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MILITARY COMMISSIONS ACT AND THE CONTINUED USE OF GUANTANAMO BAY AS A DETENTION FACILITY

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
FIRST SESSION

HEARING HELD
MARCH 29, 2007

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MILITARY COMMISSIONS ACT AND THE CONTINUED USE OF GUANTANAMO BAY AS A DETENTION FACILITY

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, March 29, 2007.

The committee met, pursuant to call, at 10:06 a.m., in room 2118, Rayburn House Office Building, Hon. Ike Skelton (chairman of the committee) presiding.

OPENING STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order.

Let me take this opportunity to welcome our witnesses today.

Our old friend, Will Taft IV, it is certainly good to have him once again before our committee—former deputy secretary of defense, former legal advisor to the Department of State and a very distinguished career, now a practicing attorney.

Patrick Philbin, former associate deputy attorney general.

Neal Katyal—did I pronounce it correctly? Got it. Professor of Law, Georgetown Law School at Georgetown University.

Elisa Massimino—do I pronounce it correctly? Good. Director of the Washington, D.C., office of Human Rights First.

And thank you each for being with us today. This is a very important subject, and we look forward to your expertise.

Now, although the Military Commissions Act and Guantanamo are nominally the subjects of today's hearing, our discussion is about much more. The hearing tackles fundamental questions about who we are as a nation and how we treat those who are charged with threatening our security.

Today's hearing was meant to be the second in a series. Regrettably, yesterday's hearing with the principal deputy general counsel of the Department of Defense and the chief defense counsel of the Military Commissions was postponed because of the ongoing legal proceedings at Guantanamo.

We are considering these issues with a great deal of seriousness and with a range of perspectives, because the questions before us are, frankly, complex and very important. They do not lend themselves to simple answers. An example of this is the Military Commissions Act.

Last year, when Congress passed the law, I argued that the most important task before Congress was to design a system that could withstand legal scrutiny and would be found to be constitutional for that reason.

I proposed that we expedite the ability of the courts to review the constitutionality of various provisions of the bill, which I find to be legally suspect. There are at least seven potential constitutional challenges.

First, it seems clear to me and many others that the act may be unconstitutionally stripping the Federal courts of jurisdiction over habeas cases.

Relatedly, the act may violate the Exceptions Clause under Article III of the Constitution by restricting the Supreme Court's review.

Third, it is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Conventions.

Fourth, provisions regarding coerced testimony may be challenged under our Constitution.

Fifth, the act contains very lenient hearsay rules, which rub up against the right of the accused to confront witnesses.

And sixth, the act may be challenged on equal protection and other constitutional grounds on how it discriminates against the detainees for being aliens.

And last, Article I of the Constitution prohibits *ex post facto* laws, and that is what this act may have created.

Providing for the expedited review of the Supreme Court of these seven issues was, and continues to be, important. If the justices find that the Military Commissions Act includes constitutional infirmities and the government has already secured convictions, it is likely that known terrorists could receive a "get out of jail free" card or have death penalties reversed.

Permitting hardened terrorists to escape jail time because we did not do our full job in Congress to fix the Military Commissions Act would be a travesty of justice.

The bottom line is that we must prosecute those who are terrorists with the full force of the law, but we must also make sure that the convictions stick. Certainty of convictions must go hand-in-hand with tough prosecutions.

And I well know of which I speak, having been a prosecuting attorney a good number of years ago, that the certainty of convictions and that they stand up on appeal is so very important.

This brings me to the future of Guantanamo—an issue on which, if we act with haste, we will do so at our peril. I have no doubt that Guantanamo has become a lightning rod for criticism of American detainee policy and has undermined both our moral authority and our ability to rally necessary support for policies abroad.

Secretary Gates, Secretary Rice, Senator McCain and former Secretary Powell, among many others, reportedly all have pointed to the hole that Guantanamo continues to burn in the international reputation of our country. The morale of our troops overseas and their level of security rely upon how they are perceived in other countries.

There are some in Guantanamo who might well be released or remanded to a home or a third country. Yet there is a core group of hardened terrorists who must be detained, tried, and confined for a long time.

Determining where we will lock up these hard-core detainees over the long run, so as to ensure they cannot return to the battlefield, is the question before us.

Some have proposed maintaining Guantanamo's military supermax prison for these extremely dangerous individuals. Others recommend Federal correctional facilities like the Administrative Maximum facility (ADX) at Florence in Colorado.

This is a hard call, and I look to the witnesses to help inform this committee to grapple with these very difficult issues.

Now I turn to my good friend, our distinguished Ranking Member and former Chairman, Duncan Hunter.

Mr. Hunter.

STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE FROM CALIFORNIA, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. HUNTER. Mr. Chairman, thank you for holding this hearing, and I look forward to discussing this issue with our witnesses.

Mr. Chairman, I think that we got it right when we put this bill together that established what I call the "terrorist tribunals." We went through a great deal of analysis. We interacted with military lawyers, with constitutional scholars, and we put together a bill that enables us to effectively prosecute people in this new war, in this long war.

And I just wanted to say, to put my marker out there, stating that we got it right when we put this thing together. It has now been upheld in several—this military tribunal system has been upheld now in two court decisions, one in the district court and one in the court of appeals, especially with respect to the constitutionality of the law and with respect to the habeas corpus—to the denial of habeas corpus to these terrorists.

There is a second issue here, which is closing down Guantanamo Bay.

And, Mr. Chairman, I think we are going in exactly the wrong direction. It is right to keep Guantanamo open.

There is not a single member of this committee who has not had 10 times the people killed or murdered in their own prisons, in their own states, as have been murdered in Guantanamo. And the reason for that is, no one has been murdered in Guantanamo.

They have unfortunately had a couple of suicides, but there have been no murders in Guantanamo.

Guantanamo has been open to hundreds and hundreds of visits by international visitors, by congressmen and congresswomen from the U.S. House and from the U.S. Senate. And the idea that we are going to close down Guantanamo—because the image, the myth, is that Guantanamo is a bad place—does nothing but confirm the fiction of the bad image. And you have spoken about the image and referred to that several times in your opening statement.

When it is not the truth, do not confirm it, and do not concede it as being the truth, because if we close down Guantanamo and we move these hardened terrorists to these locations that have been offered, which involves dozens of American military communities and dozens of American towns and counties across this country, we do several various dangerous things.

Number one, you arguably give more rights to these terrorists once they are on American soil. And number two, I think there is a real damage and a real danger in bringing in people that know how to make car bombs, who are experts with explosives, and putting them in any proximity with American prisoners and American criminals, who might pick up that capability.

The idea that we are going to take these hardened terrorists, who are very effective in killing people, and move them to communities throughout the United States, I think, is very ill-founded.

So, Mr. Chairman, you know, we put this Military Commissions Act together to ensure that the U.S. was able to detain, interrogate and try terrorists and to do it in a manner that was consistent with the Constitution and the international laws of war.

And, you know, we have had this—it appears to me that the Democrat leadership does not want to take "yes" for an answer. We did not get a bad decision from the Court of Appeals or from the initial D.C. court that ruled on the constitutionality. That was a D.C. circuit court. We did not get a bad decision from them.

The District of Columbia ruled that this act is indeed constitutional with respect to the habeas corpus issue. And that was a major issue that was brought up by a number of Democrat leaders on the House floor.

Not long after that, the D.C. Circuit Court of Appeals held that the act conforms with the Constitution and that the detainees in Guantanamo do not have a constitutional right to habeas corpus.

And I might add that this right to habeas corpus that many would give to these terrorists, including people like Khalid Sheikh Mohammed, who admitted a few days ago to being the mastermind, the main planner, on the attacks on New York on 9/11 and the attacks on the Pentagon and the tragedy in Pennsylvania on 9/11. He admitted to doing that, taking part in killing thousands of Americans.

And the idea that we are stretching to give him more constitutional rights, more rights than American service men and women who wear the uniform of the United States, I think, is going in exactly the wrong direction.

I think these two decisions that we have seen now, with respect to the D.C. Circuit Court and the U.S. District Court for the District of Columbia, have been very encouraging. They validated what we did. They did not say you did it wrong.

And I know lots of people predicted on the House floor, that when we got to the U.S. District Court for the District of Columbia, we would get a bad decision. Well, we did not get a bad decision. We got a decision that said, "Yes, indeed, what you have done is constitutional, and especially with respect to the habeas corpus issue." And then when it went up to the D.C. Circuit Court of Appeals, they did not say Congress messed up. They said, you did it right. And they found that the detainees in Guantanamo do not have a constitutional right to habeas corpus.

And I would note that the procedures that are provided in the Combatant Status Review Tribunal (CSRT) track, they track very, very closely with Army Regulation 190–8 for enemy prisoners of war. And in some ways, they exceed those found in A.R. 190–8.

And I would like to submit that for the record, Mr. Chairman.

The CHAIRMAN. Without objection.

[The information referred to can be found in the Appendix on page 129.]

Mr. HUNTER. So, I caution against this committee and this Congress taking any action amending the MCA, because it will have the effect of delaying or invalidating the commissions that are currently underway.

And let me just end with one simple point.

Our terrorist detainee policy was constructed to address a new type of enemy and a new type of war. We have used the international laws of war and the Uniform Code of Military Justice (UCMJ) as guideposts in crafting this new policy, because fundamentally, it is a war policy.

And moving the detainees from Guantanamo or amending the MCA will have the net effect of holding up the execution of our global war on terror detainee policy.

Now, some folks would like this result. They would prefer to see terrorists tried under the criminal justice system.

And I want to remind you, Mr. Chairman, we brought in a Judge Advocate General (JAG) officer who had tried hundreds of cases. And we asked him if we took the Uniform Code of Military Justice and applied it.

The colonel sat there where Mr. Taft is sitting today, and he said, if we applied that—and I said, "When would Miranda rights attach?" That is the time when you have a right to have a lawyer before you say anything else.

And he said—and I gave him the scenario. I said, "If you had an American soldier in Afghanistan, and he saw somebody shoot at him with an AK–47 and he captured that person and threw him over the hood of a Humvee to search him, when would the rights to Miranda attach, if you went under the UCMJ?"

The JAG officer who testified to us said, they would attach at that point. That means you would have to have lawyers on the battlefield—according to him—to give Miranda rights. In his professional opinion, at that point you would have to give them Miranda rights. So, I am just reminded of his testimony.

And I know, Mr. Chairman, some people say, well, we think that JAG officer was wrong. And I think that shows precisely the problem with trying to attach the UCMJ or use the UCMJ, to go back and use that as the blueprint for this new law.

Now, you know, we tried the terrorists who were responsible for the first World Trade Center bombing. We all know that. We found that the discovery rules of the criminal justice system actually gave the defense access to information under those trials that found their way to the al Qaeda camps in Afghanistan.

Military commissions are crucial, because they are crafted for the conduct of war by providing procedures flexible enough to account for the constraints and conditions of the battlefield. And remember, we have American troops on that battlefield.

So, if we go back to what we had before the first World Trade Center bombing, where under the rules of discovery we found out—and this was undeniable, uncontested—that information that should not have gotten out, under the rules of discovery it got to

defense lawyers. It ended up going back and being taken under the possession of the al Qaeda on the battlefield.

Remember this, Mr. Chairman, we have troops still in those theaters, still fighting. And their safety depends on that information being closely held.

So, the idea that we are going to afford new discovery procedures to terrorists, so that we can feel that somehow we have given them modicum or some shade of constitutional rights, that will accrue to the detriment of the young men and women whose lives on the battlefield today depend largely on security on that kind of information.

So, let me just close with a statement that President Lincoln made when our country faced another daunting challenge. He said this. He said, "The dogmas of the quiet past are inadequate to the stormy present." I think that is very applicable to today. "As our case is new, so we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country." That was Lincoln's second annual message to Congress, December 1, 1862.

Mr. Chairman, let us just remember this. We were attacked on 9/11. We discovered we are in a new type of war. It is a war which often does not know boundary lines between nations. It is a war in which most of our enemies do not wear uniforms. And we had to come up with a new system of prosecution to handle the people that were captured in this new war.

Those people did not wear uniforms. And we found that the UCMJ could not apply to them totally. We also found, as we found with the prosecution of the World Trade Center bombers on the first attack, that you could not give them all the rights that American citizens had.

So we gave them an array of rights. And we went through Nuremberg. And we went through Rwanda. And we went through these other tribunals, and we took a large array of defendants' rights, and we gave them to these people who murdered thousands of Americans—people like Osama bin Laden's bodyguards, who were held at Guantanamo; people like Khalid Sheikh Mohammed, who admitted to participating in the killing of thousands of Americans and said, essentially, "I will do it again, if I get the opportunity."

And the idea that for some wrong-headed notion, some idea that we have to liberalize every single thing that we do in this country, we are going to take a body of law—which now is withstanding court scrutiny and which the courts, these two courts that have ruled on it and said, "Yes, it is constitutional, and, no, they do not have habeas corpus rights," which no American soldiers have—somehow, we feel that we have to do two things.

First, we have to close down Guantanamo, which gives a higher level of health care than most health maintenance organizations (HMOs) in America, which serves a better menu than most American families have on a weekly basis, which interrupts proceedings five times a day to broadcast over public broadcast system the prayer for the prisoners, which allows them to have exercise, which allows them to have games, which allows them to have entertainment, and which, to date, has seen not one single murder of a pris-

oner—and there is not one member of this body, in this committee or in the House of Representatives who can claim that even about their county jails, much less their state prisons, where hundreds of people are murdered on an annual basis.

The idea that we are going to close down Guantanamo, because you have had some complaints about square footage and because you have had all that old footage of the old camp that had concertina wire on top of the walls—the idea that we are going to close that down and confirm the myth that Americans mistreat prisoners is one of the worst things we could do.

I think it is also a disservice to the men and women that wear the uniform of the United States. These people risk their lives capturing these people. We now have been treating them very fairly.

We have put in place a good system of justice—emphasis on justice—cross-examination, right to a lawyer, right not to testify on the stand. All the things that—we gave them everything that they had in the tribunals at Nuremberg and Rwanda and more.

And we find that somehow we second-guess ourselves and say that we have done the wrong thing, and reverse this system—which at least the first two court decisions have validated—is, I think, wrong-headed.

So, Mr. Chairman, do not put me down as undecided on this. I strongly oppose closing Guantanamo. And I strongly oppose opening up this criminal justice system that we labored long and hard. And your staff worked on this and my staff worked on it. We used lots of outside experts. We collaborated with the Senate on this thing.

I think we put together a sound body of law. And I think we owe it to the men and women who risked their lives to capture these people, to go forward with their prosecution. And the way we do that is by not undoing the system at this point.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Mr. HUNTER. And I would like to put my full statement in the record, Mr. Chairman.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Hunter can be found in the Appendix on page 51.]

The CHAIRMAN. I wish to point out to the committee—and you should know this, if you do not already—before we call on our witnesses that on February the 20th, this year, in a three-to-two panel decision—not en banc, but a panel decision—the Federal Court of Appeals for the District of Columbia decided a case known as *Boumediene v. Bush*.

In that case, it was a consolidation of several habeas corpus cases, which had been filed by foreign nationals who had been captured abroad and were being held at Guantanamo.

The appellate court, the panel held that the law that was passed deprived the Federal courts of jurisdiction over habeas corpus, and that Guantanamo detainees had no constitutional right to habeas corpus.

However, the court of appeals did not reach the merits of the detainees' designation as enemy combatants. And by their combatant status review tribunals.

This has been appealed to the United States Supreme Court. Being a country lawyer, I question why it did not go en banc. However, as I understand it, both sides of the case wanted to go straight to the Supreme Court, and it was not necessary to go to the court of appeals en banc, and is now on its way to the Supreme Court.

And, of course, it would be interesting to see that particular decision when it is handed down.

Really appreciate our witnesses coming, a rare group of first-class talent, and we appreciate your doing so.

We call on our friend, Will Taft, first. Secretary Taft.

STATEMENT OF WILLIAM H. TAFT, IV, OF COUNSEL, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, LLP, FORMER LEGAL ADVISOR, DEPARTMENT OF STATE, FORMER DEPUTY SECRETARY OF DEFENSE

Mr. TAFT. Thank you, Mr. Chairman. I am pleased to appear in response to your invitation to discuss the future of the detention facility at Guantanamo Bay and the Military Commissions Act.

As you know, I have testified before the committee many times, but I do not think I have been here since 1988, when I left the Pentagon, almost 20 years ago.

It is good to be back, and I see some faces—I miss some faces that were here then, but I am glad to see at least a few familiar ones, and, of course, many new ones, or if not faces, at least name plates that are new.

Regarding the future of the detention facility at Guantanamo Bay, I understand that most people would like to close it and transfer the persons we have captured in our conflict with al Qaeda and the Taliban regime—who are there—to other facilities.

I share this view.

The facility has acquired a notorious reputation around the world in its continued use as a focal point for criticism of our foreign policy and a drag on our ability to get important things done.

Its notoriety arises, I believe, from two causes.

First, detainees have been abused at the facility, and interrogation methods used there have not complied with our international obligations.

And second, there is an impression that the facility was established in Guantanamo in order to deprive the persons captured of access to our courts and other rights that they would have, if they were being held at a facility in the United States.

Regarding this last point, in my view, persons captured in the conflict with al Qaeda and the Taliban should not be treated differently, because they are in custody at Guantanamo, from the way they would be treated if they were in custody in the United States.

The decision, then, about whether the facility is to be closed should not be based on how this may affect the legal rights of the detainees. It should not affect them.

Political and logistical factors should determine our course. Logistically, I imagine, Guantanamo still has a number of advantages over other options.

It seems doubtful, however, that these outweigh the political costs of continuing its operation. At some point, a brand becomes

so toxic that no amount of Madison Avenue talent can rehabilitate its image.

What the Reverend Jim Jones did for Kool-Aid and the British penal system did for Van Diemen's Land, abuse of the detainees—whether there or at Abu Ghraib or elsewhere—seems to have done for Guantanamo.

My recommendation would be to cut our losses.

Regarding the Military Commissions Act, I have just three points.

First, it was a mistake for Congress to preclude judicial review of the lawfulness of detaining the persons we have captured in the conflict with al Qaeda and the Taliban. As I understand it, convicted detainees may obtain such review after their criminal cases are concluded, but persons who are not charged with crimes do not have access to the courts to challenge their detention.

The benefits of this approach escape me.

The Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban, as long as they pose a threat to the United States. This is black letter law of war.

Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees, nor will they do so, as long as it is shown that the detainee poses a threat.

Currently, this determination is made by the military. Having it endorsed by a court would greatly enhance its credibility and be consistent with our legal tradition. And I have no doubt it would be endorsed by a court—any court.

My two other points relating to the Military Commissions Act concern the rules of evidence in the trials.

I do not think either hearsay evidence or coerced testimony should be used in these trials. The Sixth Amendment establishes a defendant's right to confront witnesses in criminal trials.

Use of hearsay evidence is inconsistent with this right. The hearsay witness is not under oath, on the record or available for cross-examination, so his testimony is presumed automatically to be unreliable.

Coerced testimony is likewise inherently unreliable. Courts normally exclude such testimony, not only because it is unreliable, but also in order to discourage the use of coercion by the authorities. Both rationales are relevant here.

If I thought for a moment that Khalid Sheikh Mohammed or other detainees like him might be released as a result of such changes, I would not recommend them. What Khalid Sheikh Mohammed says he has done to Daniel Pearl and in planning the 9/11 attacks enrages all Americans and all normal people around the world.

But because he is being held consistent with the law of war, he will not be released. And it is very important when we are enraged, when our blood boils, that we most need to adhere to the rule of law and not change it.

And it is in that spirit that I would recommend these changes to the rules of evidence in the act.

Thank you, Mr. Chairman. I am glad to have this opportunity to appear before your committee. I ask that my full statement be included in the record, and I look forward to answering your questions.

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

The CHAIRMAN. Without objection, Mr. Taft's statement will be put in the record, and we thank you for your testimony.

Mr. Philbin, please.

STATEMENT OF PATRICK F. PHILBIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. PHILBIN. Thank you, Mr. Chairman, Ranking Member Hunter and members of the committee, I appreciate the opportunity to address the matters before the committee today.

Both the Military Commissions Act of 2006, or the MCA, and the continued use of the U.S. Naval Base at Guantanamo Bay, Cuba, as a detention facility are exceedingly important issues for the Nation's conduct of the continuing armed conflict with al Qaeda and associated terrorist forces.

In this brief opening statement, I would like to emphasize two points.

First, in the MCA, Congress has already crafted a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in *Hamdan v. Rumsfeld*.

Military commissions are finally poised to proceed more than five years after the President originally issued the order providing for their creation. At this point, changes to the MCA should be made only if they are required either by a compelling legal need to remedy some constitutional infirmity or by an imperative operational need of the military.

In my view, the changes some have proposed are not justified by either necessity. Instead, they would only add confusion to a workable system and further delay the day when military commissions become fully operational.

In particular, there is no constitutional need to provide habeas corpus jurisdiction for petitions from detainees at Guantanamo. Aliens held at Guantanamo Bay have no constitutional right to habeas corpus.

And in any event, the MCA provides an adequate substitute for habeas by providing a review in the United States Court of Appeals for the D.C. Circuit for the decisions of both combatant status review tribunals and military commissions.

