented.

20. Senator MCCAIN. Attorney General Gonzales, when is it legal for the military to abuse prisoners of war?

Mr. GONZALES. We would refer you to the answer to question 19.

21. Senator MCCAIN. Attorney General Gonzales, in what way do you believe it might be unlawful for Congress to tell the military that it cannot physically abuse a prisoner of war?

Mr. GONZALES. We would refer you to the answer to question 19.

COMMON ARTICLE 3

22. Senator MCCAIN. Secretary England, the Attorney General has stated that Common Article 3 is unacceptably vague. Yet you sent a memo to the DOD stating your understanding that all DOD procedures are in compliance with Common Article 3. If Common Article 3 is so vague, how do you know that DOD is in compliance with its obligations?

Secretary ENGLAND. I believe the Attorney General stated that "although many of the provisions of Common Article 3 prohibit actions that are universally condemned, some of its terms are inherently vague." That is undeniable, and Congress recognized the same point in the MCA. However, the policies promulgated by the DOD comply with the law, including Common Article 3. Indeed, the interrogation techniques in the FM are well within the humane treatment requirements of Common Article 3. The FM was submitted to the DOJ for its review. DOJ concluded the FM is consistent with the law, including the DTA of 2005 and Common Article 3.

Additionally, legal reviews by DOD counsel, including Chairman's Legal Counsel, and Military Department Judge Advocates, also concluded that the FM complies with the requirements of the law, including the DTA and Common Article 3.

23. Senator MCCAIN. Secretary England, the administration would like to put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last year's DTA. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th Amendments to the U.S. Constitution. Are you comfortable with the administration's definition of what constitutes cruel, inhumane, and degrading treatment?

Secretary ENGLAND. Yes.

24. Senator MCCAIN. Secretary England, would you be comfortable with all of the interrogation techniques permitted under this definition being used on Americans in this or future wars?

Secretary ENGLAND. Although the interrogation techniques permitted under FM 2–22.3, Human Intelligence Collector Operations, clearly comply with applicable law, including the Geneva Conventions, I do not know if the enemy DOD will face in the future will comply with the requirements of the Geneva Conventions and other legal obligations when interrogating U.S. Armed Forces.

25. Senator MCCAIN. Secretary England, when the JAGs testified before this committee on July 13, they were asked about the application of Common Article 3. Admiral McPherson stated: "It created no new requirements for us. . . . [We] we have been training to and operating under that standard for a long, long time." General Romig stated: "We train to it. We always have. I'm just glad to see we're taking credit for what we do now." The other JAGs agreed. If the military already complies with Common Article 3, has been training to it, and has been operating under this standard, why is there a need to redefine the standard now?

Secretary ENGLAND. 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.

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. Had Congress left it undefined by statute, the application of Common Article 3 would create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3—before the MCA's enactment—constituted a Federal crime under the War Crimes Act. That said, the U.S. Government had never prosecuted anyone under that provision of the War Crimes Act, and it is conceivable that our courts might have concluded that parts of that offense were impermissibly vague.

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.

QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

COMMISSION PROCEDURES FOR HANDLING CLASSIFIED INFORMATION

26. Senator KENNEDY. Attorney General Gonzales, in your testimony to the committee, you indicated that in developing new procedures for the operation of military commissions, you need to take special care to deal with the issue of securing classified information in the context of a trial. It is unnecessary to start from scratch in developing such rules. The Classified Information Procedures Act (CIPA) governs the use of classified information in the context of Federal criminal prosecutions, and that statute strikes the necessary balance between the rights of the accused and the national security interests of the United States. In addition, Military Rule of Evidence 505 outlines established procedures for effectively dealing with classified information in a court-martial context. At the July 13 hearing of the Senate Armed Services Committee, Senator Roberts asked the JAGs about the applicability of these procedures to the new military commissions currently being developed. Major General Scott Black, JAG for the Army, said that Rule 505 "is consistent with CIPA in every respect and provides a procedure that we could well adapt to the commission's process." There are major benefits in following established procedures. Rear

Admiral McPherson, JAG of the Navy, testified that military lawyers "have a wealth of experience under 505 that's probably being used today in a court-martial someplace. So the experience is there." While the JAG lawyers recognize that some modification of Rule 505 or the CIPA standards may be needed, testimony before this committee indicates that those modifications should be limited in scope and that deviations should be the exception, not the rule. Do you agree that CIPA and Rule 505 should be the basis for any rules governing the use of classified information by the new military commissions?

Mr. GONZALES. The MCA of 2006 strikes an appropriate balance between the rights of the accused and the interests of our national security. The new law grants the accused the right to be present for all trial proceedings, unless he engages in disruptive conduct that requires his exclusion. See 10 U.S.C. § 949a(b)(1)(B); id. § 949d(e). Moreover, the accused will have access and the opportunity to respond to all 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).

Military Rule of Evidence 505, which is similar to the CIPA, 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 in an ongoing armed conflict—not the members of our own Armed Forces—and that in contrast to courts-martial, military commission prosecutions are far more likely to concern evidence that either includes classified information or was derived from classified sources or methods.

27. Senator KENNEDY. Attorney General Gonzales, please indicate any and all areas in which you believe that CIPA or Rule 505 as written are ill-equipped to deal with the issue of classified information in military commission trials. Please provide evidence to support any assertions in this regard—citations to situations in which CIPA or Rule 505 were insufficient for effective prosecutions, evidence from historical cases, etc.

Mr. GONZALES. Both CIPA and Military Rule of Evidence 505 provide procedures that allow the Government to seek judicial approval for the substitution of classified evidence with redacted or summarized evidence. These procedures generally apply in cases where the accused himself has had access to the classified information, and the primary goal of these procedures is to permit the trial to go forward in public without the unnecessary disclosure of classified evidence. By contrast, military commission cases may involve a considerable amount of classified evidence to which the accused, a captured terrorist, has never had access and cannot be safely given access in the middle of the present armed conflict.

Like CIPA and Rule 505, the MCA does protect the accused's right to have access, and to respond, to all evidence actually admitted before the trier of fact, and it does permit the substitution of unclassified evidence, where practicable. At the same time, the MCA contains additional procedures that will permit the Government to introduce evidence while protecting from disclosure the highly classified sources and methods from which that evidence may have been derived. We believe that such procedures, not specifically contained in CIPA and Rule 505, are important protections that will allow the United States to prosecute captured terrorists while still protecting our Nation's most important secrets during wartime. The Administration did not support these new procedures because of dissatisfaction with any particular judicial rulings under CIPA or Military Rule of Evidence 505. Rather, we supported these procedures because CIPA and Rule 505 are not principally aimed at protecting classified information in the way it is likely to be used in military commission prosecutions.

28. Senator KENNEDY. Attorney General Gonzales, do you agree with Rear Admiral McPherson that modeling the rules governing classified information in military commissions on Rule 505 would be an important asset in promoting efficient and effective commission trials, given the "wealth of experience" by military lawyers in applying those rules in the real world?

Mr. GONZALES. We believe that Congress, through the MCA, struck the appropriate balance in the handling of classified evidence for military commission prosecutions. In enacting the MCA, Congress no doubt drew on the experience that Federal courts and courts-martial have gained from applying CIPA and Rule 505. That experience also reveals that the use of classified evidence in those cases often makes prosecutions quite difficult. In light of the amount of classified evidence that may

be relevant to military commission proceedings, we would expect that military commission prosecutions also may prove challenging. We believe, however, that the MCA establishes strong and fair procedures that will allow for the most effective and efficient prosecutions under these circumstances.

DETAINEE PROTECTIONS AND EFFECTIVE PROSECUTION OF HOSTILITIES

29. Senator KENNEDY. Attorney General Gonzales, at the August 2 hearing, Senator Clinton asked you why, if the military is trained to comply with the standards of Geneva that are higher than Common Article 3, we don't just apply those higher standards now instead of trying to lower ourselves to the lowest common denominator of detainee treatment that is borderline-permissible under the Constitution. You responded that the *Hamdan* decision only requires us to comply with Common Article 3. Implicit in that response is the argument that it is necessary for us to minimize the level of protection we provide to detainees in order to effectively wage the war on terror. This assertion is heard often from this administration, but it does not seem to comport with the testimony of career military officers who engage these issues as professionals on a day-to-day basis. At a July 13 hearing before the Senate Judiciary Committee, Major General Jack Rives, JAG for the Air Force, testified that you "have no problem with the Intelligence Community gathering intelligence effectively. Speaking to a lot of folks in the intel community and having read a fair amount about it, I don't believe they need to cross the lines and the violations of the DTA or Common Article 3 to effectively gather intelligence." Do you have any empirical evidence indicating that treating prisoners according to the requirements of Common Article 3 would in any way impede our ability to collect intelligence? If so, please provide any and all evidence upon which that conclusion is based.