That means that both the determination to detain an individual as an enemy combatant and the final decision of any military commission on a war crime charge are subject to review in a civilian Article 3 court.

And I think I disagree with Mr. Taft on this point. My understanding under the law is that, through the CSRT process there is review in the D.C. Circuit Court of Appeals, so that determination to detain is reviewed in an Article 3 court.

Reestablishing habeas jurisdiction at this point would only add a confusing, parallel avenue of judicial review that would sacrifice

the benefits of the orderly procedure Congress has established in the MCA. Moreover, it would do so without providing any additional substantive rights for the detainees.

Habeas provides an avenue for access to the courts, but it does not supply the substantive law for the court to apply. So, reestablishing habeas jurisdiction would just entail a new round of wasteful litigation to determine exactly how the habeas proceedings should fit in with the other review proceedings, and it would not actually provide additional substantive rights to the detainees.

Second, the continued use of Guantanamo Bay undeniably presents a very difficult question for the United States.

There can be no doubt that Guantanamo has become a lightning rod for criticism in the international community, and maintaining good relations with our allies and securing their continuing support, as well as securing the goodwill of other nations more broadly, is an important aspect of winning the conflict with al Qaeda.

When I examine the alternatives, however, I come to the conclusion that Guantanamo remains the only practical facility for its mission, based on three considerations.

First, I believe the government has a duty to the American people to continue to detain those enemy combatants who would pose a threat to the United States if released.

Second, the only alternative to holding enemy combatants at Guantanamo would be bringing them onto U.S. soil. As a practical matter, that would raise a serious security concern for whatever facility was constructed to house the detainees, and for the vicinity—the American community around that facility.

As a legal matter, it would spark a completely new round of litigation, because once the detainees are on U.S. soil, they likely will be held to have constitutional rights. The unprecedented procedures that are provided for the detainees now, I think, may well satisfy those rights, but it would take years of additional litigation to determine that.

Third, and finally, I am concerned that simply moving the detainees to the United States will not achieve one of the primary stated objectives of closing Guantanamo; namely, silencing the course of international criticism and repairing strained relations with foreign partners.

International criticism does not depend primarily on the place where enemy combatants are detained. Instead, at bottom, it rejects the fundamental legal paradigm under which the United States asserts the right to detain individuals as enemy combatants and, hence, without charge, in an armed conflict with al Qaeda.

Unless the United States is prepared to abandon the entire law of war framework governing the conflict with al Qaeda—which I strongly believe it should not do—I fear that simply moving the detainees to the U.S. is likely to accomplish little in appeasing critics in the international community.

Thank you, Mr. Chairman, for the opportunity to address the committee. I would like to have my full written statement submitted for the record, and I would be happy to address any questions the committee may have.

[The prepared statement of Mr. Philbin can be found in the Appendix on page 68.]

The CHAIRMAN. Thank you. Your statement will be put in the record in total, as well as all four witnesses'.

Mr. Katyal. Do I say it right?

Mr. KATYAL. That is perfect.

The CHAIRMAN. Got it.

STATEMENT OF NEAL KATYAL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW SCHOOL, GEORGETOWN UNIVERSITY

Mr. KATYAL. Thank you, Chairman Skelton and Ranking Member Hunter, for inviting me.

I want to begin by thanking the chairman's staff, particularly Ms. Conaton, Ms. Unmacht and Mr. Oostburg. They are models of public servants, e-mailing both sides during the 2005 Detainee Treatment Act (DTA) debates and 2006 MCA debates, frankly, at all hours of the night, just trying to learn about these issues.

On November 28, 2001, I testified in the Senate about the President's then-two-week-old military commission plan. I warned that Congress, not the President, must set them up, or the result would be no convictions and a court decision striking those tribunals down.

One thousand nine hundred and forty-seven days have elapsed since that time. Not a single trial has taken place during that time. No one was even indicted for over two years. And last year, the Supreme Court invalidated that scheme.

I did not come here to gloat. The decision to file the Hamdan lawsuit was the hardest one I have ever faced.

I previously served as national security advisor at the Justice Department, and my academic work extols the idea of the unitary executive, strong President theory. My work in criminal law centers on the need for tough laws to benefit prosecutors.

Yet today, forward-looking members in Congress have foreseen the results of the MCA: a new court decision that strikes this tribunal system down and more legislation driven by reaction, not deliberation.

The committee has asked us here today to help avoid this new round of the same game. Responsibility, not reaction, is required.

I want to make two points.

First, the reported views of Secretaries Gates and Rice that the commission trials be moved to the United States are a crucial first step, perhaps more important than repealing the MCA's habeas text.

Trials are gripping, dramatic, and easy to follow. They are unlike detention, which involves little drama and no grand moment of resolution. The trials at Guantanamo will be watched by the world, and we cannot forget that, in them, our Nation—and not simply the detainees—face judgment.

Yet the Administration clings to the shortsighted theory that Guantanamo is a legal black hole where none of the protections of our great Constitution apply.

This view will corrupt the trials and undermine America's image—what Secretary Taft referred to as the "brand" of America. And these views must be replaced with one that reflects America's traditions and values.

Second, Congress should repeal the MCA and use our proud tradition of courts-martial.

Here, I think, I just want to focus on one point, a basic point, about equality.

When I first met Mr. Hamdan at Guantanamo in 2004, he asked me a simple question. He said, "Why are you doing this? Why are you defending me?" He said to me, "Your last client was Al Gore. What are you doing here?"

And I told him that my parents came here from India with $8 in their pockets, and they chose this land, because they knew they could arrive on our shores and be treated fairly.

There is no nation on earth, I told him, that would treat me, the son of immigrants, and give me the opportunities that I had. I told him I was deeply patriotic for these reasons.

And when I read the President's military trial order, for the first time I felt that vision of America—my parents' vision—was being violated.

Remember our history. We are a land of immigrants. The Declaration of Independence lists as its first self-evident truth that all men are created equal.

This premise is the heart of what Abraham Lincoln did in the Civil War. It is the heart of the Equal Protection Clause, which gives all persons constitutional rights, not simply all citizens.

When you think about the MCA, think about that. For the first time, this body set up a trial system that applies only to the 5 billion people around the world outside the United States and the 12 million green card holders. A United States citizen gets the Cadillac version of justice, the foreigner gets the beat-up Chevy version, a stripped-down Guantanamo trial.

Yet, in all past military commissions in this Nation's history, foreigners and United States citizens were brought before them equally.

As Justice Scalia has warned, the genius of the Equal Protection Clause is that it prevents Congress from ducking hard choices by limiting the rights of the powerless. It is not surprising the MCA was introduced on September 6th and passes this body a short three weeks later—in record time.

It passed not because the act was written by Plato. It passed because the only people the Act affected were the powerless, people who have literally no vote in the process, the five billion people in the world and the 12 million green card holders.

Ultimately, the MCA will be struck down for this and other reasons.

In summary, I ask you to realize the power that lies in your hands, the power to ensure the safety of our troops and the dignity of the values they defend.

I applaud Secretaries Gates and Rice and all others who recognize the only thing worse than making a mistake is failing to correct it when you have the chance.

Thank you.

[The prepared statement of Mr. Katyal can be found in the Appendix on page 97.]

The CHAIRMAN. Thank you. Thank you very much.

Ms. Massimino.

Ms. MASSIMINO. "Massimino."
The CHAIRMAN. Try it again. Did I say it right?
Ms. MASSIMINO. "Massimino."
The CHAIRMAN. Got it.
Ms. MASSIMINO. Thank you, Mr. Chairman.
The CHAIRMAN. Please.

STATEMENT OF ELISA MASSIMINO, DIRECTOR OF THE WASHINGTON, D.C., OFFICE OF HUMAN RIGHTS FIRST

Ms. MASSIMINO. Thank you very much. And thank you for inviting me here today.

These are very difficult issues of great urgency and import for our Nation. And as you noted, Mr. Chairman, in your opening statement, while this hearing is framed as being about Guantanamo and the Military Commissions Act, it is part of a larger debate about U.S. counterterrorism policy.

I strongly agree with that view.

And I believe that many of the missteps that we have made in interrogation policy, in military commissions trials have resulted from a failure to view those issues as part of the broader counterterrorism policy. And that is the main point, really, that I want to bring home today.

The policy of detention, interrogation, and trial, and of terror suspects at Guantanamo, in our view, has been a failure. And it is up to you, to Congress, to fix it.

The decision to hold detainees at Guantanamo in the first place was driven, at least in part, by a desire on the part of the Administration to insulate U.S. actions taken there—detention, interrogation and trials—from judicial scrutiny, and even from the realm of law itself.

Early on, one Administration official, you might recall, called Guantanamo the legal equivalent of outer space.

That goal, to create a law-free zone in which certain people are considered beneath the law, was illegitimate and unworthy of this Nation, and any policy bent on achieving it was bound to fail.

The policy at Guantanamo has failed in several important respects.

First, and most obviously, it has failed as a legal matter. The Supreme Court has rejected the Government's detention, interrogation and trial policies at Guantanamo every time it has examined them, and it likely will do so again.

Of course, I do not need to tell you about—and you have heard about it already today—how many people, including Secretary Gates, Secretary Rice, Secretary Powell, and many, many of the United States' closest allies have urged the closing of Guantanamo.

And of course, while it is important to take into consideration the views of our closest allies, nobody argues that the U.S. ought to change its policy because other countries do not like it.

The questions, the most important questions that you all ought to be asking about the current policy now is, is it smart, is it working, does it serve our overall objective and does it comport with our laws and values. And I would say that Guantanamo fails all of those tests.

The military commissions have failed to hold terrorists accountable for their most serious crimes, as you have heard. And in addition, the view of Guantanamo as a legal black hole led it to become the laboratory for a policy of calculated cruelty that later migrated to Iraq and was revealed to the world in the photographs from Abu Ghraib.

Whatever information was gained through those policies, few dispute now that they aided jihadist recruitment and they did immense damage to the honor of the United States and its reputation—undermining, as Secretary Gates recently argued, the war effort itself.

But perhaps most importantly, from a security perspective, the policy at Guantanamo, which treats terrorists as combatants in a war against the United States, but rejects application of the laws of war, has had the doubly pernicious effects of degrading the laws of war while conferring on suspected terrorists the elevated status of combatants.

By taking the strategic metaphor of war literally, we have unwittingly ceded an operational and rhetorical advantage to al Qaeda, allowing them to project themselves to the world—and to potential recruits and a broader audience in the Middle East—as warriors rather than criminals.

Nothing brought that home more than the transcript that we all read from Khalid Sheikh Mohammed's combatant status review tribunal a couple of weeks ago at Guantanamo.

After ticking off an itemized list of 30-plus crimes that he was involved in and committed, including 9/11 an the hideous murder of Daniel Pearl, he addressed—as if soldier-to-soldier—the Navy captain that was presiding over that proceeding and said, essentially, war is hell and people get killed.

And we, by our policies of treating him as a combatant, has facilitated the ability of him to frame himself in that role and to reinforce the terrorist narrative, that they are in a global war with a mighty power.

And that, I would say, is not only deeply offensive to our military, our men and women serving in uniform, but it is also operationally not smart.

I would recommend to you, if you have not looked at it, the brand-new counterinsurgency manual that was drafted under the supervision of General David Petraeus, which really underscores the fundamental problems with that kind of approach to dealing with an enemy like al Qaeda.

And I think, once we start to view Guantanamo and the military commissions as part of that broader effort to defeat this terrorist enemy, it will help reconceptualize our entire counterterrorism policy. And that is what I would urge this committee to begin to do.

I look forward to answering your questions.

[The prepared statement of Ms. Massimino can be found in the Appendix on page 111.]

The CHAIRMAN. Thank you very much.

Let me ask some rather quick questions.

Mr. Katyal, being a law school professor, you are it for the first question.

In 1942, President Roosevelt established by executive order a tribunal that tried eight German saboteurs, six of whom were given the death penalty. The United States Supreme Court upheld the tribunal. Two received life imprisonment.

I happen to know a little bit about this. One of the two that received life imprisonment was represented by a lawyer from my home town named Colonel Carl Ristine, who did a first class representation of Mr. Dasch in that tribunal.

Can we, if you know, tell tribunal executive order and the initial executive order by this President regarding the present tribunal? If you know.

Mr. KATYAL. Thank you for the question. And Colonel Ristine did a fantastic job. I have read the transcript very closely and studied it.

Now, the difference between those 1942 trials and these ones are quite marked, both in its procedures and in the way they have ultimately unfolded. Those were quick trials that happened right away.

They applied the same rules to foreigners and United States citizens.

This trial system, under the Military Commissions Act, applies a completely different set of rules to one group of people—the five billion people and the 12 million green card holders—than it does to United States citizens.

We have never done that before. We have had military commissions since 1847. They have always applied the same rules to foreigners and American citizens.

The MCA, for the first time, does something different.

When we passed the Equal Protection Clause in 1866, when this body ratified it, one of its objectives was equalizing punishment between aliens and citizens. This Congress passed two laws that implemented the Fourteenth Amendment, that made it a Federal crime to give aliens different punishments than to give Americans.

Yet, the MCA does precisely that. And for that reason, Chairman Skelton, I think the MCA will ultimately fail the test that you laid down last year during the MCA debates, which is, will this system that this body sets up survive the Supreme Court review process ultimately?

And I think the answer is "no." This is a newfangled trial system that enshrines a cardinal discrimination into the laws of this body. And I think it cannot withstand Supreme Court review.

And whenever this case gets to the Supreme Court, whether it is this year or, as the Administration hopes, in 5 or 10 years, it will get struck down, and all these convictions will have to be overturned.

And then where will we be? We will be where we are right now, five years later and counting, with not a single person convicted for these 9/11 attacks in the military commission system.

The CHAIRMAN. Thank you, sir.

The question often put to me—and I will ask each of you your judgment—should Guantanamo facility be shut down, what do you do with the detainees?

Mr. Taft.

Mr. TAFT. Well, sir, I think that the detainees are on their way to being treated and the numbers diminished, even as we speak.

I gather that some 400 or more have already been returned to their countries. There are more going each month.

My guess is that the facilities that are available in the United States could easily accommodate whatever number of detainees remain in Guantanamo.

There are many stockades and brigs available in the country, and I think that they could be used.

It is obviously an important thing to be sure that these people are in secure places. But I have not—I am not familiar with any difficulties that the Army or the Navy have had in keeping people locked up in the United States in their facilities.

The CHAIRMAN. Thank you.

Mr. Philbin.

Mr. PHILBIN. I think that is a difficult question, Mr. Chairman. Where would they go?

From the time that I was in government, it was—you know, it has been considered for many years. Is there an alternative to Guantanamo? And if so, what is it? Where would they go?

And it is my understanding that the military has serious concerns with having enough high security places where they could put over 300 people from Guantanamo. You create a security concern for that facility and for the community around that facility.

No place in the United States is as remote and as secure as Guantanamo.

And in addition, you have the options. You have options of either splitting them up amongst a whole bunch of facilities, in which case you have got to increase the security at all of those facilities, or building some new facility that is secure enough to house all of them.

In addition to that, you have to take into consideration the intelligence mission that goes on at Guantanamo. Guantanamo continues today to receive new detainees.

Just this week someone was transferred who was captured in Kenya, who is considered to have significant operational intelligence about al Qaeda's East African network, was transferred to Guantanamo. There is going to be an intelligence mission there.

And part of the advantage of Guantanamo is that all the detainees are in one spot. So, if, in interrogating one detainee, you get some information that seems relevant to another or that might play into something that someone else has said, interrogators on the team working on that can go back around to the other detainee.

If you have them spread out among different facilities all over the country, that becomes more difficult. Those are operational concerns that I think that the military would be better able to address.

But I think there are a lot of difficulties, a lot of serious problems with where will you put them if they were not at Guantanamo.

Mr. Chairman, if I could, just to add something briefly to your question to Professor Katyal.

In comparing the President's initial, November 13, 2001, order to President Roosevelt's order—just specifically comparing those two—President Bush's order very closely parallels FDR's order. It was, in fact, modeled after it, and intentionally so.

And the initial military commission system then set up actually, because the military supplemented the President's order with Military Commission Order No. 1, and other procedures, provided a great deal more procedures than were provided in the trials for those in Ex parte Quirin.

So, the initial Presidential order was similar, but then there were additional procedures added to it.

The CHAIRMAN. Thank you.

I am not sure who argued the case on behalf of the German convicted saboteurs, whether Colonel Ristine did or not, before the Supreme Court. But it is interesting to note that the Supreme Court very quickly held that to be proper and constitutional.

Mr. Katyal.

Mr. KATYAL. Colonel Royall argued the case on behalf of the saboteurs, Chairman, and it was upheld, precisely because it applied equally to foreigners and United States citizens.

This order—President Bush's order—explicitly deviated from FDR's by only applying it to foreigners.

With respect to what we do with Guantanamo, I would do two things. First, I would move the small number of anticipated trials to the United States.

That is a small number of detainees. Right now it is only three. There are Pentagon projections it might go as high as 80.

Trials are high-visibility events, unlike detention. So, the eyes of the world are going to be watching these trials. And right now they are taking place under a legal theory of the Administration that the Constitution does not apply at all—no part of it—to Guantanamo.

That is one reason why you have so much outrage internationally at what is going on at Guantanamo. Within these trials people may be put to death.

And the idea that the United States is going to put them to death with no constitutional protections at all—literally none—I think, will undermine the image of the United States and undermine our Constitution.

Second, with respect to the larger group of detainees, I think Mr. Philbin raises some very good security points. I still think that a military base may be an appropriate place, but it should be the subject of inquiry by this committee.

Whatever happens, though, I think a national security court is something that this body should consider authorizing. This unites people on both the political left and the right, people like Andrew McCarthy of the *National Review*, people like myself, who are identified more on the Democratic side of the aisle.

And it is a way to try and think through detention issues in the form of a specialized court that hears the cases and evaluates them fairly.

The CHAIRMAN. Ms. Massimino.

Ms. MASSIMINO. Thank you.

Your question about what to do if we were to close Guantanamo is a very important, practical, operational question, and I appreciate it. And there is no question that that is going to be difficult.

As with all of these questions, there is going to have to be a balancing, whether the liabilities of continuing to hold people at Guan-

tanamo outweigh the clear risks, as Mr. Philbin outlined, the security risks and others, of bringing them here.

But the Administration is now working, I think, as hard as it can to convince other governments to take many of the detainees at Guantanamo. As Secretary Taft said, they are trying very hard to unload people.

I think—I believe that U.S. allies, particularly the Europeans, who have called so loudly for the closing of Guantanamo, ought to be doing more to help the U.S. The U.S. may have climbed into this box by itself, but it is the responsibility of all of our allies to help get out of that.

And I think that that would be made easier, were we to bring the remaining detainees from Guantanamo to military installations in the United States.

If we were to do that, I think that would indicate to the Europeans, in particular, that we are not afraid of that, and that the ones that we have determined are no longer of a danger to the United States should be sent elsewhere.

The CHAIRMAN. Thank you.

Before I ask my friend, Mr. Hunter, to ask questions, I remind the committee members that we are under the five-minute rule.

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

Mr. Katyal, you are Mr. Hamdan's lawyer, are you not?

Mr. KATYAL. I am.

Mr. HUNTER. Okay. What new rights will attach to Mr. Hamdan, in your opinion—in your legal opinion—if he is moved to the United States?

Mr. KATYAL. In my opinion, none. That is because I think, ultimately, the Supreme Court will hold, as it has already hinted, that Guantanamo is, for all practical purposes, United States soil.

The relevant test is the Supreme Court's case in 1990, in a case called *Verdugo-Urquidez*, which says that, basically, when you are dealing with territory of the United States in which the United States has absolute control, the fundamental rights of the Constitution apply.

The Supreme Court in 2004, in *Rasul v. Bush*, said that Guantanamo—unlike, say, Iraq or Afghanistan or France or Germany—is a place in which the United States has permanent, total control over the area. And for that reason——

Mr. HUNTER. Okay. So, we have now basically separated these two issues, because you have established by your statement that we are to take it as being a valid representation of rights that attach to Guantanamo versus the United States, that the movement of prisoners from Guantanamo to the United States does not have legal impact on the rights of the defendants.

That is basically what you have said. Is that right?

Mr. KATYAL. What I am saying, the Administration takes a different view right now——

Mr. HUNTER. Well, I understand, but I am just asking you for your position.

Mr. KATYAL. That is right.

Mr. HUNTER. Does anybody else have a different position? Are there any of you think that there is a difference in the rights of

the prisoners, of the detainees, dependent on whether they are located in Guantanamo or the United States?

Anybody have a view on that?

Mr. Philbin.

Mr. PHILBIN. Yes, Mr. Hunter. I disagree with Professor Katyal.

I think that the detainees now at Guantanamo are not on U.S. soil, that the controlling opinion is *Johnson v. Eisentrager* from 1950, which holds that constitutional protections, like those of the Fifth Amendment, do not apply to aliens held outside the United States, so that they do not have those constitutional protections.

Now, as a practical matter, since they have been given, through CSRTs, a procedure——

Mr. HUNTER. Pull that mike a little bit closer to you, so we can hear you a little bit better.

Mr. PHILBIN. As a practical matter, since they have been given procedures through the combatant status review tribunals, that were designed to meet the due process requirements, the Supreme Court plurality in the Hamdi case—*Hamdi v. Rumsfeld*—outlined as what would be necessary to detain a U.S. citizen in the United States as an enemy combatant.

Those procedures have been given to the detainees at GTMO. And they have Article 3 court review with that. And given the procedures in the Military Commissions Act, and the Article 3 court review with that, I am not sure that there would be much practical difference. But they would be able to challenge those, if brought to the United States.

But as a legal matter of their status, they would gain constitutional rights that they do not have now.

Mr. HUNTER. So, in your opinion, they would have new rights as a result of being located here, rather than being located there.

Mr. PHILBIN. Yes.

Mr. HUNTER. That is the essence of your testimony.

Mr. PHILBIN. Yes.

Mr. HUNTER. We are discussing, really, whether or not this new body of law that we have created is going to make it, all the way up through review that includes going up to the U.S. Supreme Court.

That is largely going to depend on the array of rights that we have granted, as we deliberated and wrote and wrote this bill and put it together, along with our counterparts in the Senate, whether we gave an adequate array of rights to the defendants.

For practical purposes, fairness is manifested in the rights that you give to the individuals who are tried.

Now, I have got the rights that are given to Khalid Sheikh Mohammed, and all of the other prisoners.

And I want to go over them: right to counsel; right to an impartial judge; presumption of innocence; standard of proof beyond a reasonable doubt; right to be informed of the charges as soon as practicable; right to service of charges sufficiently in advance of trial; right to reasonable continuances; right to preempt or rechallenge against members of the commission, and challenges for cause against members of the commission and the military judge; witness must testify under oath; judges, counsel, and members of military commission must take oath; right to enter a plea of not guilty;

right to obtain witnesses and other evidence; right to exculpatory evidence as soon as practicable; right to be present at all proceedings with the exception of certain classified evidence involving national security, preservation or safety, or preventing disruption of proceedings; right to public trial, except for national security issues or physical safety issues; right to have any findings or sentences announced as soon as determined; right against compulsory self-incrimination; right against double jeopardy; right to the defense of lack of mental responsibility; voting by members of the military commission by secret written ballot; prohibitions against unlawful command influence toward members of the commission counsel or military judges; two-thirds vote of members required for conviction; three-quarters vote required for sentences of life over 10 years; unanimous verdict required for death penalty; verbatim, authenticated record of trial; cruel or unusual punishments prohibited; treatment and discipline during confinement the same as afforded to prisoners in U.S. domestic courts; right to review a full factual record by convening authority; and right to at least two appeals, including to a federal, Article 3 appellate court.

I want to ask each of you, and let us start with Mr. Katyal, what rights in this array of rights that we have given to Khalid Sheikh Mohammed—who has now said that he, in fact did participate in putting together the plan that killed thousands of Americans—which rights would you give him in addition to the rights that he now has?

Because that is the body of this law, not some generalized discussion about vague statements about Guantanamo or about whether the United States has made mistakes in terms of the legal standing for the body of law that was put together in violation of Geneva Article 3, which required participation by Congress, basically, arguments that go to the structure of the law and the way the Administration acted without Congress' participation.

This is the bundle of rights that every single defendant has.

Which rights, above and beyond these, would you give to the defendants, substantive rights?

Mr. Katyal.

Mr. KATYAL. Representative Hunter, I appreciate the excellent question. And I would say three things.

First, the list that you just read is the same list that the Administration read about its November 13, 2001, order, that many of us warned would get struck down by the courts.

It is not simply the rights that are written on the paper; it is the fundamental way those rights are enforced.

And here, the Administration says the Constitution does not protect the detainees at all. And if that is true, none of the laundry list of rights you have read actually give the detainees any right in court that enforces all of the things that you read.

Mr. HUNTER. Actually, Mr. Katyal, there is a difference with respect to the classification of the classified evidence to which the defendant has a right to review. Evidence upon which he is convicted, he does have a right to be present——

Mr. KATYAL. He now cannot be kicked out of the trial. That is one——

Mr. HUNTER. That is a change in what the Administration has——

Mr. KATYAL. Absolutely. And it is a wonderful change. And I think many appreciate it, that——

Mr. HUNTER. So, which substantive rights, again, do you think that the prisoners should have—the defendants should have—that I did not read here? Rather than simply say, this is what has gone before.

Mr. KATYAL. I think it should——

Mr. HUNTER. And Mr. Katyal, this has gone before, not only—I mean, basic rights like the right to counsel, the right to the presumption of innocence—those are not things that are unique to the Administration's proposal. Those are rights that are embodied in legal systems around the world, as you know.

And also, a number of them were manifested in Nuremberg, Rwanda, and other military proceedings.

Mr. KATYAL. Absolutely.

Mr. HUNTER. So, if there are substantive rights that you think that your defendant should have that are not on this list, I want to know what they are. I think that is a reasonable question.

Mr. KATYAL. Absolutely. It is a great question.

It is not the rights that—or it is not what the paper says about the rights. It is how they are enforced and implemented. And let me give you one example, Representative Hunter.

You pointed out in your list the right to obtain exculpatory evidence. That is——

Mr. HUNTER. Okay. But let me stop you for one minute. I want to hear that. If you are saying these rights are not enforced, now that is a second answer.

The first thing I want you to do is to presume that the rights that I just listed are enforceable—are, in fact, enforceable and are defendants' rights. Are there other substantive defendants' rights that are not on here?

Mr. KATYAL. Yes.

Mr. HUNTER. For example, maybe saying I think that they should be—there should be a unanimous verdict for a conviction.

Mr. KATYAL. Yes. The most important——

Mr. HUNTER. Okay. What I want to hear is the substantive rights.

Mr. KATYAL. The most important substantive rights that are not on there are the right of equality—same treatment for citizens and aliens, which would mean court-martial systems, which would mean a procedure that we know enforces the rights, as opposed to a newfangled one, which we do not know is going to actually enforce the rights in practice.

Another one. The list you had does not provide a right against evidence taken under coercion, which, you know, the American courts, the Supreme Court has said, is absolutely essential to the fairness of any military tribunal system.

But here is the fundamental point——

Mr. HUNTER. Okay. So, you have got two—hold on a second. This is a careful procedure. Let us walk down this.

You say, first——

The CHAIRMAN. Just a minute. Let the gentleman answer.

Are you through answering the full question?

Mr. HUNTER. Well, I know. But I want to make sure that we lay this out in an orderly way.

You have got court-martial procedures. So you think under the UCMJ—is that what you are saying?

Mr. KATYAL. That is right.

Mr. HUNTER. The UCMJ system should have been followed. And second, you think that evidence that is taken under coercion should be excluded.

Mr. KATYAL. That is correct.

Mr. HUNTER. Okay.

Mr. KATYAL. And then, my fundamental point, Representative Hunter, is this. If you are convinced that these trials are fair, that is all the more reason to bring them to the United States and have the type of orderly review that this Nation has always had, up to the Supreme Court.

Let us test that. Let us see if these things are really fair.

Let us not have these trials in a place which the Administration says is a legal black hole in which people are going to be convicted and these convictions are ultimately going to have to be undone.

Mr. HUNTER. Okay, Mr. Katyal.

Let me ask—let the other folks ask—are there any of the array of rights that I read—and I am going to give you each a copy of those. We have one—I see one substantive right; that is that evidence under coercion should be excluded. That is Mr. Katyal's recommendation.

Ms. Massimino.

Ms. MASSIMINO. Yes.

Mr. HUNTER. Have I got it right?

Ms. MASSIMINO. Yes, you do.

Mr. HUNTER. What other substantive rights would you give the defendants?

Ms. MASSIMINO. Well, I would put the one that we just discussed, that you just discussed with Mr. Katyal at the top of the list. And that is the introduction of evidence based on coercion.

I think that that alone risks undermining the fairness of the trial, even if you do not look at all of these other issues.

In a fair trial, Khalid Sheikh Mohammed would have a very difficult time raising a defense. But we are giving him a defense——

Mr. HUNTER. Now let me remind you——

Ms. MASSIMINO [continuing]. After we fixed that problem.

Mr. HUNTER. I believe—and we had the rights that attached at Nuremberg—I believe that that was not an exclusion at Nuremberg. Now, if that was, correct me.

So, you are saying that these people should have at least, in that case, more rights than attached at Nuremberg.

And I believe that they—I do not believe that that right, the exclusion of evidence that was derived under coercion, attached at Rwanda.

So, you are saying, if, in fact that is the case, they should have additional rights beyond what those folks had in those two military tribunals.

Ms. MASSIMINO. I am saying that, yes. And I think that our own understanding of the fundamental due process rights that adhere

in a fair system has evolved, and it clearly includes that right today.

Mr. HUNTER. Okay.

Mr. Philbin. What additional rights would you give beyond that array of rights that I just read?

Mr. PHILBIN. I would not add additional rights. But could I make two comments on what the other panelists have suggested?

Mr. HUNTER. Well, sure, just—yes, sir, quickly. And then we will move on to Mr. Taft.

Mr. PHILBIN. Yes, sir.

Professor Katyal has, at a number of points, suggested that there must be equal protection, that the Equal Protection Clause here requires that citizens and aliens be treated the same.

And I do not think that that is a serious constitutional issue here.

The Supreme Court has always allowed the Federal Government to make distinctions between citizens and aliens, particularly nonresident aliens—we are not talking about resident aliens here—and has not applied it to strict scrutiny.

And the Supreme Court has said specifically, any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

And similarly, in the Eisentrager case, the Court made clear that there was a distinction between citizens and aliens that was particularly important in wartime.

And in terms of evidence obtained by court—and I believe you are correct, Representative Hunter, that in Rwanda and the International Criminal Tribunal for Rwanda and for Yugoslavia, the way the issue of coercion is dealt with is that, hearsay evidence may be admitted, but there is then some probe into the reliability of it, which is a similar standard to what is in the MCA today, that there is a probe into whether or not evidence is reliable.

Mr. HUNTER. Mr. Chairman, I understand we have got very little time left for this vote. If we could break here.

I think this is a really critical question, because this goes to the heart of what we wrote——

The CHAIRMAN. The gentleman will be able to resume his questions when we get back.

[Recess.]

The CHAIRMAN. I thank the witnesses for resuming, for staying at the table.

Mr. Hunter had to break as we went over to vote.

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

And, Mr. Chairman, I would ask for unanimous consent just to distribute the list of rights that are derived from the tribunal legislation that this body passed and that is now the law.

The CHAIRMAN. Yes, without objection.

May I make an inquiry? Let me ask inquiry as to where this was derived from?

Mr. HUNTER. Derived from our legislation. This is the right to counsel, right to impartial judge, et cetera.

The CHAIRMAN. Thank you. You bet.

Mr. HUNTER. Let me continue. My question simply was, of this array of rights that I read off, which of them—what additional rights would you give to the accused terrorists, including people like Khalid Sheikh Mohammed, that are not in the law that we passed?

And Mr. Katyal said that he would also add the exclusion of evidence that is obtained under coercion. Ms. Massimino said also she would add that right to exclude evidence obtained under coercion.

And I might note that the only way that evidence obtained under coercion can be introduced is if the judge finds—and I am looking at the statute—one, the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and, two, the interests of justice would best be served by admission of the statement into evidence.

And that that is an exclusion that you are asking for, under my understanding, did not attach to the defendants at the Nuremberg trials, nor did it attach to the Rwanda trials.

And I would now ask Mr. Taft if there are any additional rights, substantive rights for the accused that you would add to this list of rights that we gave him.

Mr. TAFT. Well, Mr. Hunter, the two points that I mentioned in my testimony are the only things that I would——

Mr. HUNTER. Bring that mike a little closer, sir, if you could.

Mr. TAFT. The two points that I mentioned in my testimony are the only ones that I would bring in.

I do think that coerced testimony should not be admitted, even in the circumstances that you have—the finding that you said, just described. And I would——

Mr. HUNTER. Okay. Well, let me just ask one question on that, because I——

Mr. TAFT. Could I just finish the second one?

Mr. HUNTER. That is a common point. I will let you make your second one, but since that is a common point——

Mr. TAFT. Thank you. It is just the hearsay. I would also exclude hearsay.

Mr. HUNTER. Okay. You would exclude hearsay. And hearsay was not excluded at the Nuremberg trials, nor was it excluded in Rwanda.

But let me just say that one of the testimonies that was given to us as we very carefully put this legislation together, with respect to the potential exclusion of any coerced testimony, one of our JAG officers testified to us, in essence, he said, any time you capture somebody at the point of a gun, and you have got a loaded gun pointed at them, and they make statements, there is always an element of coercion that attends that.

And he said, if you flatly exclude any evidence that is excluded under coercion, you have an argument with respect to any statement at all that is made on the battlefield, because battlefield statements are always extracted, generally by somebody who is at the other end of a loaded weapon.

And so, once again, I would offer that that evidence is excluded, unless a judge makes the two findings that we put in as conditions upon which that evidence can be admitted.

And so, let me ask another follow-up on this.

You stated—you have all stated, except for Mr. Philbin—that Guantanamo should be closed or people should be moved from Guantanamo.

Now, my understanding is that not a single person has been murdered at Guantanamo. And yet, there is nobody sitting in this hearing today, nor is there a single Member of Congress who can say that about the prisons in their respective states.

There is not a major prison in this country which has not been the site of murders.

So, Mr. Taft, do you think, in light of that, that we should close down domestic prisons when murders occur in those prisons on the basis that they have been given a stigma or have been given a bad image, and that that detracts from the world view of America?

Mr. TAFT. No——

Mr. HUNTER. Do you think we should close down domestic prisons, if murders occur in domestic prisons?

Mr. TAFT. No, sir.

Mr. HUNTER. Mr. Philbin.

Mr. PHILBIN. No, sir.

Mr. HUNTER. Mr. Katyal.

Mr. KATYAL. No, sir. And I would add that, if the best we can say about Guantanamo is that no murders occurred there, that strikes me as not the most important thing.

We are in a war on terror, and our reputation and our values are how we win this war on terror.

Mr. HUNTER. Okay.

Mr. Katyal, let me ask you this question, then, since you have stated that that is not the full picture, in essence.

If you have looked over—and I am sure you have—the health care that is delivered to the people in Guantanamo, which appears to me, and by testimony of our doctors who were there, that it is really a higher quality than many HMOs and Americans receive.

The average prisoner has gained something over six pounds in weight since he has been there, that the medical care is good.

The diet—in fact, when we went down on our bipartisan congressional delegation (CODEL), we ate the same menu that the prisoners had. As I recall, on one Friday it was honey-glazed chicken. It was lemon fish for Saturday, served with rice pilaf. It is quite an attractive menu, if that is attractive.

If we are paying for prayer rugs, if we interrupt the daily routine five times a day to give prayer call for all the prisoners over the loud speakers.

When we left they were—they had a soccer game going on when our CODEL left.

What additional things do you think we should give those prisoners, in any setting, that they are not receiving?

Mr. KATYAL. Again, a great question. And there are undoubtedly great stories about treatment at Guantanamo, about the food, about guards who care for the detainees, and the like.

There are also bad stories about what happens at Guantanamo, whether it be——

Mr. HUNTER. Well, Mr. Katyal, I want your opinion, based on defects that you see. Do not accept my statement as a fact.

Do you see a—is there anything else that you would give those people right now that they do not have?

Mr. KATYAL. Let me point to one from my own experience.

Mr. Hamdan was put in solitary isolation, did not see another human being for 10 months. Our own CIA manuals say, if you put someone in solitary isolation for three days, it causes permanent psychological damage.

Yet, we want to try these people after they have been put through that long period of isolation. That strikes me as a dangerous strategy.

What I would say, Mr. Hunter, is that, Representative Hunter——

Mr. HUNTER. Okay, so isolation——

Mr. KATYAL. Yes, so what I——

Mr. HUNTER. Isolation is a substantive—you think we have isolated some people too long, and that that is a condition you would change.

Although my understanding is that nobody there right now is isolated beyond very short periods of time.

Mr. KATYAL. I believe that is inaccurate, and that camp six effectively amounts to a solitary isolation facility, which houses dozens of detainees.

But, again, I do not know exactly the details——

Mr. HUNTER. Okay. But let us put you down as saying isolation is a condition you would change.

Mr. KATYAL. And then——

Mr. HUNTER. What else?

Mr. KATYAL [continuing]. I think the most important thing is the trials—not the detention, but the trials—because that is what the world is watching. And the trials have to take place under a regime of fairness, with review that we know will survive the Supreme Court's test——

Mr. HUNTER. Okay, key question. And, Mr. Chairman, I will then move on—but this is a complicated area. We devoted hundreds of hours, and therefore, the consideration of reviewing this record—and what we did has to be very carefully looked at.

You said the fairness of trials, and that has been used interchangeably with moving the site from Guantanamo to the U.S.

Why can't you have just as fair a trial at one site? Because fairness in trials is manifested in rights and the application of rights.

Why can't you have just as fair a trial inside a building in Guantanamo as you have inside a building somewhere else in the world?

Mr. KATYAL. Because the trials that take place at Guantanamo take place against the Government's argument that the Constitution does not constrain what they do.

Again, Representative Hunter, it is not the rights on the piece of paper; it is the way the rights are enforced.

So, for example, on that piece of paper you read, it said there is a right to exculpatory evidence. That is the same right that was there in the last military commission system.

And what happened? There were front page stories in the *New York Times* and the *Wall Street Journal*, that the military commission prosecutors protested the system, because it was not turning over exculpatory evidence for the defense.

Mr. HUNTER. What does that have to do with the location, in which building the trial is held?

Mr. KATYAL. Because if——

Mr. HUNTER. Why would in one building you would not get exculpatory evidence, in another building you would have it?

Mr. KATYAL. Because if it takes place in America, the Administration cannot cling to its wrong argument——

Mr. HUNTER. Mr. Katyal, you have just contradicted yourself, because you told me, your first answer to the question was, there were no substantive rights that were changed as a result in the difference in sites between Guantanamo and America.

Now you tell me you must have them in America, because there are new rights that attach.

Now, which one is it?

Mr. KATYAL. With all due respect, it is not a contradiction. It is the same argument. That is, if the trials take place now at Guantanamo, they will take place with no constitutional rights. That is what the Administration is saying.

That will get struck down by the Supreme Court, and we will be left years from now with no convictions.

I am saying, Representative Hunter, move them to the United States where it is undoubtedly the case, and the Administration cannot cling to its bad argument that no constitutional rights apply. And then you will see the discovery process unfold more fairly. You will see the rights given mirror those of our courts-martial system.

And I think the world will be on notice that America does justice fairly and proudly.

Mr. HUNTER. Okay. Ms. Massimino.

Ms. MASSIMINO. Yes. I have to——

Mr. HUNTER. What are your thoughts here?

Ms. MASSIMINO. I have to admit that I am a little confused by your framing of the question about the safety of the prisoners at Guantanamo. I do not hear anyone arguing that Guantanamo ought to be closed because it is unsafe for the prisoners.

Now, Human Rights First, my organization, has not been permitted to go to Guantanamo for the purpose of a fact-finding mission about the treatment of the prisoners. We go down to observe the military commissions trial.

But we are not arguing, and we have not argued that it should be closed because it is unsafe for the prisoners, because they might be murdered there. But——

Mr. HUNTER. Well, are they inhospitable?

Ms. MASSIMINO. Excuse me, but——

Mr. HUNTER. Let me just address that, since you asked that—you made that point. My point is that, if there is a reason to close down a prison, it is because people are murdered in the prison. The first thing you go to is murder. And the point is, every single prison in the United States has had murders occur in it. Guantanamo has never had a murder occur in it.

So, if you go on the basis that severe acts—that is, murder—occurring to the inmates justify closure, we would justify closure of every prison in America before we closed Guantanamo, because nobody has been murdered in Guantanamo.

Ms. MASSIMINO. That is a straw—with respect, that is a straw man. No one is making that argument. And that is not——

Mr. HUNTER. Well, then, how about the treatment?

Ms. MASSIMINO. And that is not the sole reason why we—the only consideration that ought to be—that you all ought to be thinking about when you decide where we ought to hold these prisoners——

Mr. HUNTER. How about the treatment of the prisoners?

Ms. MASSIMINO. Well, as I say, we have not been able to go there to make any kind of independent judgment. But I will say that people who have, including Secretary Gates, has said that the trials there will never be viewed as fair by the rest of the world.

Now, that is a very sad fact, but it is a fact. And we have to grapple with that.

When the government originally argued that Guantanamo was the legal equivalent of outer space—now, thankfully, because of our courts and this Congress, that is no longer really true.

But the rest of the world believes that. And unfortunately, they always will.

Now, you know, we have not been clamoring for years that Guantanamo be closed, frankly, because for us, as Will Taft said, it is more important how they are treated and the legal system under which they are judged, than whether they are 90 miles south of the United States or they are here.

But you must consider, I would submit, whether the liabilities of continuing to hold people there under the system that we have constructed, outweigh the benefits.

Now, there are clearly some benefits, as you have heard. But there are serious liabilities. And people much more close to the national security interests of the United States than I am have made that judgment and are making that argument.

And I would submit to you, that when you think about Guantanamo, and the Military Commissions Act in particular, until you start to consider that those issues must be addressed in the context of a broader strategy to defeat al Qaeda, then we will continue to make these kind of shortsighted mistakes.