Mr. GONZALES. The administration fully supports treating all detainees in accordance with our international obligations, including the Geneva Conventions. The President determined in February 2002 that Common Article 3 did not apply to the global war on terror, because Common Article 3 only applies to conflicts "not of an international character." The Supreme Court reached a different conclusion in *Hamdan* v. *Rumsfeld,* 126 S. Ct. 2749 (2006), however. Since that decision, the administration has worked to make sure that all United States policies comply with the standards applicable under Common Article 3.

The administration has never believed that our obligations under Common Article 3 are inconsistent with effective intelligence gathering. We have recognized, however, that some of Common Article 3's provisions, such as its prohibition upon "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," are vague and susceptible to uncertain application. For that reason, we encouraged Congress to enact implementing legislation to bring clarity to those standards. Congress responded with the MCA. Section 6(a) of the MCA reaffirms and reinforces the President's authority to issue authoritative interpretations of Common Article 3 under United States law. Section 6(b) defines the nine "grave breaches of Common Article 3" that give rise to criminal liability under the War Crimes Act. Section 6(c) recognizes that the prohibition on "cruel, inhuman, or degrading treatment or punishment" established by the DTA of 2005 constitutes an additional obligation relevant to United States compliance with Common Article 3. The MCA therefore permits the United States to ensure that it honors its international obligations under Common Article 3, while carrying forward the CIA interrogation program that has been a vital intelligence tool in the war on terror.

30. Senator KENNEDY. Attorney General Gonzales, do you have any empirical evidence indicating that treating prisoners according to the requirements of full Geneva Conventions standards that all military service men have trained to for over 50 years would in any way impede our ability to collect intelligence? If so, please provide any and all evidence upon which that conclusion is based.

Mr. GONZALES. It is a fundamental principle of international law that the Geneva Conventions distinguish between lawful and unlawful combatants as a way of encouraging mutual respect for the law of war. The Geneva Conventions provide that combatants are only entitled to the special privileges of prisoners of war when they themselves belong to forces that comply with the law of war. To afford prisoner of war status to unlawful enemy combatants would remove the incentive that the Conventions provide to encourage compliance with the law of war.

The Third Geneva Convention provides significant constraints on the actionable intelligence that may be obtained from prisoners of war. Article 17 makes clear that prisoners of war need only divulge their name, rank, and serial number under interrogation, and they may not be exposed to coercion or unpleasant or disadvantageous

treatment of any kind for refusing to provide additional information. It is hardly surprising, therefore, that experienced interrogators within the United States Government have made the judgment that hardened terrorists are likely to withhold much actionable intelligence when examined under such limitations.

The United States conducts no formal experiments as to the effectiveness of interrogation techniques of detainees in custody. But there is an ample empirical basis to support the judgment that CIA interrogations of unlawful enemy combatants have been successful in providing the United States with critical intelligence that has allowed us to capture al Qaeda members, disrupt terrorist plots, and save the lives of Americans' intelligence that traditional techniques had failed to elicit. Although the techniques employed by the CIA remain highly classified, the President has made clear that they are safe, professionally employed, and carefully reviewed to ensure compliance with our domestic and international legal obligations.

Intelligence obtained in the CIA program has played a role in nearly every significant capture of al Qaeda members and associates since 2003 and was instrumental in capturing some of Osama bin Laden's key lieutenants, including the mastermind of the September 11 attacks, Khalid Sheikh Mohammed.

The President's most important obligation is to protect the safety of American citizens. To discharge that obligation, he has a duty to employ all lawful means that would effectively prevent the terrorists who have attacked our Nation from engaging in future attacks. The CIA interrogation program is a necessary and vital tool in service of that goal.

31. Senator KENNEDY. Attorney General Gonzales, do you have any empirical evidence indicating that intelligence officers must be required to violate either the full Geneva Conventions or the requirements of Common Article 3 in order to obtain actionable intelligence in a timely manner? If so, please provide any and all evidence upon which that conclusion is based.

Mr. GONZALES. As we stated, the United States has always worked to comply with its international obligations, including the Geneva Conventions. We are not aware of any instance in which the United States determined that it would be necessary to breach its international obligations under the Geneva Conventions to obtain actionable intelligence in this conflict. To the contrary, the CIA interrogation program has been carefully reviewed and determined to be lawful.

As noted above, prior to *Hamdan,* the United States did not believe that Common Article 3 applied to the global war on terror. Since the Supreme Court decision, however, the administration has reviewed its policies to ensure compliance with Common Article 3, and it supported the enactment of the MCA to provide further clarity as to the meaning of those obligations.