Mr. HUNTER. Okay.

Mr. Chairman, thank you for that time.

I would just recount that, with respect to going through this large array of defendants' rights, the basic defendants' rights in any trial—there were precisely two recommendations that were made for expansion of those substantive rights.

And no one gave a condition, a living condition, that they would change in Guantanamo, except Mr. Katyal said that he thought that isolation was, in and of itself, an inappropriate aspect of incarceration.

But with respect to the food, with respect to the medical treatment, with respect to the prayer call, with respect to the exercise, no one had a complaint.

Ms. MASSIMINO. Excuse me.

Mr. HUNTER. And, Mr. Chairman, I think that closing down a base to fulfill a myth, which is that we brutalize people at Guantanamo, only confirms the myth. It certainly does not alleviate those who would criticize our country.

The CHAIRMAN. I thank the gentleman.

Dr. Snyder, please.

Dr. SNYDER. Thank you, Mr. Chairman.

We have been here an hour and 50 minutes, and so you finally get to look at a different face than our chairman and ranking member.

We have a policy here of what we call "questions for the record", in which sometimes something comes up that you may not know the answer and that we give you a chance to submit it in written form.

Mr. Chairman. Mr. Chairman.

What I want to do is—my question for the record is—I think every one of you have been interrupted multiple times in your answers so far today, and these are very complex questions.

If, after this hearing is over, on review you believe that you would like to provide either more complete answers to any questions you have been asked by any member or amplify on anything that has come up, please submit your statements and as a response to my question for the record that you have that opportunity to do that.

The CHAIRMAN. Without objection.

Dr. SNYDER. The posture we are in as a committee in the Congress is that the President——

Mr. HUNTER. Mr. Chairman, just reserving the right to object, I just want to comment on that.

I would just say to my friend that we have gone—it is important when you have a limited amount of time in a hearing, we all have our statements and our positions that we want to take, and that is absolutely appropriate with respect to our witnesses.

But there are several key facts that we have the right to explore. And so, when I ask the question, what additional rights would you give, above and beyond the ones that I read, it was important to get an answer to that. And that is why I asked the witnesses to, along with the rest of their statements, answer those questions, and they did.

So, I would just say to my friend——

The CHAIRMAN. It has occurred——

Mr. HUNTER [continuing]. That I did not intend to cut anybody off, and I want to see, if you have reams of paper in explanations that you want to give with respect to your answers, let us do it.

But I thought it was important, because the rights that we put together and the deliberation that we undertook built this bill, this body of law, that we are now using.

And the substantive rights that accrue to those defendants under this body of law are the key to whether a reviewing court is going to uphold this law in the future. That is why those questions were critical.

With respect to Guantanamo, the condition and treatment of the prisoners is everything. And so, while world opinion may be an important thing, the actual treatment of the prisoners, and whether

or not prisoners have been murdered, is absolutely crucial to this question of whether we should close down Guantanamo.

So, I thank my friend, but I think it was important to get those answers on the record, and I would be happy to agree with him that, if they have extended answers, that is absolutely fine with this member.

And I would withdraw my objection.

The CHAIRMAN. I was about to say, doesn't it constitute an objection? But we will see.

Dr. Snyder, your time will be adjusted.

Dr. SNYDER. Mr. Chairman, in response to this discussion, it is a matter of the rules of this committee that I can ask a question for the record. No member has the right to object to any question I ask for the record.

So this discussion about, in which you said, without objection, and Mr. Hunter reserved the right to object, that is not the way the rules are.

I have a right to ask a question for the record. I have done that, and I look forward to any response or——

The CHAIRMAN. You certainly do, and let me tell the gentleman that he withdrew his objection. And I also understood that it was not a proper objection.

Dr. SNYDER. Thank you.

One of the issues that has come up is—what I started to say is, in leaving this question, I find this very complex. And I guess that is the nature of the topic, as Mr. Hunter's discussion brought out.

We are in a posture where the President made a decision to do the Guantanamo facility. There have been no legislative restrictions placed on that.

He has the authority at this time to continue it. He has authority to move the prisoners, as he has done. He has authority to shut the thing down tomorrow and move everyone.

Apparently, there has been a very, very vigorous debate within the Administration about what they want to do. But there has not been any restrictions put on that.

In our subcommittee a couple of weeks ago, a Military Personnel Subcommittee, we did our wounded warriors bill, and there was an amendment that went to a vote—unfortunately it was a party line vote, and it was, I think fortunately, voted down—in which the basic language would be, if Guantanamo were to be shut down, that none of those enemy combatants could be located anywhere within 50 miles of a military medical treatment facility.

Well, that brings—Mr. Philbin, your point is a great one—security has got to be the number one issue. I always thought the most secure place for these people would be on a military base. All bases have military treatment facilities.

So it means they could be on no military base in the United States. We then put ourselves in the position of contracting out with a state facility, trying to find room on another Federal facility, building something out on state land.

So, my specific question is with regard to this geography determining rights.

If the amendment that was proposed by one of my Republican colleagues were to be law and we could not place these people on

military bases, because they would be in proximity to a military treatment facility, and we ended up putting them not on Federal property, then do we have any issues with regard to any state rights that would complicate this matter further?

Two weeks ago I would have thought this was completely hypothetical until my colleagues presented this amendment.

Mr. PHILBIN. I am not sure I know the answer to that legally. I would assume that, even if not on a military base, that they would be located on Federal property.

Dr. SNYDER. I thought so, too, until this discussion. You could easily see that being farmed out to—the state of Arkansas has 20 empty beds. We will pay you to incarcerate these folks.

Mr. PHILBIN. And I have to caveat this. I am not really sure. But I think that the Bureau of Prisons has contracts with states' facilities all the time to house prisoners. That is the nearest analogy I can think of.

I do not think that that creates additional complications, additional rights, because they are contracted in a way that they are still in Federal custody. So, it does not give them different rights arising from state law that they would have—other than the rights they have as Federal prisoners in a Federal facility.

Dr. SNYDER. It is still not clear to me, this issue that the geography of being on the federal, clearly U.S.-controlled property at Guantanamo versus in the United States.

Mr. Philbin, you think it is settled law about what kind of rights they have.

Are all three of our legal experts—or, Ms. Massimino, you are a lawyer. Are you an attorney also?

Ms. MASSIMINO. Yes, sir.

Dr. SNYDER. Oh, all are. Are you all in agreement with that proposal? I mean, does the geography change the rights when they come to the United States?

Mr. PHILBIN. Well, if I could give a brief answer first.

I think that it is settled law that aliens outside the United States do not have rights under the Constitution. And other members of the panel can object or disagree. But I do not think——

Dr. SNYDER. On federal-controlled property.

Mr. PHILBIN. Well, but then, I think that is where the disagreement on this panel will come, that Professor Katyal will suggest that there are indications in recent Supreme Court decisions and a footnote into the *Rasul* decision and in a concurring opinion by Justice Kennedy in Verdugo-Urquidez and a concurring opinion by Justice Kennedy in Rasul, that the absolute control, the jurisdiction and control over the physical land at Guantanamo that the U.S. has makes it different, and that it should be treated just as if it were U.S. soil for purposes of the extension of constitutional rights.

I disagree with that. I mean, there is a footnote there in the Rasul opinion. It is just a footnote. It is not a holding yet.

I believe the current law is that, as held recently by the U.S. Court of Appeals for the D.C. Circuit, that Guantanamo is outside the United States. It is not United States territory.

As a result, U.S. constitutional rights do not extend to aliens there.

And one would have to consider that, if it were true that just jurisdiction and control means that constitutional rights extend to a place, occupied Germany was occupied for years. The Landsberg prison where prisoners were held in the *Eisentrager* case was controlled by the United States.

The U.S. sector in Berlin was controlled for decades by the United States. And whether or not just control over a place for an extended period of time means the constitutional rights extend there is a very dicey issue. And——

Dr. SNYDER. Mr. Philbin, my time has long expired, but thank you for your answer.

The CHAIRMAN. Thank the gentleman.

Going down the list, before the gavel, Mr. Johnson of Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Sanchez, thank you.

Mr. JOHNSON. What evidence, Mr. Philbin—well, let me ask the question this way.

The CHAIRMAN. Would the gentleman suspend? I apologize. I misread the list. It is Ms. Sanchez before the gentleman from Georgia.

The gentlelady from California is recognized.

Ms. SANCHEZ. Thank you, Mr. Chairman.

And thank you, all of you, for being before us today.

As the chairman knows, I have been very interested in this topic, probably even before most of the members of this committee.

I believe that the Supreme Court will uphold the MCA. And I do believe that aliens outside the United States do not have U.S. constitutional rights for some very good reasons. I think the Supreme Court will not extend the reach of our Constitution to the four corners of the globe.

The Constitution is our national law. Outside the territory, international law applies.

And I think it would be very poor on their part to extend constitutional rights to people detained, for example, for war reasons elsewhere, like in Iraq. I mean, what are we going to do, let Iraqis bring equal protection claims in U.S. courts?

I really think the idea is so ludicrous, it is almost self-refuting. So, I would begin with the process that there is a reason why we have these detainees in Guantanamo rather than here in the United States.

I have some questions for Mr. Katyal. Is that how you pronounce it?

Mr. KATYAL. That is fine.

Ms. SANCHEZ. I have a number of concerns about trying cases by courts-martial, because I believe that the MCA looks like and functions like the court-martial, but it is not. And we determined, when we passed that law, that military commissions would have a legitimate place in U.S. military law, and that would be an alternative for trying alien, unlawful, enemy combatants.

And I would also point out that MCA authorizes the use of military commissions, but it does not require their use in war crime cases. In fact, if the President wanted to, he could still direct that Hamdan, Hicks, or other detainees be tried by courts-martial instead of military commissions.

But since you are such an advocate of courts-martial, the MCA expands the kinds of offenses that may be tried by military commissions to include certain offenses that are not traditional war crimes, but are still offenses that should be available, I believe, to the prosecution of international terrorism.

For example, crimes of hijacking, material support to terrorism, and even conspiracy are arguably not war crimes per se.

Do you believe that such crimes could legally be tried by courts-martial under the UCMJ today? Because, if we were to use courts-martial for these trials, we would have to give up the possibility of charging your clients with these kinds of terrorism offenses. Isn't that right?

These offenses can be tried by the military commissions under the MCA.

Mr. KATYAL. A terrific question, Representative Sanchez.

First of all, I do not think that the MCA can both look like a court-martial and not be a court-martial at the same time. It is one or the other.

And my view is that it should be a court-martial, these trials should be courts-martial, to signal to the world and comply with our Geneva Convention obligations, regular courts with offenses defined ahead of time, not before.

The crimes you mention—crimes like hijacking and conspiracy—were added in October of last year. And we cannot turn back the clock and apply them to people who have already committed their acts. After all, that is what the Article 1, Section 9 *ex post facto* prohibition is all about.

Of course, those crimes that you mention are crimes at least in the civilian code, if not in the military code, as well.

But let me point out two fundamental defects between—for the reason why courts-martial do not—why the MCA does not look like a court-martial. One is expedited review. Representative Skelton's opening remarks about how a court-martial—we know the system is fair. It has been upheld by the Supreme Court time and time again.

This is a newfangled system operating in what the Administration calls a legal black hole.

Ms. SANCHEZ. Reclaiming my time for a moment.

If we were worried about every time we make a new law and there was not case law for it, then we would never make new laws. If we were worried about every time we tried a person that we were going on new ground, then we would never make a new system.

So, I think that that is neither here nor there.

Mr. KATYAL. What I am saying——

Ms. SANCHEZ. The Supreme Court will decide.

Mr. KATYAL. And what I am saying, Representative Sanchez, is that it is not just that it is a new law. There is law that is fundamentally against what the MCA is all about. And the arguments that you would advance, the arguments Representative Skelton has advanced, are the same arguments we have heard for five years.

Johnson v. Eisentrager is going to uphold this military commission system. We do not have to give Geneva Convention protection. We do not have to give habeas——

Ms. SANCHEZ. No. Again, reclaiming my time, that is not the case.

In fact, I argued to the former chairman, now the ranking member, and to the chairman during the year, that I thought the Supreme Court would come back and tell the Congress, "You are in charge of writing the rules for these military commissions, or whatever it is you decide to do, not the President."

But I believe that we had a very thorough process in doing this. And I do believe the Congress had that right and it was their responsibility. And we did it.

If you will indulge me just—I have one more question that I have for the gentleman, Mr. Chairman.

The CHAIRMAN. Please proceed.

Ms. SANCHEZ. I am very concerned about you wanting to go to courts-martial versus what we have done in the MCA. And it has to do with the rules of evidence, in fact, Military Rule of Evidence 305.

Because, as you know, battlefield interrogation, other types of interrogations that have gone on have not been with Miranda rights.

And so, it is my opinion that, if somebody who is on the side of a defendant right now—of course, you would like to kick this into a courts-martial process, because the evidence in the interrogation and any of the information we may have had since your client did not have Miranda rights read to him, would be thrown out automatically. Don't you believe that?

Mr. KATYAL. Absolutely not.

As I testified in the Senate in July of last year, the United States Court of Armed Forces—our highest military court—has issued an opinion called *United States v. Lonetree*, in 1992. The *Lonetree* decision says that when interrogation is taking place for purposes of intelligence gathering, no Miranda warnings need be given.

And so, I would respectfully disagree with the judge advocate general that Mr. Hunter referred to earlier, because it is quite clear under existing military law that no Miranda warnings need be given, and the evidence would not be excluded, so long as the interrogation is being undertaken for purposes of intelligence gathering, which is, as I understand it, what these interrogations were all about.

Ms. SANCHEZ. And I would differ with you, in that the line of case asked in Lonetree asked whether the intelligence and law enforcement investigations have merged.

And if they have merged, then the exception does not apply. And as you know, at GTMO, it is almost a total merge of intelligence and law enforcement purposes and routine sharing of information between intel and criminal investigators.

And I realize my time is over, but I would disagree with the gentleman.

The CHAIRMAN. Thank the gentlelady.

Ms. Castor and then Dr. Gingrey.

Ms. CASTOR. Thank you very much for your testimony today.

I am very concerned that the Bush-Cheney policy here has undermined our national security and, in fact, unnecessarily delayed bringing terrorists to account. It has not been smart or strategic

from a counterterrorism point of view, because it has fed the radical jihadist terrorist movement.

I think it has been very interesting, just in recent days, the press reports about the struggle in the executive branch. It has been reported in his first week, says Defense Secretary Robert Gates repeatedly argued that the detention facility at Guantanamo Bay, Cuba, had become so tainted abroad that legal proceedings at Guantanamo would be viewed as illegitimate.

He told President Bush and others that it should be shut down as quickly as possible. And he was joined by Secretary Rice.

It has been reported President Bush and Attorney General Alberto Gonzales and Vice President Dick Cheney rejected those arguments.

So, as I think it is going to be vital to look at this from two points of view. One is the broader view. As you put it, reconceptualize our counterterrorism strategy and strengthen it, try to repair the damage done to the relationships with the global community and our allies.

But then I would like you all to focus now on specific recommendations to this committee moving forward. I have heard a few—a national security corps ensuring that rights that are written on paper are implemented and enforced, and not just written down.

But what else specifically can you recommend to this committee right now that should be changed, should be implemented, should be adhered to?

Secretary Taft.

Mr. TAFT. My recommendation, as I said, was that we should shut down the facility at Guantanamo. I understand the factors, that it is mostly logistical convenience that suggests that it has advantages.

But on the whole, it seems to me that the political cost is too high.

I do not see that there is any great difficulty in finding places in the United States in the military facilities to house the detainees there that we are entitled to have in custody.

I mean, I am familiar with a number of situations where, for example, when we took in the Vietnamese refugees in the late 1970's, we had over 100,000 people housed over a period of 8 months on military bases.

There is plenty of room. There are facilities. We can get security. The military can do this.

And I was in the Pentagon for eight years, so I know a little bit about this. And it can happen.

So, logistically, it will cost some money, but it costs some money in Guantanamo. They can do it. It will be secure. It will be safe. And that is what we ought to do.

The cost politically is too high. And that is my recommendation to the committee.

Mr. PHILBIN. Representative Castor, I would not recommend abandoning Guantanamo and making that sort of change.

And I would just like to respond, and respond to your question also, to something that you picked up on from Ms. Massimino's earlier comments about reconceptualizing our approach to the war on terror.

Part of the reason that I think closing down Guantanamo will not achieve the intended objective of repairing relations, strained relations, with foreign partners is that, the real criticism is not just Guantanamo.

As Secretary Taft put it, you know, some brands become toxic. I think the brand that is toxic is not just Guantanamo. It is not the place.

The reason that we get criticism from our foreign partners is that they fundamentally reject the law of war paradigm that we are applying to the conflict with al Qaeda. They reject the idea that we can hold people as enemy combatants for years without charging them and trying them for something.

And I do not think that we should abandon that law of war paradigm.

And to get back to what Ms. Massimino said at the beginning, I do not think that law of war paradigm in any way empowers or heightens or raises the terrorists that we are fighting against by giving them some sort of legitimacy as combatants.

We have recognized that this is an armed conflict, but that our opponents, al Qaeda, are unlawful combatants in that conflict. They are not legitimate belligerents.

They are violating the laws of war in everything they do. It is an unlawful armed conflict. They attack women and children. They operate without uniforms. They do not abide by the laws of war.

And it does not in any way diminish the laws of war to treat this as an armed conflict. What would diminish the laws of war is, in treating this as an armed conflict, to treat them as if they were legitimate belligerents, as if they had rights as lawful belligerents. And that is not the approach we have taken.

We have recognized that this is an armed conflict, because of the level of hostility, the level of destruction that is involved in the attacks and the transnational attacks, but at the same time have recognized that it is a conflict carried on by unlawful belligerents who can be prosecuted for their war crimes.

And I think that is the right paradigm and that we should not abandon that paradigm.

Mr. KATYAL. I would fundamentally disagree with Mr. Philbin that the idea for why Guantanamo is so offensive to the world is because of the law of war paradigm. I do not think there are a bunch of law professors sitting around analyzing what legal regime applies, the law of war or law of peace.

The real problem, as Secretary Gates and Secretary Rice have said, is that Guantanamo has become a black hole where no law applies. The rest of the world is very concerned about that idea.

And so, that is why Britain, Australia, and all these other countries—Britain refuses to let its own citizens be tried at these Guantanamo commissions for this reason.

So, I would do three things.

First, I would move the trials to the United States. They are high-visibility events. Second, I would restore habeas corpus to the people at Guantanamo.

And third, I would abandon the MCA project in favor of a court-martial review, or at the very least, take up Representative Skel-

ton's idea about expedited review of these military commission procedures.

Ms. MASSIMINO. Thank you.

The CHAIRMAN. Do you have a comment, Ms. Massimino?

Ms. MASSIMINO. I was going to answer——

The CHAIRMAN. Go ahead.

Ms. MASSIMINO [continuing]. The congresswoman's question, the recommendations that I would make right now.

And they are informed by a belief that this view that there is a stark, binary choice between the criminal justice system and war is a trap that we have fallen into.

First, I would close Guantanamo. And I think that that will speed up the process of repatriating the people that the United States finds is no longer a threat.

I would try them in either regular courts-martial proceedings or in Federal court, as we have done with many other al Qaeda terrorists since 9/11.

I would restore habeas corpus to the detainees.

I would repeal the MCA, or at the very least, fix the overly broad definition of enemy combatant, which funnels people who have never been considered combatants under the laws of war into this military system.

And I would—something we have not addressed here, but should be of great concern to this committee—I would engage very quickly on the Administration's current consideration of how it will interpret Common Article 3 of the Geneva Conventions, because while that is being framed as the rules for interrogation for the CIA, essentially what that project is, right now is deciding what protections our military will have when they are engaged in non-international armed conflicts.

And that is very, very important for our people and should be of interest to this committee.

The CHAIRMAN. I thank the gentlelady.

Dr. Gingrey, then Mr. Johnson.

Dr. GINGREY. Mr. Chairman, thank you.

First of all, let me just comment in regard to what Mr. Taft said a few seconds ago in regard to how we dealt with the Vietnamese refugees in Federal facilities.

I would suggest to the gentleman that Khalid Sheikh Mohammed is a little different than Vietnamese refugees in regard to security or for housing these enemy combatants.

I want to direct my question to Mr. Katyal first. I want to ask the gentleman, the professor of law at Georgetown University, if he is permitted to have any outside employment other than, I guess, full-time faculty position. Are you able to take any consults or consultations or anything?

Mr. KATYAL. I am.

Dr. GINGREY. In regard to that response, have you ever been of counsel or represented in any way, shape or form any of these enemy combatants that are detained at Guantanamo Bay?

Mr. KATYAL. Yes, Representative. As my prepared statement said and my oral statement, I represented Mr. Hamdan pro bono all the way up to the Supreme Court of the United States and argued his case in the Supreme Court.

Dr. GINGREY. Very, very interesting.

Well, thank you. I got here late, and I am sorry I did not hear that initial testimony. I think that, certainly for this member, sheds some additional light on maybe where you are coming from in regard to some of your testimony that I have heard.

I do want to ask you, in regard to the issue of an alien, I think we all know pretty much the definition of an alien—an unnaturalized foreign resident of another country.

And I think you have spent some time this morning in your testimony trying to state that Guantanamo Bay, Cuba, is United States territory in some way, shape, or form.

But I think you probably are aware that we lease Guantanamo Bay from the sovereign country of Cuba. And, in fact—and I would expect that you would know this, as well, that Castro has, in fact, not even cashed the checks that we have submitted to him as the lease payment on an annual basis. So, he does not even recognize the lease as legal.

So, I just find it amazing that you could consider this United States sovereign territory and apply the same rights to these enemy combatant detainees that are there at Guantanamo Bay as if they were aliens—legal or illegal—in this country or a territory owned by this country.

Could you explain that to me?

Mr. KATYAL. Absolutely. And my position is that—it is not my view—it is the view, I think, of the United States Supreme Court that Guantanamo, because of the degree of American control over the base, is, for all practical purposes—that is Justice Kennedy's quote from the last Supreme Court decision—United States territory. And let me explain to you why.

This is a lease unlike any other lease. I lease an apartment, and I am sure many of your constituents do. The lease with Cuba says that we lease this big piece of land, 45 square miles, from Cuba for $4,000, or something, a year until both parties say the lease should be broken—both.

So, this is effectively permanent territory of the United States, regardless of what Mr. Castro decides to do or not.

And the fundamental point is this. Guantanamo——

Dr. GINGREY. Well, I think the fundamental point, with all due respect, is that we would be a tenant at will in that situation.

Mr. KATYAL. Our position is that we have that lease indefinitely and that the laws of Cuba do not apply to protect these detainees. Neither does the Constitution of the United States.

That is different from every other parcel of land in the world. That is why Guantanamo Bay was chosen by the Administration.

They adopted a legal theory that said, "Well, this is a place where we have absolute control, but we do not have to follow the laws of Cuba, because we are effectively permanent leaseholders in this area."

That is why, I think, you have seen the degree of condemnation internationally, and why Secretary Gates and Rice are reportedly wanting to close Guantanamo——

Dr. GINGREY. Well, I appreciate your response. My time is limited, and I want to move on to the next question, because you just

quoted a Court precedent in regard to Justice Kennedy's opinion on that.

You commented just a few minutes ago in regard to restoring the rights of habeas corpus. So, let us go to another court decision then.

February 20, 2007, the United States Court of Appeals for the District of Columbia decided—I think I am pronouncing this correctly—*Boumediene v. Bush*, that Guantanamo detainees have no constitutional rights to habeas corpus. And I tend to agree with that opinion.

And I further note that the Constitution clearly calls—clearly calls—for the speech and of habeas with the existence of an invasion or a threat to public safety.

I would like, Mr. Chairman, if you will indulge me, I realize that the time has expired, but let Mr. Katyal respond to that, if he would.

Mr. KATYAL. I have great respect for that court, the Court of Appeals for the D.C. Circuit. I think their track record in these cases has not been good.

The decision on February 20th is the same sort of decision as the one they issued in 2003 on habeas corpus rights of Guantanamo detainees. It was reversed by the Supreme Court, as was that court's later decision about military commissions at Guantanamo Bay.

So, I would caution this body to read too much into a two-to-one decision by that court.

The CHAIRMAN. I think I would point out to the gentleman that it was a three-to-two decision, if I am not correct.

Mr. KATYAL. I think it is two-to-one.

The CHAIRMAN. Was it two-to-one?

It is, as I understand it, on the way to the Supreme Court. Is that correct?

Mr. KATYAL. The Supreme Court tomorrow is scheduled to decide in conference whether to hear that case, yes.

The CHAIRMAN. I see.

Mr. Johnson.

Mr. JOHNSON. Thank you.

The Military Commissions Act of 2006 authorized the establishment of military commissions to try alien unlawful enemy combatants. And prior to that time, there had not been that class of alien that was recognized in law.

But with the advent of that act, we carved out, instead of a prisoner of war, now we have this second class of alien unlawful enemy combatant.

And that was a law that was passed by the 109th Congress, that put it into the hands of the secretary of defense, in consultation with the attorney general, to formulate rules for the conducting of trials of these enemy combatants.

And then at the same time, the Administration, under the leadership of the now-embattled attorney general, whose respect for notions of constitutional principles are suspect, in coordination with the secretary of defense, who is now thoroughly discredited, they had embarked upon this plan to establish that black hole, Guantanamo Bay, which is not subject to this legal fiction.

It is not subject to U.S. jurisdiction or Cuban jurisdiction—or any other jurisdiction. And so, therefore, no rights apply—no Geneva Convention rights, no U.S. constitutional rights. We will just decide as we go along, and we will leave it up to the attorney general—we will leave it up to the secretary of defense, along with the attorney general—to promulgate these rights.

And Congress has absolutely no say-so about those particular rules that have now been established and that we are now operating on in trying these enemy combatants. Congress has not approved them. The only thing that happened was this committee was briefed on those rules. And it was about a 45-minute briefing.

And so now, the constitutional bedrock principles that this country has been founded upon have been thrown out of the window, and we are told to assume that the arrest and detention of any person in, say, Iraq or Afghanistan, but certainly not limited to those two places—anywhere in the world that we decide to arrest somebody.

Then we start referring to them as terrorists, and there is no idea of probable cause that is given to these people to challenge the detention in advance of being charged. And, in fact, they can be held indefinitely.

And they have been held for, as you note, Mr. Katyal, five years or more—five years without charges, people still being held, held incognito in Guantanamo, not able to notify family, not able to have an attorney to represent them to contest the merits of their detention.

And now they are being brought to trial under these principles that have been established by the attorney general and the secretary of defense, which enable or allow for the use of coerced testimony, torture, to convict the accused. And it is held in a secret trial.

So, my question is to Mr. Philbin.

Evidence obtained from a witness who was forced to stand up non-stop for 20 hours is admissible in a trial of an enemy combatant. Is not that correct? Isn't that correct?

Mr. PHILBIN. That is not clear from the rules. It would have to be determined by a military judge in charge of the tribunal. If——

Mr. JOHNSON. And it would be the burden of—that the presumption would be that the evidence obtained in that manner was, in fact, probative and——

Mr. PHILBIN. No, I do not think there is any presumption like that put into the Military Commissions Act. The Military Commissions Act says that, if there is a disputed amount of coercion with respect to some evidence, if the conduct occurred after passage of the Detainee Treatment Act and the conduct violated the Detainee Treatment Act, that the evidence cannot come in, period.

If it is does not violate the Detainee Treatment Act, the military judge must find that, in the totality of the circumstances—all of the circumstances, including everything that you have described—that the evidence was reliable and that it had probative value.

Mr. JOHNSON. But to make that——

Mr. PHILBIN. And it would be in the interest of justice for it to come in.

Mr. JOHNSON. And this would be a military judge with a military prosecutor, with a military jury and a military defense attorney, who could be subject to being coerced himself, as is the case with Colonel Morris Davis, the chief prosecutor—excuse me, Major Michael Mori, the military defense lawyer—for David Hicks, the Australian, who has been accused by Colonel Morris Davis, the chief prosecutor in the case, with possible prosecution himself.

Mr. PHILBIN. If I understand it, there are rules in place for the military commissions, just as there are the same rules that would apply in the court-martial system. That if there is influence by a superior—improper influence to try to pressure one of those on the defense counsel—that that is a violation of the UCMJ, and that the person who applied that pressure improperly could be prosecuted for that.

Mr. JOHNSON. Well, let me ask you this.

Mr. PHILBIN. The same protection would apply. And I would like to——

Mr. JOHNSON. Let me ask you this question.

Mr. PHILBIN. I would like to respond to some of the earlier parts of your question, if I may, Representative.

Mr. JOHNSON. Let me just ask you this question, because I am out of time.

Mr. PHILBIN. You are——

Mr. JOHNSON. Do you have any information as to whether or not—or can you guarantee the international community that Khalid Sheikh Mohammed was not subjected to torture prior to his confession?

Mr. PHILBIN. I cannot make personal guarantees. The President of the United States has said——

Mr. JOHNSON. I think that is the problem that we have with this entire——

Mr. PHILBIN. You want me to answer your question, sir? The President of the United States——

Mr. JOHNSON [continuing]. Because it does not hold us in good regard to the public.

Mr. PHILBIN [continuing]. Says that we do not torture. It is the policy of the United States that we do not torture. The United States has never conducted——

Mr. JOHNSON. But we allow other countries to torture. We will allow people in other countries to torture, and then we will leave it up to the judge to decide whether or not that information is relevant, probative, or whether or not it is——

Mr. PHILBIN. Not that I am aware of, sir.

And I would like to go back to some of the earlier part of your question, because it contained a number of misstatements.

You said that the Military Commissions Act allows military commissions to admit evidence obtained by torture. That is explicitly prohibited by the Military Commissions Act.

Mr. JOHNSON. Well, it is prohibited in terms of the person who is charged.

The person who is accused, if they were tortured, then evidence derived from that torturous conduct would be excluded, correct?

Mr. PHILBIN. I believe that the statement in the Military Commissions Act is that statements obtained by torture are prohibited.

Mr. JOHNSON. Well, let me read it to you.

The CHAIRMAN. I thank the gentleman. Do you have a—do you wish to complete your question, Mr. Johnson?

Mr. JOHNSON. Yes.

The CHAIRMAN. Please proceed. We are going to try and get the next two members before we break to go vote.

Mr. JOHNSON. Yes. The military code of—MCA allows for the admission of hearsay testimony—or excuse me—it allows for the use of torture testimony, so long as that torture was not against the individual who is standing trial.

But statements that were obtained through cruel, inhumane or degrading treatment that does not amount to torture is admissible. And it is not defined. Torture is not defined.

But that kind of evidence is admissible under certain circumstances. And so, we have some problems with this legislation, insofar as the use of information derived from torture. And that is the point that I want to make.

The CHAIRMAN. Sir, do you have an answer?

Mr. PHILBIN. Yes. I believe that the representative's characterization of the Military Commissions Act is incorrect. The Military Commissions Act prohibits the admission of any statement obtained by torture, whether it is a statement of the accused or a statement of any other person, and as consistent with the United States obligations under the Convention Against Torture.

And just to go back to some of the earlier statements the representative may have——

Mr. JOHNSON. Torture is not defined, though, is it?

Mr. PHILBIN. Torture is explicitly defined in the Convention Against Torture and in the United States statute.

The CHAIRMAN. I thank the gentleman.

We are going to squeeze in the next two, Mr. Wilson and Mr. Sestak, and then we will end the hearing.

We will have to vote shortly.

Mr. Wilson.

Mr. WILSON. Mr. Chairman, thank you very much.

And we do have votes, but I would like to make an observation.

I have visited Guantanamo Bay twice. I have the background of seeing a first class detention facility. I served on the Corrections and Penology Committee in the State Senate of South Carolina for a number of years.

I know prisons inside and out, not from having been placed there, but having visited and asking questions. Additionally, I was the chairman of our county law enforcement advisory committee working with the detention facility.

In my visit to Guantanamo Bay, I saw a first class facility with trained personnel, professionals, who were well treating the detainees, and in particular, it was very impressive to me—giving the highest respect for all religious observances.

I was surprised on my visits to find there, that these alien detainees from the battlefield were highly educated people, highly trained people to commit mass murder. It was extraordinary to me to find out that such people indeed are enthusiastic in their efforts to want to harm the people of the United States.

I also found out that the interrogation produced information on overseas cells of terrorists in Europe, Asia, the United States.

We found out their training ability, the extraordinary financing capability they had. These are not poor people. These are very wealthy people, who have every intent to kill the people of the United States.

We found out their methods of operation. And indeed, I believe that Guantanamo Bay and the interrogation has saved thousands of lives.

I also have a background—I was 28 years as a judge advocate general in the Army National Guard. And so, I have worked very closely with the court-martial system. And I respectfully disagree with any thought that we would provide our constitutional benefits to people worldwide.

And so, I respect the view of the congresswoman from California. Indeed, I believe that military commissions protect American families.

And very important, Chairman Skelton, when this issue came up previously, stated our first goal is to protect American troops.

And I really want to see a system in place that does that.

Mr. Chairman, I yield the balance of my time.

The CHAIRMAN. Thank you very much.

Mr. Sestak. You are recognized. And then we will close the hearing.

Mr. SESTAK. Thanks, Mr. Chairman.

Mr. Philbin, I just had a couple of quick ones.

What are the consequences, and particularly security, if any, of transferring detainees from Guantanamo Bay to America? Maybe you have already answered this.

Mr. PHILBIN. I addressed it to some——

Mr. SESTAK. I am sorry, to comment on the United States.

Mr. PHILBIN. I addressed it to some extent in my written testimony. And, of course, I am not an expert on this. I think that members of the military from DOD could give you a more precise answer.

But my understanding is there are obvious security issues. You have 273 enemy combatants held at Guantanamo now, who through multiple screenings have been determined to be a continuing threat, that if they were released they would return to the fight to try to kill Americans.

To bring them to the United States, you have either got to distribute them around to a bunch of different military facilities, because no one facility right now has the capacity for them, in which case you have to increase the security at each of those.

I visited the Naval consolidated brig at Charleston, South Carolina, where Jose Padilla is housed. It is not a very large facility. Some could be housed there, but you would have to increase the security, and it is right near a population center.

Any place that you put some of these detainees, particularly, I think, if you put them all in one spot—which is what would be helpful for continuing the intelligence mission that goes on now at Guantanamo—you make it a huge target for any potential terrorist attack that al Qaeda could mount in the United States.

Mr. SESTAK. What would the concern be for the supermax prison at Florence, in Florence, Colorado, today, where we have terrorists kept?

Mr. PHILBIN. I do not think it——

Mr. SESTAK. Are they—do you happen to even know if Florence, Colorado, is on a potential terrorist list?

Mr. PHILBIN. I do not——

Mr. SESTAK. I mean, you know, the vulnerability list that we keep?

Mr. PHILBIN. I am sorry, I do not know that. And I think that it would be a different situation from supermax. We have got Ramsey Yousef and a few other terrorists to transporting several hundred and concentrating them at one site, particularly where these would be the comrades in arms of the actual people who are still out there.

Mr. SESTAK. May I ask you, if you can tell me—and we only have a moment or two.

In regard to the most important changes you would like to see in the Military Commissions Act that this Congress could make, and particularly hearsay evidence, what would it be?

Ms. MASSIMINO. Well, if you are asking, Mr. Sestak, about the military commission rules themselves, there is a long list of defects, and I go through them in my testimony.

Mr. SESTAK. Could you speak to the hearsay?

Ms. MASSIMINO. Yes. The biggest concern, frankly, that we have about the current hearsay rules is that they will provide a means for a backdoor way for there to be the admission actually of evidenced obtained through torture, frankly.

And that, because of the restrictions that are in there of preserving the classified nature of sources and methods, the problem we have is that the operation of the hearsay rule and the classified evidence rule will mean that the protections against the admission of coerced testimony, evidence obtained through cruel, inhumane and degrading treatment will end up coming in, despite the characterization, which was correct, of Mr. Philbin of the protections against the admission of that kind of evidence into military commissions.

Mr. SESTAK. Mr. Katyal, do you have a comment on that?

Mr. KATYAL. Maybe I will just defer to Secretary Taft, who has spoken on the hearsay rules.

Mr. SESTAK. Mr. Taft.

Mr. TAFT. Congressman, my concern about the hearsay rule is simply that it is inconsistent with our approach embodied in the Sixth Amendment of the right to confront a witness. A hearsay witness is not under oath, he is not on the record, he is not there, he cannot be subject to cross-examination.

Such testimony should be excluded. It is not a——

Mr. SESTAK. Mr. Taft, would you——

Mr. TAFT. It is not improper——

Mr. SESTAK. I understand.

Mr. TAFT [continuing]. To say, to want to have a different rule.

Mr. SESTAK. But do you think that the hearsay evidence that was submitted at the International Criminal Tribunal for the former Yugoslavia, are they doing it wrong to do that?

Mr. TAFT. They have a very different——

Mr. SESTAK. Or is there some sort of structure——

Mr. TAFT. No, I do not——

Mr. SESTAK [continuing]. That we could take from that to consider?

Mr. TAFT. No, they have a very different system in that tribunal. Also in the Rwanda tribunal, and indeed, in national courts in Europe. Hearsay is admitted there because of the whole different structure that they have for conducting criminal trials, where the judge and the prosecutor play very different roles from what our system is.

And we have not adopted it in our own civilian criminal trials, and I do not think we should be adopting it here.

The CHAIRMAN. There is a vote on.

I thank the gentleman.

Without objection, the letter dated March 8th this year from certain civil rights and religious organizations, is submitted into the record.

[The information referred to can be found in the Appendix on page 136.]

The CHAIRMAN. I thank the witnesses very, very much. I am sorry we have to close the hearing, because there is a vote pending.

Thank you. Adjourned.

[Whereupon, at 12:42 p.m., the committee was adjourned.]

A P P E N D I X

March 29, 2007

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

MARCH 29, 2007

Statement of Ranking Member Duncan Hunter
Committee on Armed Services

Hearing Regarding the Strengths and Weaknesses of the Military Commissions Act of 2006 and the Future of the Detention and Interrogation Facilities at the U.S. Naval Station, Guantanamo Bay, Cuba

March 29, 2007

Thank you Mr. Chairman. I want to welcome our distinguished panel of outside experts – I look forward to your testimony.

Over the last few years this Committee has spent a great deal of time focusing on our Global War on Terrorism detainee policy. The policy that this Committee advanced took into account that the war against terror has produced a new type of battlefield and a new type of enemy. In the last Congress, this Committee worked hard to pass the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA), ensuring that the United States is able to detain, interrogate and try terrorists—and to do so in a manner that

is consistent with the Constitution and the international Laws of War.

I think we got it right. As we meet today, our detention policy is being executed in accordance with requirements of the DTA, MCA and the recently revised Army Field Manual. Similarly, the long awaited Military Commissions have begun, and accused terrorists, or unlawful enemy combatants, will now be tried for War Crimes. A little more than five years after the horrific attacks of September 11th—the day al Qaeda declared a war against the United States—we are finally beginning to see our enemies brought to justice. There were challenges along the way, and through rigorous oversight, the Congress improved, and in many instances, changed the Administration's policy. But, with the signing of the MCA this past October, we are finally moving forward.

Mr. Chairman, I've taken the time to refer back to the work of the previous Congress to demonstrate that we have worked hard on the issue before the Committee today, and to say we ought to let

the policy the Congress pushed forward in the DTA and MCA have a chance to work. Moreover, we should be careful not to take action that would have a chilling effect on the implementation of these polices.

I note that today's hearing is on the future of GTMO, and entertains possible alternatives for GTMO detention and interrogation facilities. We've been here before. Through briefings, hearings, and fact-finding visits to GTMO, I know that: 1) the detainees are treated in accordance with U.S. and international law; 2) the facility provides the highest level of security to ensure our enemies do not endanger American lives; and 3) we are able to conduct effective intelligence operations.

We keep these terrorists in GTMO because we are at war, and under international laws of war, the United States has the authority to detain persons who seek to attack us for the duration of hostilities without charges or trials. The Supreme Court has recognized this right (*Hamdi v. Rumsfeld*), and we ought to do nothing to interfere with the President's ability to execute this

right. Simply put, our country needs this tool. Just last week, we brought to GTMO Abdul Malik, a high value al Qaeda operative that was operating in East Africa. Like other detainees at GTMO, he has provided information essential to preventing future al Qaeda attacks.

In addition to my objections to the premise of this hearing, I am very distressed over the "alternatives" to GTMO that have been suggested today (see page 10 of the Committee memo). The idea that we would import dangerous terrorists, like Khalid Sheikh Mohammed, into American communities is dangerous for at least four reasons:

- It will undermine our current detention operations by parceling out the detainees to different facilities across the country, as no single facility can currently house all the GTMO detainees.
- Transferring detainees will create an opportunity for these dangerous enemies to recruit, and disseminate their terrorist skills. Moreover, it will increase the threat of an attempted

escape and the danger of harm to American civilians if there were such an escape.

- It will make these domestic detention facilities prime targets for any terrorist attack that al Qaeda is able to mount within our borders.
- Finally, it will have severe implications on our detention policy because it will raise uncertainties about the detainees' Constitutional rights.

It is this last implication—increasing the rights of foreign detainees under the U.S. Constitution—that brings me to the other piece of today's hearing: assessing the Military Commissions Act. As I noted earlier, the Commissions process has recently begun and we are starting to see the fruits of our labor. Just this Monday, David Hicks, accused of providing material support for terrorism, entered a guilty plea. This process is working.

When the Committee worked on the MCA just last year those with reservations on the other side of the aisle cautioned that

the constitutionality of the Act was uncertain. As of today's hearing, the U.S. District Court for the District of Columbia has ruled that the MCA is indeed constitutional with respect to the habeas corpus issue. Not long after that decision, the DC Circuit held that the MCA conforms with the Constitution and that the detainees in GTMO do NOT have a constitutional right to habeas corpus.