ADMISSIBILITY OF EVIDENCE OBTAINED THROUGH COERCION

32. Senator KENNEDY. Attorney General Gonzales, at the August 2 hearing before the Senate Judiciary Committee, each of the JAGs on the panel agreed that evidence obtained by coercion should not be admissible in a military commission proceeding. When Senator McCain posed that question to you, you responded that whether or not evidence obtained by coercion should be admissible would depend on whether the evidence obtained was reliable and probative. The JAGs did not qualify their answer—they unequivocally rejected the use of coerced evidence in legal proceedings. What kind of inquiry will you allow into hearsay statements to determine whether they are coerced? Will the judge or the panel make that determination?

Mr. GONZALES. The MCA categorically prohibits the admission of statements against the accused that have been obtained through torture, except against a person accused of torture as evidence that the statement was made. 10 U.S.C. § 948r(b). The MCA further prohibits the admission of statements obtained in violation of the DTA, which was enacted on December 30, 2005. See id. § 948r(d)(3). With respect to a statement allegedly obtained through coercion that does not fall within either of those two categories, the MCA requires the military judge to consider whether the statement is reliable under the circumstances. See id. § 948r (c)(1), (d)(1). In addition, the MCA requires that the military judge determine whether admission of the statement is in the interests of justice. See id. § 948r (c)(2), (d)(2). The MCA provisions do not separately distinguish between allegedly coerced statements that are considered hearsay and those that are not hearsay under the law.

It is our understanding that shortly before the enactment of the MCA, the JAGs stated in letters to Senator Levin that they had reviewed and did not object to the approach to this issue reflected in the final version of the MCA. With respect to the particular views of the JAGs, however, we would refer you to the DOD.

33. Senator KENNEDY. Attorney General Gonzales, what standards would a military judge be expected to apply in the determination of whether hearsay evidence is both sufficiently probative and sufficiently reliable for admission to a military commission proceeding?

Mr. GONZALES. With respect to hearsay evidence, the MCA does not require a particular rule. It does, however, recommend that the Secretary of Defense adopt a rule that would make hearsay admissible on similar terms as other forms of evidence, provided that the proponent of the evidence gives advance notice of the statement to the adverse party and provided that the military judge does not find the evidence unreliable. See id. § 949a(b)(2)(E). Military judges have a wealth of experience making determinations as to the probative value and the reliability of evidence, and we believe that those fact-specific determinations are appropriately left to the military judge's discretion. The Manual for Military Commissions, which the Secretary recently promulgated, adopts the hearsay standard that Congress recommended. See Military Commission Rules of Evidence (MCRE) 802, 803.

34. Senator KENNEDY. Attorney General Gonzales, is it your position that evidence obtained through coercion should be admissible under certain circumstances? If so, what are those circumstances?

Mr. GONZALES. We would refer you to the answer to question 32, which describes how Congress resolved this issue under the MCA. The administration fully supports that approach.

35. Senator KENNEDY. Attorney General Gonzales, what standards would a military judge be expected to apply in determining whether coerced testimony is both sufficiently probative and sufficiently reliable for admission in a military commission proceeding?

Mr. GONZALES. Military judges make similar judgments as to the probative value and the reliability of evidence all the time. There is no bright-line rule, however, for determining whether a particular piece of evidence is sufficiently reliable and probative to be admitted into evidence. Rather, a military judge will exercise his discretion based on the totality of the evidence in a particular case.

36. Senator KENNEDY. Attorney General Gonzales, should evidence obtained through torture ever be admissible in a military commission?

Mr. GONZALES. The United States opposes torture in any form, consistent with its obligations under domestic and international law. The MCA prohibits the admission of statements against the accused that have been obtained through torture, "except against a person accused of torture as evidence that the statement was made." Id. § 948r(b). That prohibition, including the exception, tracks U.S. obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Therefore, statements obtained through torture will not be admissible in a military commission proceeding, except in the criminal prosecution of an individual charged with torture.

37. Senator KENNEDY. Attorney General Gonzales, a military judge recently refused to say that statements obtained while poking an individual in the eye with a red-hot poker would lead to a blanket exclusion of evidence obtained from that interrogation. Do you believe that statements obtained while poking a detainee in the eye with a red-hot poker would ever be admissible?

Mr. GONZALES. No, we expect that such statements would not be admissible. As explained in the answer to question 36, statements obtained through torture should not be and will not be admissible in a military commission proceeding, except against an individual charged with torture. Torture is defined to include the intentional infliction of "severe physical or mental pain or suffering." Whether particular conduct rises to the level of torture would be considered by a judge in the context of an actual case, but any statement obtained in the course of the conduct you describe certainly would appear to fit that definition.

38. Senator KENNEDY. Attorney General Gonzales, the Supreme Court recognized the importance of excluding statements obtained through coercion most recently in an opinion by Chief Justice Roberts (*Sanchez-Llamas* v. *Oregon,* 126 S. Ct. 2669 (2006)). He said, "We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable." Do you disagree with Justice Roberts' statement that coerced confessions tend to be unreliable?

Mr. GONZALES. The MCA excludes any statement that the military judge determines to be unreliable under the facts and circumstances of a particular case. It

may not be easy to determine whether a statement is "coerced" as a matter of law, but the alleged degree of coercion under the circumstances is clearly one factor that a judge would take into account in measuring the reliability of the statement. See MCRE 304(c).

39. Senator KENNEDY. Attorney General Gonzales, do you disagree with Justice Roberts that such statements must be excluded?

Mr. GONZALES. In the passage that you quote from Sanchez-Llamas, Chief Justice Roberts observed that coerced statements obtained in violation of the Fifth Amendment's right against self-incrimination must be excluded. We certainly do agree that such a statement is an accurate explanation of existing law for criminal proceedings in Article III courts. The Chief Justice, however, was not discussing the procedures required for the prosecution by military commission of alien unlawful enemy combatants. There, the appropriate question is not what the Fifth Amendment requires, but what has Congress required by statute. The MCA provides that statements should be excluded if they are not reliable or if their admission would be contrary to the interests of justice.

DEFINITION OF UNLAWFUL ENEMY COMBATANT

40. Senator KENNEDY. Attorney General Gonzales, in your definition of unlawful enemy combatant, are there any limits on who can be subject to arrest and detention as an "associate" or "supporter" of al Qaeda?

Mr. GONZALES. Section 948a(1) of title 10 defines "unlawful enemy combatant" as "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)." That definition, which concerns the alien unlawful enemy combatants who may be tried by military commission, does not govern the standard for detention as an enemy combatant. With respect to the detention of enemy combatants by the military, the DOD has defined an enemy combatant to be an individual who is "part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." We do believe that those terms are reasonably clear under the law and appropriately ensure that the United States detains only persons who are involved in hostilities against the United States or its partners.

41. Senator KENNEDY. Attorney General Gonzales, can American citizens be arrested and indefinitely detained as "associates" or "supporters" of al Qaeda?

Mr. GONZALES. In *Hamdi* v. *Rumsfeld,* 542 U.S. 507 (2004), the Supreme Court held that American citizens who support al Qaeda may be held for the duration of ongoing hostilities. As Justice O'Connor's plurality opinion recognized, "A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States'." Id. at 519. Therefore, in light of *Hamdi,* the United States may protect the Nation by detaining citizens who are part of or supporters of forces hostile to the United States. At the same time, the MCA is clear that military commissions may be used to try only alien unlawful enemy combatants. See 10 U.S.C. § 948b(a). Therefore, if the United States wanted to prosecute and punish American citizens for criminal conduct in support of the enemy—as opposed to simply detaining them as enemy combatants—then it would be necessary to prosecute them in Federal court.

42. Senator KENNEDY. Attorney General Gonzales, what about the old woman in Switzerland who gives money to the charitable affiliate of al Qaeda that is building an orphanage in Afghanistan?

Mr. GONZALES. As a general matter, the definition of an enemy combatant under the law of war includes not only those who take up arms, but those facilitators who make such attacks possible by, among other things, providing material support to the terrorists, acting as couriers, and operating safe houses. We do not believe that this definition would reach individuals who innocently make charitable donations that are later diverted to al Qaeda. On the other hand, an individual who purposefully and materially provides al Qaeda with the support necessary to carry out terrorist attacks can be just as dangerous to the United States as those who actually carry out the attacks. Depending on the circumstances, such an individual may be properly detained by the United States and prosecuted for war crimes under the MCA. It is, however, always difficult to speculate outside the facts of a particular case.

43. Senator KENNEDY. Attorney General Gonzales, what about the American citizen who visits a mosque in Turkey where an imam expressed support for the current insurgency in Afghanistan?

Mr. GONZALES. Again, although it is difficult to speculate outside the facts of a particular case, we would not expect that a simple visitor to a mosque would be determined to be a person who has engaged in hostilities against the United States, either under the definition employed by the DOD or that enacted by Congress under the MCA. We would note that an American citizen could not be prosecuted before a military commission convened under the MCA, and an American citizen would have the right to file a petition for habeas corpus to challenge the legality of his detention in Federal court.