This is encouraging. It demonstrates that the Congress has come up with a system—through the Combatant Status Review Tribunals (CSRTs), the yearly Administrative Review Boards, and the ability to appeal those decisions to the DC Circuit—that provides terrorist detainees with a fair system and sufficient due process. I note that the procedures provided in the CSRTs track with those provided in Army Regulation 190-8 for Enemy Prisoners of War, and in some ways exceed those found in AR 190-8 (submit for the record). I caution against this Committee and the Congress taking any action amending the MCA, because it

will have the effect of delaying or invalidating the Commissions currently underway.

Let me just end with one simple point. Our terrorist detainee policy was constructed to address a new type of enemy in a new type of war. We have used the international laws of war and the Uniform Code of Military Justice as guide posts in crafting this new policy—because it is fundamentally a war policy. Moving the detainees from GTMO or amending the MCA will have the net effect of holding up the execution of our Global War on Terrorism detainee policy.

Some would like this result; they would prefer to see terrorists tried under the criminal justice system. This is a false choice. We can't try terrorists for war crimes if it requires our soldiers to read terrorists Miranda rights or take a battalion of lawyers onto the battlefield. We've tried the former approach, and it has backfired. During the trial of the terrorists responsible for the first World Trade Center bombing, the discovery rules of the

criminal justice system gave the defense access to information that found its way to al Qaeda camps in Afghanistan. Military Commissions are crucial because they are crafted for the conduct of war by providing procedures flexible enough to account for the constraints and conditions of the battlefield.

As I hear critics who claim that our domestic courts or domestic prisons can handle this "criminal" problem, I fear that they do not truly understand the enemy we face and the war that we are presently fighting. We need to heed the words President Lincoln uttered when our country faced another daunting challenge, **"The dogmas of the quiet past are inadequate to the stormy present... As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country." (Lincoln's Second Annual Message to Congress, December 1, 1862.)** Mr. Chairman, five years plus into this war we have crafted a new policy tailored for this new conflict

that will work – now it is upon us to exercise discretion and give this policy a chance.

TESTIMONY OF
WILLIAM H. TAFT, IV
HOUSE COMMITTEE ON ARMED SERVICES
MARCH 29, 2007

Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss two subjects – the future of the detention facility at Guantanamo Bay and the Military Commissions Act. As you know, I have testified many times before this committee, but I don't think I have been here since 1988, when I left the Pentagon almost twenty years ago. It's a pleasure to be back. Although I miss some faces, I am glad to see at least a few familiar ones and, of course, many new ones.

Regarding the future of the detention facility at Guantanamo Bay, I understand that most people would like to close it and transfer the persons we have captured in our conflict with al Qaeda and the Taliban regime who are there to other facilities. I share this view. There is no doubt that the facility has acquired a notorious reputation around the world, and its continued use is a focal point for criticism of our foreign policy and a drag on our ability to get important things done. Its notoriety arises, I believe, from two causes. First , it is evident that some detainees have been abused at the facility and that interrogation methods that have been used there have not complied with our international obligations under the Geneva Conventions, particularly Common Article 3 of the conventions. Second, there is an impression that the facility was established in Guantanamo in order to deprive the persons we captured in the conflict with the terrorists of access to our courts and other rights that they would enjoy if they were being held at a facility in the United States.

As to the treatment of the detainees and the methods of interrogation that have been employed at Guantanamo, I believe it was a mistake not to follow the consistent U.S. practice in all our conflicts since World War II. That practice was to treat all detainees in strict accordance with the Geneva Conventions and the Army Field Manual, regardless of whether they were entitled to this. I understand that this is now the policy embodied in the Detainee Treatment Act

and the Military Commissions Act. Whether the detainees are at Guantanamo or elsewhere, then, will not affect how they are treated going forward. I certainly hope that by treating them properly we will both repair our reputation for compliance with the laws of war generally and, most importantly, increase the chances that our servicemen will be treated properly when they are captured in combat. The capture of a number of British servicemen by Iranian forces earlier this week reminds us that the United States is not the only state that can revise or reinterpret the rules under which its forces operate in war. We created a dangerous president when we set out on that road in February, 2002. Even if it will take some time to repair our reputation, we are right to have begun that work.

Regarding the impression that we established the facility in Guantanamo in order to deprive the persons held there of access to the courts and other rights they would enjoy if they were in custody in the United States, I would make two points.

First, it was not clear at the time the decision to use Guantanamo was made that the persons held there would be treated any differently from the way they would have been treated if they were in custody in the United States. At the time, it was U.S. policy to treat all captured persons in accordance with the Geneva Conventions and the Army Field Manual. Those were the rules of engagement for our forces operating in Afghanistan. Guantanamo had many features that made it a natural choice for us: security, size, ability to obtain intelligence from detainees gathered in one place, no issues with governors or members of congress, etc. What was not a factor at that time was the idea that detainees would be treated differently in Guantanamo than if they were held in the United States. True, many thought that, consistent with the precedent of the Eisentrager case, the detainees would not have access to U.S. courts to review the issue, under habeas corpus, whether they were being lawfully detained at all. I believed the Eisentrager decision would prevent this. The point, however, did not appear to be significant in light of our policy to comply with the Geneva Conventions and our undoubted ability to detain persons captured in combat who posed a threat to us. Those of us who had experience with military law enforcement procedures had confidence, at the time, that the absence of judicial review of our

forces' conduct in Guantanamo was not likely to result in the abuse of detainees there. It had not done so in Korea or Vietnam or other theaters of war over which the courts have no jurisdiction. It would not, we thought, affect the way the detainees were treated in Guantanamo.

Second, persons captured in the conflict with al Qaeda and the Taliban should not be treated differently because they are in custody in Guantanamo from the way they would be treated if they were in custody in the United States. That is to say, the decision about whether the facility is to be closed should not, in my judgment, be based on how this may affect the legal rights of the detainees. Political and logistical factors should determine our course. Logistically, I imagine, Guantanamo still has a number of advantages over other options. It seems doubtful, however, that these outweigh the political costs of continuing its operation. At some point a brand becomes so toxic that no amount of Madison Avenue talent can rehabilitate its image. What the Reverend Jim Jones did for KoolAid and the British penal system did for Van Diemen's Land, abuse of the detainees seems to have done for Guantanamo. My recommendation would be to cut our losses. Relocation in the United States should not affect the legal rights of the persons held in Guantanamo for the simple reason that they should not be being deprived of any rights because they are there rather than in the United States.

Regarding the Military Commissions Act, I will limit my remarks to just three points.

First, I think it was a mistake for Congress to preclude judicial review of the lawfulness of detaining the persons we have captured in the conflict with al Qaeda and the Taliban. As I understand it, convicted detainees may obtain such review after their criminal cases are concluded, but persons who are not charged with crimes do not have access to the courts to challenge their detention. The benefits of this approach escape me.

It should be recalled that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban as long as they pose a threat to the United States. This is black letter law of war. Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees. Nor, will they do so as long as it is shown that the detainee poses a threat.

Currently, this determination is made by the military. Having it endorsed by a court would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of these cases will impose only a very modest burden on the courts. As I say, the cases are comparatively straightforward. My understanding is that many detainees freely state that they would try to harm the United States if they are released. The records of military determinations should make judicial review uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases. And there are not that many detainees.

My two other points relating to the Military Commissioners Act concern the rules of evidence in the trials before the commissions. I do not think either hearsay evidence or coerced testimony should be used in these trials.

I understand that hearsay evidence is admitted in several international criminal tribunals and in other national courts. But our system and traditions are different. The Sixth Amendment establishes a defendant's right to confront witnesses in criminal trials. The use of hearsay evidence is inconsistent with this right. The hearsay "witness" is not under oath, on the record or available for cross-examination, so his testimony is presumed automatically to be unreliable. Coerced testimony is likewise inherently unreliable. Courts normally exclude such testimony not only because it is unreliable but also in order to discourage the use of coercion by the authorities. Both rationales are relevant to the proceedings of the military commissions.

In proposing these changes in the rules of evidence I recognize that they may make it harder to obtain convictions. If I thought for a moment that Khalid Sheik Muhammed or other detainees like him might be released as a result of such changes, I might hesitate to recommend them. What Khalid Sheik Muhammed says he has done to Daniel Pearl and in planning the 9/11 attacks naturally enrages all Americans. But because he is being held consistent with the law of war he will not be released and, most importantly, it is when we are enraged – when our blood boils - that we most need to adhere to the rule of law as we have established it, not change it to suit our convenience. In this sense, Senator McCain is right when he says that how we treat the

detainees is not about them but about us. It is in this spirit that I make these proposals for changes in the rules of evidence set out in the Military Commissions Act.

Mr. Chairman, thank you for this opportunity to appear before your committee. This concludes my testimony. I look forward to answering your questions.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: WILLIAM H. TAFT, IV

Capacity in which appearing: (check one)

X Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented:_____

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Hearing Before the House Committee on Armed Services

Re: The Strengths and Weaknesses of the Military Commissions Act of 2006 and the Future of the Detention and Interrogation Facilities at the U.S. Naval Station, Guantanamo Bay, Cuba.

March 29, 2007

Prepared Statement of Patrick F. Philbin, former Associate Deputy Attorney General, U.S. Department of Justice.

Chairman Skelton, Ranking Member Hunter, and Members of the Committee, I appreciate the opportunity to address the matters before the Committee today. Both the Military Commissions Act of 2006 ("MCA"), and recent proposals to amend it, and the continued use of the U.S. Naval Base at Guantanamo Bay, Cuba as a detention facility are exceedingly important issues for the Nation's conduct of the continuing armed conflict with al Qaeda and associated terrorist forces. I gained significant expertise with respect to both military commissions and Guantanamo Bay during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on many issues related to military commissions, the detention of enemy combatants at Guantanamo Bay, and the creation of the military's procedures for reviewing detentions through both Combatant Status Review Tribunals and annual Administrative Review Boards. Since my return to the private sector, I have continued to follow the developments in this area with interest.

In addressing the topics before the Committee, I intend to make two basic points.

First, in the MCA, Congress has already crafted a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct.

2749 (2006). As a result, under the MCA, military commissions are finally poised to proceed more than six years after the President originally issued the order providing for their creation. Indeed, just this Monday, David Hicks entered a guilty plea in the first military commission proceeding initiated under the new rules of the MCA, and by the end of this week it is likely that a conviction will be entered in his case. At this juncture, when the process is finally starting to work, changes to the MCA should be made only if they are required either by a compelling legal need to remedy some constitutional infirmity in the statute or by an imperative operational need of the military. In my view, the changes that some Senators and Members of Congress have proposed are not justified by either necessity. Instead, they would only add confusion to a workable system and further delay the day when military commissions become fully operational.

Second, with respect to Guantanamo Bay, the only feasible alternative to holding enemy combatants at Guantanamo would be bringing them onto U.S. soil. That, in my view, would be a gravely misguided policy choice for at least three reasons. First, as a practical matter it would raise a serious security concern for whatever facility was constructed to house the detainees and for the vicinity around that facility. Second, it would likely materially alter the detainees' legal rights. Under current law, aliens detained outside the United States do not have rights under the Constitution. Once they are brought onto U.S. soil, however, the detainees arguably will have constitutional rights, and that change in status will inevitably spawn a completely new round of litigation. That will only further drain resources from the military and divert attention from the military mission of detaining the enemy combatants to prevent them from rejoining the fight. Third, and finally, simply moving the detainees to the United States will not achieve one of the primary stated objectives of closing Guantanamo — namely, silencing the chorus of criticism the United States receives in the international community and thereby repairing strained relations

with foreign partners. International criticism does not depend primarily on the *place* where enemy combatants are detained. Instead, at bottom, it rejects the fundamental legal paradigm under which the United States asserts the right to detain individuals as enemy combatants (and, hence, without charge) in the armed conflict with al Qaeda. Unless the United States is prepared to abandon the entire law-of-war framework governing the conflict with al Qaeda — which I strongly believe it should not do — simply moving the detainees to the U.S. is likely to accomplish little in appeasing critics in the international community.

In addressing these issues, I want to emphasize a theme that I believe is too often lost when debate focuses on specific proposals for altering military commission procedures or providing other procedural protections for the enemy combatants at Guantanamo. The proper touchstone for judging the mechanisms the military uses in detaining enemy combatants or in prosecuting enemy combatants for war crimes is not the full panoply of protections provided in criminal trials in Article III courts. Military commissions are part and parcel of the conduct of war and their procedures have always been flexible enough to be adapted to the exigencies of war. Although the United States must ensure that it provides full and fair trials that comply with all of its treaty obligations, it also should not lose sight of the fact that fair trials under the law of war need not replicate the full protections provided by the Constitution in an American criminal court.

I. The Military Commissions Act of 2006 and Proposed Amendments

A. Background

The current debate about amendments to the MCA can be fully understood only in the context of the history — including the series of Supreme Court decisions and congressional responses — that led to the passage of the MCA in 2006. A brief synopsis of that history is thus warranted.

In late 2001, the President determined that military commissions should be convened to try captured enemy combatants in the conflict with al Qaeda for violations of the laws of war. As administration officials explained to Congress at the time, multiple considerations made military commissions rather than our domestic criminal justice system the most appropriate forum for prosecuting enemy combatants. In part, using military commissions, which are the standard mechanism the Executive has always used for war crimes trials, acknowledged the fundamental fact that the struggle with al Qaeda was not simply a matter a of criminal law enforcement — it had risen to the level of an armed conflict to which the laws of war would apply.

In addition, the circumstances of war-fighting in which enemy combatants are captured and interrogated and in which documents and computers are seized are not remotely adapted to satisfying the strict requirements of the Constitution in later bringing a criminal prosecution in an Article III court. For example, enemy combatants are properly interrogated without a lawyer present, but would that mean that under *Miranda* their statements could not be used? Statements made by other enemy combatants might be useful in the trial of a different accused, but would a record of those statements be barred by hearsay rules? Soldiers raiding an al Qaeda hideout will seize for intelligence purposes materials that might later become "evidence," but they are not concerned (nor should they be) with establishing a chain of custody as FBI agents at a crime scene would. And there was a concern that classified information could not adequately be protected in regular criminal trials. Precisely because the circumstances in fighting a war are always different from those in investigating a crime in our domestic system, military commissions have always been the standard mechanism used for prosecuting war crimes. Thousands of commissions were convened in Europe and the Far East after World War II, and

(to give just one example) the orders convening those commissions routinely called for flexible evidentiary rules, permitting the admission of "such evidence as in [the commission's] opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man."[1] That practice reflected what the Supreme Court later acknowledged was one of the characteristics of military commissions; namely, that their procedure "has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

In early 2002, the Department of Defense began detaining enemy combatants seized overseas in operations in Afghanistan at the Naval Base at Guantanamo Bay, Cuba. In addition to the ideal attributes Guantanamo provided from a security perspective and other reasons, the decision to use Guantanamo was based, in part, on reliance on a clear-cut decision from the Supreme Court handed down shortly after World War II holding that aliens seized and detained outside the United States had no right to file habeas corpus petitions in United States courts. That decision was *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When detainees at Guantanamo began to file habeas petitions in federal court, therefore, the Government relied on *Eisentrager* to argue that no federal court had jurisdiction to entertain the petitions.

The Supreme Court ultimately disagreed with that position and in *Rasul v. Bush*, 542 U.S. 466 (2004), concluded that the habeas statute, 28 U.S.C. § 2441, extended jurisdiction to habeas petitions filed by detainees held at Guantanamo. The Court made clear, however, that its holding was based on an interpretation of the habeas statute – not upon the Constitution. *See, e.g., Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear

[1] Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Forces, Pacific, 24 September 1945.

petitioners' habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base.").

At the same time the Court decided *Rasul*, it also decided *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a decision relevant here primarily for one thing: in it, the plurality outlined the type of procedures that, in keeping with the Due Process Clause of the Constitution, the military could employ to determine to detain an *American citizen* as an enemy combatant in the United States.

The Government responded to these decisions in several ways. The Department of Defense soon promulgated a new procedure – a Combatant Status Review Tribunal or "CSRT" – that would review the determination of enemy combatant status for every detainee at Guantanamo. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under the Geneva Conventions. They were also designed to meet the procedural requirements that the Supreme Court in *Hamdi* had suggested would be sufficient to provide due process to a U.S. citizen held in the United States, even though such procedures were not required for the aliens held at Guantanamo. In addition, prior to these decisions, DOD had recently announced another mechanism for reviewing the detention of those at Guantanamo – the Administrative Review Board or "ARB." The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant.

Congress also responded to the *Rasul* decision by passing the Detainee Treatment Act of 2005 ("DTA"). In addition to defining standards for treatment of detainees, the DTA eliminated habeas jurisdiction for petitions filed by detainees at Guantanamo. In its place, it provided for judicial review in the United States Court of Appeals for the District of Columbia Circuit for

both the decisions of CSRTs and the decisions of military commissions.[2] Providing such review in regular civilian courts for the decisions of military tribunals was an unprecedented move. Particularly with respect to CSRTs it bears emphasis that the military's determination to detain an alien overseas as an enemy combatant in an armed conflict has never been reviewable in civilian court, and certainly not under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

Despite the elimination of habeas jurisdiction in the DTA, the Supreme Court concluded in 2006 that habeas jurisdiction still existed over cases pending when the DTA was passed, and in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), struck down the procedures the military had promulgated for conducting military commissions. Once again, the Court's decision was based on statutory, not constitutional grounds, and rested primarily on the conclusion that procedures for the military commissions violated provisions of the UCMJ.

In response, Congress passed the MCA of 2006. In it, Congress closed the jurisdictional loophole that had allowed the *Hamdan* case to proceed by making clear that the elimination of habeas jurisdiction for detainees at Guantanamo applied to *all* cases, including those pending on the date of enactment. In addition, Congress established by statute a detailed procedural framework for the conduct of trials by military commission.

[2] Although the DTA originally made review in the D.C. Circuit of some military commission decisions discretionary, the MCA has since changed that provision and now makes all final military commission decisions reviewable in the D.C. Circuit as of right.

The latter was an extraordinary step, but probably a necessary one to ensure that military commissions would finally begin to dispense justice to some of the enemy combatants detained at Guantanamo. Although military commissions have been used almost since the Founding of the Republic, they have traditionally been created, and their procedures determined, wholly by the Executive. As the Supreme Court explained in *Madsen v Kinsella*, 343 U.S. 341, 346-48 (1952), "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war. They have been called our common law war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute," but instead, "it has been adapted in each instance to the need that called it forth." The creation of a detailed set of statutory procedures for the military commissions was thus a measure without precedent in the Nation's history.

Congress was also careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are "regularly constituted courts" for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.).

As a result of this whole series of events, the unlawful enemy combatants detained at Guantanamo Bay, Cuba currently have available to them an array of procedural protections unprecedented in the history of warfare. Each has his status as an enemy combatant reviewed by a panel of officers in a CSRT according to procedures that were designed to meet the due process requirements that would be necessary for detaining a U.S. citizen as an enemy combatant in the

United States. The detainee may appear before a board of officers; he may examine unclassified evidence to be considered by the board; he has the assistance of a Personal Representative to help him make his case; and he may call witnesses that are reasonably available. The CSRT's decision is then subject to review in the D.C. Circuit. In addition, each detainee has his detention reviewed once a year by an ARB, which assesses the extent to which the detainee continues to pose a threat and should be detained. Detainees who are charged before a military commission have a complete set of statutory procedures for their trials that – again in an unprecedented departure from past practice – include review by an Article III court.

The point that I would like to make to the Committee is that, given this unprecedented set of procedures, and the amount of time and delay it has already taken to get to this point, the wise choice for Congress now is to let the MCA work. Absent some compelling need for a change that is demanded by the Constitution, there is no need to make further modifications to the Act. Changes at this point will only further postpone the day when military commissions can begin to deliver justice.

B. Proposed Amendments to the MCA

Before I turn to the specifics of proposed amendments to the MCA, it is worth noting the titles of some the bills proposing amendments, because they reflect a fundamental premise that I believe is misguided. The bills bear titles such as "Restoring the Constitution Act of 2007." That title attempts to draw rhetorical force from the unstated assumption that aliens detained as enemy combatants outside the United States in the midst of an armed conflict have constitutional rights that have been taken away by the MCA and that should be "restored." As a matter of law, that is a fundamentally incorrect assumption. As a result, I think it provides a distorted basis for guiding congressional action in this area.

The Supreme Court made clear more than fifty years ago in *Eisentrager* that aliens held outside the United States do not have rights under the Constitution. As the *Eisentrager* Court explained, if the Constitution conferred rights on aliens detained overseas as enemy combatants, "enemy elements . . . could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable searches and seizures' as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." 339 U.S. at 784. As the Court explained, "[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments . . . that it could scarcely have failed to excite contemporary comment." *Id.* But there is nothing in the records of the constitutional convention or contemporary practice to suggest that the Founders intended such a novel approach. Nothing in the Supreme Court's decisions since *Eisentrager* — including the recent decisions in *Rasul* and *Hamdan* — has disturbed these fundamental principles. To the contrary, in ruling in 1990 that the Fourth Amendment did not protect aliens outside our borders, the Court resoundingly reaffirmed the teaching of *Eisentrager*, stressing that in *Eisentrager* "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *see also Zadvydas v. Davis*, 553 U.S. 678, 693 (2001).[3] *Eisentrager*'s constitutional holding thus remains the law today.

As a result, clothing the debate about the MCA in the rhetoric of constitutional rights distorts the law and improperly obscures the fact that what is at stake here is not a matter of

[3] The same rule, following the Supreme Court's teaching, has been consistently applied in the courts of appeal. *See, e.g.*, *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

constitutional imperative. Instead, the issues at hand are policy choices for Congress to make about the best mechanisms for allowing the military to deal with enemy combatants in an ongoing armed conflict.

1. Providing habeas corpus for detainees at GTMO

One of the primary changes proposed for the MCA would restore jurisdiction of federal courts to hear habeas corpus petitions from enemy combatants at Guantanamo Bay. Such a change is not required by law, and it is certainly not called for by any practical necessity. To the contrary, it would serve only to add an unnecessary and confusing parallel avenue for judicial review of detentions in addition to that already provided in the DTA.

There is no merit to the idea that restoring habeas jurisdiction over claims brought by aliens held at Guantanamo Bay is somehow required by the Suspension Clause of the Constitution. That clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, sect. 9, cl. 2. That prohibition does not require any change to the MCA for at least two reasons.

First, as explained above, aliens held outside the United States have no rights under the Constitution, including under the Suspension Clause. The same reasoning that the Supreme Court applied in *Eisentrager* (and reaffirmed in cases such as *Verdugo-Urquidez*) to conclude that aliens overseas do not have rights under the Fifth Amendment applies equally to the Suspension Clause. If it did not, and aliens overseas did have a constitutional right to habeas review, there is no immediately apparent reason why the same right would not apply to aliens held in Iraq or in Baghram, Afghanistan (or to aliens held anywhere in the world any future war). Congress should be reluctant to adopt such a novel and extraordinarily expansive notion of constitutional rights.

Second, even if aliens at Guantanamo had some rights under the Suspension Clause, the procedures provided in the DTA for judicial review of detentions (after a CSRT decision) fully satisfy any rights they may have. The purpose of the writ of habeas corpus is to provide judicial review for executive detention. As long as Congress provides some mechanism for securing that judicial review, the demands of the Suspension Clause are satisfied, whether or not the procedure is labeled a "habeas" proceeding. As the Supreme Court has explained, "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). Indeed, the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001). Congress has provided precisely such an adequate substitute here by providing for review in the D.C. Circuit of both the determinations of CSRTs and the final decisions of military commissions.

In fact, the DTA and the MCA provide even greater review than what has been available historically upon habeas challenges to a military tribunal decision in cases where habeas was available. In cases involving military commissions in World War II, the Supreme Court made clear that the function of habeas corpus was simply to test the jurisdiction of the tribunal to issue a decision, not to examine the correctness of its decision. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts, but for the military authorities which are alone authorized to review their decision."); *see also Ex parte Quirin*, 317 U.S. 1, 25 (1942). In providing for review of constitutional and other claims, including the legal claim of

insufficiency of evidence, the DTA and MCA actually provide the detainees at Guantanamo with far more judicial review than has traditionally been provided through habeas to those convicted by a military commission. The MCA thus certainly provides an adequate substitute for any constitutional right to habeas that the detainees could be found to have.

The Court of Appeals for the District of Columbia Circuit has recently rejected the claim that the MCA's elimination of habeas review for Guantanamo violates any constitutional provision. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Following the longstanding precedent outlined above, the court ruled that the detainees have no constitutional rights under the Suspension Clause. *See id.* at 988-94. There is certainly no need for Congress to intervene to amend the MCA now when the courts are still in the midst of their review and the latest indication from the Court of Appeals is that the statute's habeas provisions suffer from no constitutional infirmity at all.

Re-establishing habeas jurisdiction over Guantanamo at this point, moreover, would simply generate confusion and wasteful litigation by creating a parallel avenue for legal challenges, but without clear standards to govern them. The Supreme Court recognized long ago the practical dangers that would be posed by permitting enemy combatants detained overseas free access to our courts to file petitions for habeas corpus. As the Court explained in *Eisentrager*, permitting such petitions "would hamper the war effort and bring aid and comfort to the enemy. . . . It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United

States." 339 U.S. at 779. The initial rounds of habeas litigation on behalf of detainees at Guantanamo, culminating in the *Rasul* decision, proved that Justice Jackson's fears in *Eisentrager* were well founded.

After *Rasul*, however, Congress wisely alleviated the worst of these problems by providing orderly judicial review mechanisms that would proceed only after military decisions had been completed through military processes. Thus, it made the enemy combatant status determination of a CSRT reviewable in the D.C. Circuit and the final decision of a military commission reviewable in the same court. Opening the field up once again to unrestricted challenges under the general habeas statute will only generate a flood of litigation that will unnecessarily divert the resources of the military and the Department of Justice and eliminate the very advantages of an orderly process that Congress sought to achieve through the DTA and MCA. It would do so, moreover, without providing any clear guidance as to any *substantive* change in detainees' rights. To the contrary, presumably no substantive change in rights would be intended. But it would take years of litigation to establish that result.

Based on all of these considerations, there is simply no reason to return to the confusing legal landscape that existed before Congress created the well structured and orderly review mechanisms in the DTA and the MCA.

2. Prohibiting the use of testimony obtained by "coercion"

Another proposed amendment would alter the MCA's carefully balanced provisions regulating the use of statements obtained by some disputed degree of coercion. This amendment would simply ban all testimony obtained by "coercion." I believe such an amendment would be a grave error. It would needlessly deprive military commissions of reliable evidence that was obtained in compliance with all requirements of law and would spawn endless litigation over the meaning of the undefined term "coercion."

The MCA, of course, rightly includes a categorical prohibition on the use of any evidence obtained by torture. 10 U.S.C. § 948r(b). That is not at issue here. In addition, the MCA takes a balanced approach to deal with the thorny issue of statements obtained through some lesser and disputed degree of coercion. For statements obtained after passage of the DTA, it prohibits the use of any statement obtained in violation of the DTA's standards of treatment. 10 U.S.C. § 948r(d). For statements obtained before passage of the DTA, it provides that the statement may be admitted only if the military judge finds that the statement is reliable and possesses sufficient probative value and "the interests of justice would be served by the admission of the statement into evidence." 10 U.S.C. § 948r(c). This approach wisely ties admissibility to the standards of conduct already provided by the DTA. And, for the period before the passage of the DTA, it ensures that the military judge will provide a safeguard against the use of statements obtained by methods that suggest a degree of pressure that might have produced false testimony.

Changing the MCA to prohibit any use of statements obtained by "coercion" would only sow confusion in military commission proceedings and generate further delay as new rounds of litigation would be needed to determine the meaning of "coercion." To begin with, Congress should recognize that virtually every detainee will assert that his statements (and those of others) were obtained by coercion. Al Qaeda training manuals instruct those who are captured to claim that they were *tortured*. The detainees will hardly fail to assert that their treatment amounted to some lesser level of "coercion."

More important, this provision would likely prove particularly confusing in litigation, because the concept of "coerced" testimony already has a well-developed meaning in the context of the protections provided by the Fifth Amendment in criminal prosecutions. But it would be absurd to apply the finely reticulated standards and presumptions that courts have developed

under the Fifth Amendment in this context. That would require that any statement obtained without *Miranda* warnings be deemed coerced. Indeed, the very suggestion that all testimony obtained by "coercion" should be prohibited reflects, in my view, a misguided effort to carry over into the context of military commission trials for war crimes the mind-set and standards of the criminal law. War fighting is not the same as prosecuting criminals in the Article III court system. Everything about the detention and interrogation of an unlawful enemy combatant is – under the way we use the term in the criminal law – inherently coercive. But that does not mean that it violates the laws of war (including Common Article 3 of the Geneva Conventions), or the standards of treatment of the DTA. And it certainly does not mean that a military commission should be deprived of the evidence such an interrogation produces if a military judge deems it reliable.

Indeed, most Americans rightly expect that, in interrogating al Qaeda operatives, our military and intelligence services may use some methods that fall within the broad bounds of the term "coercive" – especially as that term is commonly understood when used in our criminal law. Some degree of coercion seems entirely appropriate when the objective is to obtain vital intelligence from a detainee such as Khalid Sheikh Mohammed – intelligence that could save potentially thousands of lives by preventing another attack like that of September 11th. There is a range of permissible conduct between prohibited "cruel, inhuman, and degrading treatment" and mere "coercion," and there is no basis in law or logic for Congress to deprive military commissions of evidence obtained by such lawful means.

Moreover, Congress should be wary that in setting standards for the admission of evidence in military commissions, it does not inadvertently affect the standards used in the vital task of obtaining intelligence from captured members of al Qaeda. Under the MCA, the

standards for admissibility of evidence and the standards governing interrogators' primary conduct are essentially aligned. If the standard for admissibility in military commissions, however, were changed to depend upon some undefined notion of "coercion" it could have unintended consequences for interrogations. Of course, interrogations of enemy combatants for vital intelligence should be conducted with the paramount objective of obtaining intelligence – not the objective of building a case for a military commission. But if negative consequences would flow from using interrogation practices that, although perfectly lawful under the DTA, might later be deemed "coercive" under a different standard, there is always the chance that, at the margins, interrogators may alter their approach in a way that sacrifices the intelligence objective to preserve the viability of a later prosecution. Congress should avoid risking such an outcome by adhering to the current provisions of the MCA.

None of this, of course, is to suggest that military commissions should receive into evidence statements obtained through means that suggest the declarant was pressured into saying something false to satisfy his questioners. Such a result would be abhorrent to notions of justice deeply rooted in the common law, contrary to the President's order that military commissions provide "full and fair" trials, and would likely violate norms under the laws of war. The MCA, however, already fully guards against that possibility by prohibiting statements obtained in violation of the DTA and by requiring the military judge, in all cases where coercion is at issue, to assess whether "the totality of the circumstances renders the statement reliable and possessing sufficient probative value." 10 U.S.C. § 948r(c)(1), (d)(1). That provision directly addresses the concern at the heart of "coercion" — that false statements not be used as evidence. And it does so through a standard that is far more judicially administrable than a vague prohibition on "coercion" that would only lead to further litigation.

3. Making CSRT determinations of enemy combatant status reviewable by a military commission for purposes of determining jurisdiction.

Under the MCA as currently written, the final determination of a CSRT that an individual is an enemy combatant conclusively determines that person's status for purposes of the jurisdiction of a military commission.[4] That provision makes eminent sense. It recognizes that the procedures provided by CSRTs (including review by the D.C. Circuit) are fully adequate to make a decision about the status of a detainee that may lead to his detention for years as an enemy combatant and provides finality to that threshold status determination. Allowing a detainee to reopen that fundamental status determination as part of the proceedings of a military commission would serve no useful purpose and would only embroil military commissions in unnecessary further litigation.

As outlined above, CSRTs already provide unlawful enemy combatants a degree of process for determining their status that is unprecedented in the history of warfare. The CSRTs are modeled in part after the procedures used by the military under Army Regulation (AR) 190-8 for determining the POW status of detained personnel under Article 5 of the Geneva Conventions. They provide for a board of three officers to review evidence to determine the status of the detainee and permit the detainee to make a case concerning his status, including the right to call witnesses reasonably available. But the CSRTs also provide procedures well beyond those required in AR 190-8. To name just a few, the detainee is provided a Personal Representative to assist him in presenting his case; he is given access to the unclassified

[4] Military commissions under the MCA have jurisdiction only over unlawful enemy combatants. 10 U.S.C. §§ 948c, 948d(a).

evidence being used by the CSRT; and, most significantly, the CSRT determination is subject to judicial review in a civilian court — the D.C. Circuit.

This elaborate process is not only unprecedented in the history of warfare, it was also designed specifically to satisfy the requirements of due process that the Supreme Court outlined in *Hamdi v. Rumsfeld* in describing the process due to a *U.S. citizen* held as an enemy combatant *in the United States*. A plurality of the Court in *Hamdi* explained that the basic elements for such a process consisted of "notice of the factual basis for [the individual's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. The plurality made clear, moreover, that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 538. Indeed, the Court specifically noted that AR 190-8 "already provide[s] for such process," *id.*, in the context of POW-status determinations. The CSRTs are tailor-made to comply with the dictates of due process that the Supreme Court outlined.

It is true that the CSRT is not a full-blown adversarial proceeding involving representation by counsel. But there is no need for such a process in the context of detention of enemy combatants during an armed conflict. Once again, the touchstone for comparison here should not be the procedures we use as part of the criminal law in deciding upon the detention of an individual. That paradigm provides the wrong frame of reference. Adversarial hearings have never been required for detaining enemy combatants until the end of a conflict. And as the Supreme Court itself pointed out in *Hamdi*, even where the detention of a U.S. citizen is concerned, "the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at the time of ongoing military conflict." 542 U.S. at 533 (plurality).

The procedures provided by CSRTs are well tailored to suit the needs of the situation and they are more than adequate to satisfy all legal requirements to justify the detention of enemy combatants under the law of war. If they provide a sufficient process for that purpose — which will deprive a detainee of his liberty potentially for years — they certainly provide sufficient process to treat the status determination they produce as final for purposes of the jurisdiction of a military commission. Affording them that treatment does not eliminate any of the rights of the accused to challenge the evidence presented against him, nor does it eliminate the government's burden to establish every element of a charge beyond a reasonable doubt. Failing to treat CSRT determinations as final would simply generate further re-litigation of an issue already properly decided with full procedural protections and cause confusion and delay in military commission proceedings.

II. Continued Use of U.S. Naval Base, Guantanamo Bay, Cuba as a Detention Facility

The continued use of Guantanamo Bay for detaining enemy combatants unquestionably raises a difficult issue for the United States. There can be no doubt that Guantanamo has become a lightning rod for criticism in the international community. And maintaining good relations with our allies and securing their continuing support (as well as securing the good will of other nations more broadly) is an important aspect of winning the conflict with al Qaeda. At the same time, the detention of those remaining at Guantanamo Bay serves an imperative national security function. The military has reviewed the situation of every enemy combatant at Guantanamo at least twice (and is now starting a third round of review) and determined that they would continue to pose a threat of rejoining al Qaeda or the Taliban if released.[5] I believe the Government has

[5] This leaves to one side the situation of some detainees whom the military has determined to release but who cannot be repatriated to their home countries for fear they would be persecuted there.

an obligation to the American people not to release such enemy combatants who would continue to pose a threat to the United States and its coalition partners in an ongoing armed conflict. The danger that these detainees potentially pose is quite real, as has been demonstrated by the fact that to date at least 29 detainees released from Guantanamo re-engaged in terrorist activities, some by rejoining hostilities in Afghanistan where they were either killed or captured on the battlefield.[6]

One aspect of the debate about Guantanamo should be dispensed with at the outset. To some extent, critics of Guantanamo assert that the detainees should be "charged or released." Indeed, many articles critical of Guantanamo repeatedly emphasize that those detained there have been "held without charge" for years. These criticisms fundamentally misconceive the nature of the military mission in detaining enemy combatants and the rights under the law of war on which it is founded. Once again, the criticisms are improperly based on assumptions derived from the wholly different context of the criminal law. Under the laws of war, enemy combatants may be detained for the duration of the conflict simply because they are enemy combatants. This detention is not punitive; it is designed simply to prevent the enemy from rejoining the fight. As a result, under the law of war, there is no need to charge an enemy with any violation of the law of war to justify detaining him until the end of the conflict. It is true that, in this unconventional war, the "end of the conflict" is difficult to predict and, at this point, difficult to foresee. But to address that concern, the military has adopted the unprecedented measure of holding ARBs — annual reviews to determine whether each detainee continues to pose a threat warranting his

[6] *See* www.defenselink.mil/news/Mar2005/d20050304info.pdf (citing outdated figure of 10 confirmed returning to terrorist activity and describing specific cases).

detention. There is no requirement under the laws of war for such a review, and this innovation ensures that the military will not detain any enemy combatant who no longer poses a threat.

Ultimately, I believe that Guantanamo Bay must continue to be used for three reasons:

First, the Government has a duty to the American people not to release those who would return to the fight and pose a threat to Americans or our coalition partners.

Second, there is no practical alternative to Guantanamo. In particular, moving the detainees to the United States is not a viable alternative for both practical and legal reasons. As a practical matter, there is no adequate facility in the United States for fulfilling the mission currently served at Guantanamo Bay. The facilities at Guantanamo – by virtue of both their location and the physical plant that the military has in place – are the most secure place for these individuals to be detained. They house the detainees in a setting where they pose little risk of escape, and they provide key facilities for the dual missions of detaining enemy combatants and interrogating them for intelligence. Interrogations of detainees at Guantanamo have produced significant intelligence in the war with al Qaeda, and to the extent we continue to capture key al Qaeda operatives, we can expect that the intelligence mission must continue. Indeed, just this Monday an al Qaeda operative potentially possessing valuable intelligence about al Qaeda's network in East Africa was transferred to Guantanamo after being seized in Kenya. As I understand it, the military simply does not have any facility large enough and secure enough to fulfill these roles in the United States. Nor could the detainees be housed by parceling them out to different federal facilities run by the Bureau of Prisons. That solution would inevitably provide the detainees unmonitored means of transmitting and receiving messages to the outside and increase the security threat they pose.

In theory, if enough money were spent, a new facility might be created in the United States that would be secure enough to house the detainees. But it would inevitably raise additional security concerns that simply are not present at Guantanamo — concerns for the community near that facility. Bringing to a U.S. facility over 270 enemy combatants[7] whom the military has already determined, through multiple reviews, are the ones who are most dangerous and would return to the fight if they were released would likely increase the threat of an attempted escape and the danger of harm to American civilians if there were such an escape. These are individuals who have made various threats confirming their intent to do harm to Americans wherever possible. For example, one detainee has said that if released he would "arrange for the kidnapping and execution of U.S. citizens"; another has threatened MPs that he would come to their homes and cut their throats; and yet another has said that "one day I will enjoy sucking their blood, although their blood is bitter."[8] In addition, any transfer would make the new U.S. facility a prime target of opportunity for any terrorist attack that al Qaeda is able to mount within our borders. Although the Government has been hard at work keeping our borders secure since 9/11, there is always the risk that an al Qaeda cell could evade those efforts and slip into the country. If that happened, an attack on the facility detaining their comrades would provide a target with media potential that would be difficult pass up. That, too, would create a

[7] After the most recent round of ARBs was completed, the military recommended 273 enemy combatants for continued detention at Guantanamo, which reflects an assessment that those detainees are sufficiently dangerous that they must remain in U.S. custody. Other detainees at Guantanamo (at least 55) have been recommended for transfer to another nation. That does not mean, however, that they are not dangerous. As I understand it, a recommendation for transfer (as opposed to a recommendation for release) is conditioned on fulfillment of certain security requirements (including, perhaps, detention by the transferee nation). Many detainees recommended for transfer remain at Guantanamo because those security requirements have not yet been met by the potential transferee nation.

[8] JTF-GTMO Information on Detainees at 2, 3, avaialbe at www.defenselink.mil/news/Mar2005/d20050304info.pdf.

danger for the entire area around such a new facility. In short, the simple fact is that any place inside the United States will be more accessible and less secure than Guantanamo Bay.

In addition to the significant practical hurdles presented by moving enemy combatants to the United States, the legal implications of bringing them onto U.S. soil are also daunting. The law is clear that various constitutional rights do not apply outside the United States to aliens, and nothing in the Supreme Court's recent decision regarding enemy combatants has altered that. But the general rule as to aliens who have crossed our borders is quite different. As the Supreme Court has explained, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (collecting cases); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments . . . .").

Whether and to what extent these decisions would be applied to unlawful enemy combatants brought to the United States solely for detention purposes is not necessarily foreordained. Current case law, however, favors the conclusion that these individuals would secure constitutional rights once on U.S. soil. And it is a certainty that detainees will attempt to assert such rights in an entirely new round of litigation. Given the array of procedures provided for the detainees, it may well be that even if they were brought to the United States and were held to have constitutional rights, the procedures already provided would satisfy those rights. But even if that were the ultimate outcome, it would take years of further litigation and delay to finally reach that result. In the meantime, the military commission process would be stalled once again, none of the enemy combatants at Guantanamo would be brought to justice, and the scarce

resources of both the Department of Justice and the Department of Defense would be drained in a needless round of additional litigation.

Third, and finally, I believe that the United States should continue to use Guantanamo because simply closing Guantanamo and moving detainees to U.S. soil would almost certainly not achieve the desired objective of eliminating criticism and securing support from the international community. The criticisms from the international community do not hinge on the *place* where detainees are held. Guantanamo is a flashpoint because it is the place where detainees are held now and, admittedly, because of the initial legal battles about detainees' access to courts. But criticisms have not stopped despite the unprecedented procedures now afforded at Guantanamo, including judicial review. In my view, that is because the fundamental criticism the United States faces is an attack on the entire law-of-war paradigm under which the United States asserts the right to treat the struggle with al Qaeda as an armed conflict and to detain enemy combatants under the laws of war without "prosecuting" them on some "charge." Thus, unless the United States is prepared to abandon the law-of-war framework that currently governs the detention of those at Guantanamo, simply moving the detainees to the United States will likely do little to quell the outcry from the international community. I believe the United States was right to treat the conflict with al Qaeda as an armed conflict; that exercising the rights provided a belligerent under the law of war are critical for succeeding in that conflict; and that the United States should not abandon the course it has pursued.