LEGAL RIGHTS

44. Senator KENNEDY. Attorney General Gonzales, both the current military commissions and various versions of proposed draft commission legislation guarantee the right to counsel and the privilege against self-incrimination. When do those rights attach? At capture? At incarceration? After being charged?

Mr. GONZALES. Under 10 U.S.C. § 948k(a)(3), the accused's military defense counsel shall be detailed as soon as practicable after the swearing of charges against the accused. Under section 948r(a), the accused has the privilege not to testify against himself in a military commission proceeding. These rights do not attach upon capture and incarceration because such a rule would be unduly onerous in the context of capturing enemy combatants during wartime operations, and because the United States has a need to conduct intelligence interrogations of captured terrorists wholly apart from any interest in prosecution.

RECIPROCITY

45. Senator KENNEDY. Attorney General Gonzales, Lori Berenson, a U.S. citizen, was captured in Peru and charged with being a member of the Tupac Amaru and committing terrorist acts. She was found guilty by a Peruvian military commission. In 1996, the State Department objected to her trial, because "Ms. Berenson was not tried in an open civilian court with full rights of legal defense, in accordance with international juridical norms" and called for the case to be retried in an "open judicial proceeding in a civilian court." Do you believe that it was appropriate for Peru to try Ms. Berenson before a military tribunal?

Mr. GONZALES. We are not familiar with the facts of Ms. Berenson's case or with the specific circumstances of the Peruvian military commission proceedings involved there. We would, however, refer you to the Department of State, which is in a better position to comment.

46. Senator KENNEDY. Attorney General Gonzales, would the U.S. Government object to the trial of U.S. citizens before military courts in other nations?

Mr. GONZALES. All lawful combatants—including United States personnel captured by foreign forces—must be tried in accordance with the Third Geneva Convention's provisions for prisoners of war. Article 102 of the Third Geneva Convention provides that prisoners of war must be tried in "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." Thus, if the foreign nation uses military courts to try members of its own armed forces, the Third Geneva Convention provides that those same courts and procedures could be used to try American prisoners of war. We would use our own courts-martial, for instance, as military courts to try prisoners of war for violations of the law of war. We similarly would expect that if a member of the Armed Forces of the United States were captured by the enemy, he would be tried consistent with the Geneva Conventions.

The MCA provides fair tribunals that meet or exceed all United States obligations under the Geneva Conventions. Alien unlawful enemy combatants have no right to be tried by courts-martial and instead may be tried by military commissions convened under the MCA. Needless to say, our enemies in the current conflict do not try captured United States citizens before tribunals of any kind, but rather torture and behead prisoners who fall into their custody. We provide fair trials by military commission not out of any false hope of reciprocity, but because we as a Nation are committed to the fair treatment of everyone in United States custody and to the rule of law.

47. Senator KENNEDY. Attorney General Gonzales, are you prepared to accept the legality of each of the following forms of treatment if reciprocally applied, in each case, by either a foreign government or a transnational organization to any citizen of the United States—including, but not limited to, U.S. servicemembers, covert operatives, and civilian contractors—that may be captured and detained in connection with an armed conflict?

A. A detainee is tried by a military commission in which hearsay evidence that is deemed to be both reliable and probative by that foreign military commission is admitted.

B. A detainee is tried by a military commission in which coerced testimony that is deemed to be both reliable and probative by that foreign military commission is admitted.

C. A detainee is tried by a military commission in which evidence that is deemed to be classified by that military commission is admitted, but withheld from the accused.

D. A detainee is tried by a military commission in absentia or in which the detainee is excluded from parts of the trial.

E. A detainee is tried by a military commission in which the accused has limited or no access to witnesses.

F. A detainee is tried by a military commission for conspiracy to commit a war crime.

Mr. GONZALES. Again, it is difficult to give a firm conclusion as to the legality of a particular tribunal without knowledge of all the surrounding circumstances. As noted, the Third Geneva Convention requires that prisoners of war be tried in the same courts used to try the enemy force. The MCA, by contrast, is reserved for unlawful enemy combatants who do not merit the higher protections afforded prisoners of war. That said, some of the scenarios you describe would appear consistent with the practices of international and foreign courts. For instance, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda permit the admission of reliable and probative hearsay evidence, and there is no specific prohibition on reliable "coerced evidence."

The United States believes that the MCA provides appropriate procedures for the trial of unlawful enemy combatants that meet or exceed our international obligations and the higher standards to which we hold our Nation. With respect to (A), the MCA provides that reliable and probative hearsay evidence may be considered. See 10 U.S.C. § 949a(b)(2)(E). Indeed, hearsay evidence may sometimes be the most reliable evidence in a war crimes context. With respect to (B), the MCA excludes statements obtained by torture or in violation of the DTA. See 10 U.S.C. § 948r. When it comes to allegations of coercion, we ask the military judge to determine whether it is reliable and whether the admission of the statements is in the interests of justice. See id. When there is reliable evidence that the accused committed a war crime, we believe that it is appropriate that the trier of fact generally be able to consider that evidence.

With respect to scenarios (C) and (D), 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 id. § 949a(b)(I)(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). Moreover, with respect to scenario (E), all detainees will have a reasonable opportunity to obtain witnesses and other evidence. See id. § 949j. Finally, with respect to scenario (F), the MCA permits the accused to be prosecuted for conspiracy to commit a war crime, which Congress appropriately deemed an offense under the law of war. See id. § 950v(b)(28).

COMMON ARTICLE 3

48. Senator KENNEDY. Secretary England, when the JAGs of the Armed Forces were asked about this directive at the Senate Armed Services Committee hearing on July 13, 2006, Admiral McPherson stated: "It created no new requirements for us. . . . [W]e have been training to and operating under that standard for a long, long time." As General Romig stated: "We train to it. We always have. I'm just glad to see we're taking credit for what we do now." The other JAGs agreed. If all of the branches of the military already comply with Common Article 3, have been training to and operating under this standard, and appear to be clear about what it means, why is there a need to redefine the standard now?

Secretary ENGLAND. Please see my answer to question 25.

49. Senator KENNEDY. Secretary England, isn't it true that the reason we've complied with Common Article 3 in every armed conflict we've fought since the Geneva Conventions were ratified is that we want to be able to apply the standard to our enemies as well?

Secretary ENGLAND. We have complied with the Geneva Conventions in every armed conflict in which we have engaged since their ratification. We treat all captured personnel humanely, regardless of their status or how they have conducted themselves on the battlefield. We would welcome a commitment from all the enemies that we fight that they would, as a minimum, comply with Common Article 3. As you know, however, our current enemy has repeatedly demonstrated that it has no intention of complying with the Geneva Conventions or Common Article 3.

50. Senator KENNEDY. Secretary England, if we limit our understanding of what this standard means, aren't we inviting our enemies to do the same thing?

Secretary ENGLAND. We are not attempting to limit the understanding of what the terms contained in Common Article 3 mean. We also respectfully assume that Congress was not attempting to do that in passing the MCA. As stated previously, 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.

Moreover, since World War II, our enemies have not followed the Geneva Conventions in treatment of captured U.S. personnel, even when we have applied them to enemy captured personnel. One need only look at the torture of U.S. prisoners of war in Korea, Vietnam, and Iraq during the Gulf War and Operation Iraqi Freedom to see this. Nevertheless, the United States continues to uphold the laws of war. We would welcome, however, efforts by other High Contracting Parties that have not done so to implement in their domestic laws their obligations under the Geneva Conventions, including Common Article 3.

51. Senator KENNEDY. Attorney General Gonzales and Secretary England, what procedures are proposed to ensure that all individuals acting on behalf of the U.S. Government, either directly or indirectly, with respect to detainees (e.g. uniformed servicemembers, civilian intelligence officers, contracted civilians, et. al.) will comply with the minimum standards required by Common Article 3?

Mr. GONZALES. The United States takes seriously all of its international obligations, including those under Common Article 3. The DOJ regularly provides legal advice, when requested, to assist others in the executive branch in complying with our international obligations. Shortly following *Hamdan,* the DOD issued a public memorandum directing all of its components to review all relevant directives, regulations, policies, practices, and procedures to ensure that they comply with the standards of Common Article 3. For information on the procedures proposed or in place at other departments or agencies, we would direct you to the department or agency in question.

Secretary ENGLAND. I can only speak for the DOD and note the steps taken to ensure the holding in *Hamdan* has been communicated throughout the DOD. I issued a memorandum on July 7, 2006, informing the DOD 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. My Department provided a copy of this memorandum to Congress. This memorandum required that all DOD components review all relevant directives, regulations, policies, practices and procedures to ensure that they comply with the standards of Common Article 3.

52. Senator KENNEDY. Secretary England, the draft legislation would redefine the definition of Common Article 3 in accordance with the "shock the conscience" standard under the U.S Constitution, which has been interpreted by the administration as imposing a sliding scale, depending on the circumstances. If the interrogator thinks he needs the information badly, then certain interrogation techniques are allowed. If the need is less, then fewer techniques will be permitted. Which is easier to teach and train on: an absolute standard or a relative standard that changes according to the circumstances?

Secretary ENGLAND. See my answers to questions 25 and 50.

53. Senator KENNEDY. Secretary England, please specify examples of any and all interrogation techniques that you believe a U.S. serviceman, officer, or contractor should be allowed to employ, but are prohibited by the humane treatment requirements of Common Article 3?

Secretary ENGLAND. The DTA of 2005 contains the following provision:

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

The only authorized interrogation techniques are those listed in FM 2–22.3. The interrogation approaches and techniques contained in FM 2–22.3 comply with the law and are well within the humane treatment requirements of Common Article 3. The DOD determined that these were the correct set of techniques for DOD use.

54. Senator KENNEDY. Secretary England, 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?

Secretary ENGLAND. I do not know.

QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

ENEMY COMBATANT

55. Senator AKAKA. Attorney General Gonzales, one of the questions that will need to be addressed by Congress is the definition of who is an enemy combatant. How broad do you believe the proposed legislation should be with regard to who can be tried and detained as an enemy combatant?

Mr. GONZALES. Since I testified, Congress has enacted the MCA of 2006. The new law permits the trial by military commission only of alien unlawful enemy combatants. American citizens and lawful prisoners of war may not be prosecuted by military commission. The MCA defines "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its cobelligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1). In addition, an individual determined to be an unlawful enemy combatant through the decision of a Combatant Status Review Tribunal or other competent tribunal would be considered an unlawful enemy combatant by the military commission. This definition will permit the United States to prosecute those who engage in terrorist attacks against the United States and those who purposefully and materially make such attacks possible.

56. Senator AKAKA. Attorney General Gonzales, do you recommend permitting the detention of U.S. citizens for unspecified periods if they are believed to be supportive or associated with enemy combatants?

Mr. GONZALES. In *Hamdi* v. *Rumsfeld,* 542 U.S. 507 (2004), the Supreme Court held that American citizens who support al Qaeda in violation of the law of war may be held as enemy combatants for the duration of ongoing hostilities. The United States needs to have the capability to detain these individuals outside of the criminal justice system so as to prevent them from participating in future terrorist attacks or from returning to battlefields in Iraq, Afghanistan, and elsewhere. Of course, American citizens who take up arms in support of al Qaeda are likely to have violated numerous Federal laws. Although the MCA does not make such individuals triable by military commission, see 10 U.S.C. § 948b(a), they may be prosecuted in Federal court for criminal offenses, and we support such prosecutions.

MILITARY TRIBUNALS

57. Senator AKAKA. Attorney General Gonzales, Article I, Section 8 of the Constitution which vests Congress with the authority to "define and punish . . . offenses against the laws of nations" has historically been interpreted to mean that it is Congress, rather than the President, who has the authority to convene military tribunals. To what extent, if any, would the proposed legislation depart from this interpretation by defining the power to convene military tribunals as an exercise of presidential authority?

Mr. GONZALES. We disagree. Congress has the constitutional authority to "define and punish . . . Offenses against the Law of Nations," but Presidents and military commanders have traditionally been responsible for convening military commissions. George Washington, Abraham Lincoln, and Franklin Delano Roosevelt all convened military commissions in the course of executing their roles as Commander in Chief. Congress, in enacting the law now codified as Article 21 of the UCMJ, specifi-

cally recognized that the creation of the courts-martial system did not deprive the executive of the ability to convene military commissions to try enemy combatants. The Supreme Court, in Ex parte Quirin, 317 U.S. 1 (1942), upheld the constitutionality of military commissions convened by presidential order.

The MCA reflects the first time in our Nation's history that Congress has established a detailed statutory regime for military commissions. In light of the Supreme Court's decision in *Hamdan,* we believe that it was entirely appropriate for Congress to do so. But at the same time, the MCA recognizes and preserves the Executive's role in convening the military commissions authorized under the new law, and thus the MCA appropriately reflects the Constitution's allocation of powers in this area.

GLOBAL WAR ON TERROR

58. Senator AKAKA. Secretary England, in order to effectively combat the global war on terror, we need to have an effective system of military justice which will be able to withstand the close judicial scrutiny and, I believe, international law. What precautions have you taken in drafting your proposed legislation to ensure that it will meet the basic legal standards as outlined in the Supreme Court's *Hamdan* decision?

Secretary ENGLAND. The United States military justice system is the finest military justice system in the world. We are confident that the inclusion of chapter 47A to title 10 and its implementing regulations meet all of the requirements of the *Hamdan* decision while including specific rules tailored to the unique nature of the conflict and our need to protect national security.

[Whereupon, at 4:37 p.m., the committee adjourned.]