For these reasons, I believe that the continued use of Guantanamo Bay — even though it has costs for the United States in the international community — provides the only practical alternative for fulfilling the imperative of detaining those enemy combatants who would pose a threat to the United States if released.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions the Committee may have.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Patrick F. Philbin

Capacity in which appearing: (check one)

X Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented:_____

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007): None;
Fiscal year 2006: "";
Fiscal year 2005: "".

Federal agencies with which federal contracts are held:

Current fiscal year (2007): N/A;
Fiscal year 2006: "";
Fiscal year 2005: "".

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007): N/A;
Fiscal year 2006: "";
Fiscal year 2005: "".

Aggregate dollar value of federal contracts held:

Current fiscal year (2007): N/A;
Fiscal year 2006: "";
Fiscal year 2005: "".

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2007): None;
Fiscal year 2006: None;
Fiscal year 2005: None.

Federal agencies with which federal grants are held:

Current fiscal year (2007): N/A;
Fiscal year 2006: N/A;
Fiscal year 2005: N/A.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2007): N/A;
Fiscal year 2006: "
Fiscal year 2005: "

Aggregate dollar value of federal grants held:

Current fiscal year (2007): N/A;
Fiscal year 2006: "
Fiscal year 2005: "

Testimony of
Professor Neal Katyal
Georgetown University Law Center
Before the
House Armed Services Committee
March 29, 2007

INTRODUCTION

Thank you Chairman Skelton, Representative Hunter, and Members of the Armed Services Committee, for inviting me to speak to you today. I appreciate the time and attention that your Committee is devoting to the legal and human rights crisis surrounding the detainees at Guantanamo Bay.

On Nov. 28, 2001, I testified before the Senate Judiciary Committee about the President's then two-week old plan to try suspected terrorists before *ad hoc* military commissions. I warned the committee that our Constitution precluded the President from unilaterally establishing military tribunals and that our Founders' structure required that these tribunals be set up by Congress. On June 29, 2006, the Supreme Court agreed in *Hamdan v. Rumsfeld*, invalidating the makeshift tribunal scheme devised by presidential fiat alone.[1]

Indeed, every time the Supreme Court has ruled on the merits regarding the Executive's procedures for detainees, it has found them lacking, forcing Congress and the Executive Branch back to the drawing board at great expense in terms of money, time, and trust. Meanwhile, for five years and counting, the nation and the world at large wait for the United States to bring terrorists to justice consistent with our ideals of democracy and the rule of law.

A few weeks after the *Hamdan* decision, on July 19, 2006, I testified before the Senate Armed Services Committee, advocating a unitary court system for all suspected terrorists. I emphasized that our nation's tried-and-true courts-martial institution, complemented by the existing federal criminal justice system, provide all the safeguards needed to bring suspected terrorists to account without abandoning our most deeply-held beliefs about what it means to administer justice. I warned that legislation specifically crafted for a handful of individuals that does away with important criminal procedure guarantees is not only unnecessary but unwise. Such a two-tiered justice system threatens our nation's foundational values, as well as American credibility in the world arena.

[1] 126 S. Ct. 2749 (2006).

Unfortunately, like the Detainee Treatment Act of 2005, the Military Commissions Act of 2006 (MCA) implements precisely such an impoverished two-tier system. The MCA provides a blunt instrument for a complex operation. It eliminates the right of habeas corpus for a group defined not by objective principle, but rather by arbitrary judgment of the Executive.[2] Under the MCA, the federal courts lack jurisdiction to hear habeas claims from *any* alien detained by the United States and determined (by an untested and hastily constructed Executive proceeding) to be an enemy combatant.[3] And after constructing a proceeding where the Executive acts as judge, jury, prosecutor, and possibly executioner, the MCA allows only for the most ephemeral review by an independent judicial authority in which neither the facts nor all of the law may be questioned by the defendant. It lightens the government's burden by casting aside constitutional rights and guarantees as if they are simple conveniences, the chaff rather than the grain of our democratic order. This is plainly a stop-gap law, designed for expediency and guaranteed convictions, not for endurance, legitimacy, or justice. In the end, the gravely flawed MCA only burdens this new Congress and the federal courts with divisive litigation. It is a law that does not merely invite judicial scrutiny, but clamors for it.

Forward-thinking members of the Administration and this Congress have foreseen the end result: a new Supreme Court decision, this year or the next, followed by new legislation, this year or the next, driven by reaction rather than deliberation. This Committee has asked me here today, as I understand it, because it is interested in breaking this counterproductive cycle and avoiding a new round of constitutional hot potato between the political branches of government. Leaving a vacuum of constitutional leadership for the Court to fill falls far short of the ideal envisioned by our nation's founders: a vibrant system of innovation, evolution, and interlocking responsibility with Congress at the helm. How can we forget the stirring words of the great statesman, James Madison, as a young Member of this esteemed body, urging the House of Representatives to determine for itself the deep question of whether the proposed Bank of the United States was constitutional?[4] The need for fresh direction, and a return to Madison's view of Congress's role, is apparent.

On the other hand, a litigation-based approach to this problem can only mean delay and embarrassment as the nation and the world wait for real justice, for a sixth year. Congress should act now, rather than later, to restore rights and establish a framework for

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[2] The interpretation of the MCA is currently the subject of pending petitions for certiorari before the Supreme Court of the United States. This testimony adopts, *arguendo*, the current controlling interpretation, which has been offered in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir., Feb. 20, 2007) and *Al Odah v. United States*, No. 05-5063 (D.C. Cir., Feb. 20, 2007).

[3] Indeed, the MCA inexplicably attempts to cement into law the enemy combatant determinations of the Combatant Status Review Tribunals, which were hastily conceived and are notoriously skewed to provide the detainee with little opportunity to disprove the "enemy combatant" allegations against him. *See* Corine Hegland, *Empty Evidence*, NATIONAL JOURNAL, Feb. 4, 2006.

[4] James Madison's Speech to the House of Representatives (1791), *in* James Madison, Writings 480-90 (Rakove ed. 1999).

the habeas procedures that the Supreme Court is likely to require. The legal challenges to the military trials of suspected terrorists held at Guantanamo will cast a glaring spotlight on every nook and cranny of United States policy, and its shortcomings will be apparent. A politics of responsibility, and not reaction, is required now.

I. Moving the Trials to the U.S. Is A First (But Not Last) Step

Defense Secretary Gates has made the most recent brave attempt to argue out of turn on this issue, and I commend his proposal to transfer all terrorism trials from Guantanamo Bay to the United States. As reported by the *New York Times* last week, the purpose of this move would be to make the trials more credible, as high-level officials (evidently including the Secretary of State) acknowledge that Guantanamo's continuing existence hampers the nation's war effort.[5] Moving the trials would communicate to the world that America has no intention of relegating these trials to a "legal black hole," and that the fundamental rights we assume daily here will not be treated as special privileges, doled out to our prisoners at the pleasure of an absentee warden.

However, while the Gates plan would be a first step in signaling the government's intention to integrate these unusual proceedings into our tradition of open, fair adjudication, it would do quite little to substantively further that goal. The MCA denies habeas rights to people based on their citizenship. An alien detainee on trial in Leavenworth, Kansas and an alien detainee on trial in Guantanamo are both excluded from our legal system's most crucial protections, including habeas corpus, under the MCA. This despite the fact that the writ of habeas corpus has been described by the Supreme Court as the "highest safeguard of liberty" in our system.[6]

The Supreme Court has held that geography alone does not create rights. In *Eisentrager v. Johnson*, the Court determined that enemy aliens held abroad did not have enough of a connection to the United States to be entitled to habeas corpus rights.[7] While *Eisentrager* suggested that presence on U.S. soil might change the analysis, the Court later held that lawful but involuntary presence in this country does not necessarily entitle an individual to constitutional protection, either.[8] But even if geography were determinative, a move from Guantánamo to the United States would do little: the Court has already determined that the military base is effectively U.S. soil for reviewing detainee claims.[9]

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[5] Thom Shanker and David E. Sanger, *New to Job, Gates Argued for Closing Guantanamo*, N.Y. TIMES, Mar. 23, 2007, at A1.
[6] *Smith v. Bennett*, 365 U.S. 708, 712 (1961).
[7] 339 U.S. 763 (1950).
[8] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1991). Notably, however, *Verdugo-Urquidez* did not concern constitutional rights to habeas corpus, but rather Fourth Amendment rights to suppress illegally obtained evidence.
[9] *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

In short, some of the constitutional and prudential defects of the MCA would follow these alien detainees on their trip from Guantanamo to the United States. Whether these trials take place in the United States or Guantanamo, it is my view that the Court will ultimately hold that the Constitution's fundamental guarantees must govern these trials. Yet if these trials take place at Guantanamo, and the courts follow the Administration's claim that the judiciary is powerless to intervene until after individuals are convicted in these makeshift tribunals, the result will be atrocious: the Court will have to throw out all of the convictions because of the inescapable legal conclusion that Guantanamo is not a legal black hole where the Executive can do anything it wants when it punishes someone.

Therefore, while an incremental step like Secretary Gates's plan would provide a welcome shift of perspective, sure to be lauded by the international community, it would not address all of the substantive legal challenges raised by the detainees or halt the progress of these cases on their way to the Supreme Court. That said, it is a very useful first step in helping to restore the credibility of the United States in this matter, and, as a practical matter, would expedite the trials by eliminating the logistical delays inherent to having trials take place in such a removed locale as Guantanamo.

II. The Military Commissions Act is Unconstitutional

The only way to truly solve the problems that the MCA creates is to repeal the entire law and pass one consistent with this nation's Constitution and moral principles. As it stands, the MCA discriminates against people on the basis of alienage, a violation of the Equal Protection principle so deeply ingrained in our legal culture. And in further contravention of the basic guarantees of a free society, the law burdens the fundamental right of access to the courts. Furthermore, the commissions sanctioned by the MCA flout international law and dispense with procedures fundamental to the fair administration of justice, including the prohibition on hearsay evidence. To solve these infirmities, Congress should repeal the MCA and pass a law using the existing system of courts-martial as the basis of a legal regime to deal with the Guantánamo detainees.

a. The MCA Establishes Unconstitutional Barriers Based on Alienage

The MCA purports to deny the writ of habeas corpus to any alien detained by the United States. As the text of the MCA makes clear, it is not only those whom the Government has held under its control for years in Guantanamo that have their habeas rights removed. The MCA deprives those rights to *all* aliens, even lawful resident aliens living within the United States, who are currently or in the future determined by the Executive's makeshift procedures to be "enemy combatants." Citizen detainees remain free to challenge their detention in civilian courts, while detained aliens are now excluded from independent judicial review based on an arbitrary Executive determination of their combatant status that the MCA cements into law.

I believe that such distinctions based on alienage will eventually be struck down by the courts. As I explained in my Senate testimony, the Equal Protection components of the Fifth and Fourteenth Amendments preclude the restriction of fundamental rights and government discrimination against a protected class. The MCA targets *both* a fundamental right and a protected class, and as such it just cannot survive the stringent constitutional standard. The statute purports to restrict the right of equal access to the courts, one of the most fundamental of rights under our legal system. Worse still, the line that divides who does and who does not receive full habeas review under the MCA is based on a patently unconstitutional distinction—alienage. The onus is on this Congress and this Committee to recognize that we cannot tolerate this unconstitutional deviation from longstanding American law in the current war on terror any longer.

The commissions set up by the MCA, like President Bush's first set of military commissions, appear to be the first ones in American history designed to apply only to foreigners. The United States first employed military commissions in the Mexican-American war and "a majority of the persons tried . . . were American citizens."[10] The tribunals in the Civil War naturally applied to citizens as well. And in *Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen and along with the others who were indisputably German nationals, prompting the Supreme Court to hold: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[11]

Those who drafted the Equal Protection Clause knew all too well that discrimination against non-citizens must be constitutionally prohibited. The Clause's text itself reflects this principle; unlike other parts of the section, which provide privileges and immunities to "citizens," the drafters intentionally extended equal protection to "persons."[12] Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen."[13] This language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: "Congress shall have power to . . . secure to *all citizens* . . . the same political rights and privileges; and to *all persons in every State* equal protection in the enjoyment of life, liberty, and property."[14] The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people

[10] David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2030 (2005).
[11] *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).
[12] U.S. CONST. amend. XIV, § 1; *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens).
[13] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449 (1857). *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 170-72 (1998) (tracing the historical origins of the Equal Protection Clause and its use of the word "persons" to *Dred Scott*); *id.* at 217-18 n.* (stating that the Equal Protection Clause is "paradigmatically" concerned with "nonvoting aliens").
[14] AMAR, *supra* note 13, at 173 (quoting a draft of the Fourteenth Amendment) (emphasis added).

that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?"[15]

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country knows all too well that the kind of hatred and evil that has led to the massacre of innocent civilians is born both at home and abroad. And nothing in the MCA, nor the DTA or the Military Order that preceded it, suggests that military commissions are more necessary for aliens than for citizens suspected of terrorist activities. Indeed, both the Executive and Congress appear to believe that citizens and non-citizens pose an equal threat in the war on terror. Since the attacks of September 11th, the Executive has argued for Presidential authority to detain and prosecute U.S. citizens. And in *Hamdi v. Rumsfeld*, the Supreme Court agreed that "[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.' . . . [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict."[16] Likewise, Congress did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force, which provided the President with the authority to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."[17]

The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice no matter what their country of origin. Terrorism does not discriminate in choosing its disciples. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out its despicable bidding. The Attorney General himself has recently reminded us that "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[18] Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the disparate procedures for suspected terrorist detainees on the basis of citizenship simply makes no sense.

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[15] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). Similarly, Senator Howard stated that the Amendment was necessary to "disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." *Id.* at 2766.

[16] 504 U.S. 507, 519 (2004).

[17] 115 Stat. 224, note following 50 U.S.C. §1541.

[18] Alberto Gonzales, U.S. Attorney General, Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006) (transcript available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html); *see also Foiled Dirty-Bomb Plot Reveals Chilling New Threats*, USA TODAY, June 11, 2002, at 10A (reporting that when announcing Jose Padilla's arrest in 2002 for suspicion of planning a dirty bomb attack on U.S. soil, Attorney General John Ashcroft described Padilla's American citizenship as attractive to Al-Qaeda because Padilla could move freely and easily within the United States); Jessica Stern, Op-Ed., *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15 (fearing that Al-Qaeda is aiming to recruit American citizens for domestic terror attacks).

Further, in the wake of international disdain for the military tribunals authorized by President Bush in his Military Order, our country is already under global scrutiny for its disparate treatment of non-U.S. citizens. The reported Gates plan recognizes, at the very least, that our handling of Guantanamo detainees has garnered (and warranted) bad publicity. We must be careful not to further the perception that, in matters of justice, the American government adopts special rules that single out foreigners for disfavor. If American citizens 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 towards America worldwide.

b. The MCA's Attempt to Strip Federal Courts of Habeas Jurisdiction Over Alien Detainees is Unconstitutional

Aliens and citizens alike have a constitutional right to challenge the legality of their trial by military commission. Because Congress has not invoked its Suspension Clause power, it may not eliminate the core habeas rights enshrined into our Constitution.[19] Rather, absent suspension, the Great Writ protects all those detained by the government who seek to challenge executive detention, particularly those facing the ultimate sanctions – life imprisonment and the death penalty.[20]

And even if Congress were to invoke its Suspension Clause power, it lacks *carte blanche* power to suspend the writ at will. Instead, the Constitution permits a suspension of habeas only when in "Cases of Rebellion or Invasion the public Safety may require it."[21] In enacting the MCA, Congress made no such finding that these predicate conditions exist. Indeed, even during evident "Rebellion or Invasion," the Supreme Court has required that congressional suspension be limited in scope and duration in ways that the MCA is not:

First, Congress must tailor its suspension geographically to those jurisdictions in rebellion or facing imminent invasion. Thus, in *Ex parte Milligan*, the Court determined that because Milligan was a resident of Indiana, a state not in rebellion, his right to habeas was protected.[22] Like Indiana, "Guantanamo Bay . . . is . . . far removed from any hostilities."[23] In fact, the detention cells at Guantanamo Bay have served the explicit

[19] If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. *See INS v. St. Cyr*, 533 U.S. 289, 298-300, 305 (2001). This requirement arises not merely from the principle of avoiding serious constitutional questions, but also from the historical understanding of habeas corpus – and suspension – in our country's history. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 14 (2006).
[20] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963) ("The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military....").
[21] U.S. CONST. art. I, §9, cl. 2.
[22] 71 U.S. 2, 126 (1866). The Court reached this conclusion even though Congress had authorized a broader suspension. *See* Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the President to "suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.").
[23] *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

purpose of holding captured suspects in U.S. custody away from the tumult of the battlefield abroad.

Moreover, Congress may suspend the writ for only a limited time. The MCA, however, has no terminal date and indefinitely denies alien detainees access to habeas corpus. As a result, alien detainees swept into U.S. custody would be left to languish in an extralegal zone, their fundamental rights left to the whim of the Executive, potentially suspended forever. The Constitution simply does not condone the existence of a lawless vacuum within its jurisdiction.

The MCA's jurisdiction-stripping provision not only breaches the geographical and temporal restraints imposed by the Constitution, it also defies the historic scope and purposes of the writ. Habeas rights have always extended to individuals in U.S. jurisdiction -- citizen or alien, traitor or enemy combatant. The Supreme Court has declared that the judiciary retains the obligation to inquire into the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory, explaining that "it [is] the alien's presence within its territorial jurisdiction that [gives] the Judiciary the power to act."[24] Guantanamo Bay is not immune from these dictates of the Constitution. In *Rasul*, the Court rejected the Government's assertion that Guantanamo is a land outside U.S. jurisdiction.[25] Indeed, as "[t]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base,"[26] the Court observed that alien detainees held at Guantanamo are not categorically barred from seeking review of their claims. The majority dropped a pointed footnote, strongly suggesting that the detainees were protected by the Constitution.[27] In addition, Justice Kennedy separately concluded that Guantanamo detainees had a constitutional right to bring habeas petitions based on the status of Guantanamo Bay and the indefinite detention that the detainees faced.[28] It makes sense not to constitutionalize the battlefield; but a long-term system of detention and punishment in an area far removed from any hostilities, like that in operation at Guantanamo Bay, looks nothing like a battlefield.

The fact remains that if the military commissions are fundamentally unfair, they are unfair for everyone. It is no more just to subject an alien detainee in Guantanamo Bay to an inferior adjudicatory process than it is to subject a citizen detainee in Norfolk,

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[24] *Eisentrager*, 339 U.S. at 775, 771 (1950).
[25] 542 U.S. at 480-84.
[26] *Id.*. at 480.
[27] The footnote states: "Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3). *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein." *Id.* at 484 n.15. This passage certainly contemplates constitutional violations, otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense, as those pages deal exclusively with the Constitution's applicability.
[28] *Id.* at 488 (Kennedy, J., concurring in the judgment).

Virginia to the very same. The MCA, in its attempt to relegate alien detainees to a lesser brand of justice and eliminate their right to challenge their Executive detention, unconstitutionally tramples on the habeas rights of prisoners held within U.S. jurisdiction. The Constitution will not tolerate such arbitrary exclusions.

Finally, such restrictive habeas review jeopardizes the finality and confidence surrounding verdicts of the military commissions. If the international community believes the entire process is invalid, we cannot expect it to respect the authority of the commission outcomes. Secretary Gates has recognized that the trials of terror suspects must be credible in the eyes of the world. Removing the trials from Guantánamo would lift at least some of the perception of injustice that currently clouds the proceedings.

c. The MCA Establishes a Trial System That Violates Both Domestic and International Law

In addition to violating principles of Equal Protection that are central to our constitutional order, the MCA further violates longstanding rules of criminal procedure and evidence. For example, prosecutions under the MCA may employ hearsay evidence against a defendant on trial for his life, which deprives him of the most elemental opportunity for fairness: challenging allegations against him through cross-examination or confrontation. Further, the MCA leaves open the possibility that evidence that is the fruit of torture may be introduced and used to convict a defendant in the military commissions, a principle previously unheard of in American law.

The MCA also disposes of Common Article 3 of the Geneva Conventions as a possible source of law under which a defendant may assert rights. And what the MCA does retain of the Geneva Conventions is, under the Administration's view, thin gruel. For instance, grave breaches of Common Article 3 are subject to criminal sanction but a court may not consider international or foreign law to determine what would constitute such a grave breach. And American personnel accused of violating Common Article 3 have a ready defense – as long as they acted in good faith that their actions were lawful (which might include reliance on administration memos on torture), they may not be held liable.

The MCA quite simply fails to take our treaty obligations seriously. When this happens, we can no longer be surprised to see our credibility in the world community falling and anti-Americanism on the rise.

d. Congress should repeal the MCA and enact a system to deal with these prosecutions based on the Uniform Code of Military Justice and the courts-martial.

Unlike the dichotomy presented by the media and talk-show hosts, the choice here is not between the unconstitutional tribunals under the MCA and the civilian justice system with the full panoply of criminal procedure rights possessed by any ordinary

defendant. There is a middle way to run these prosecutions that provides the flexibility required to safeguard national security while still employing fair procedures and protecting fundamental rights. Namely, the longstanding system of courts-martial set forth in the Uniform Code of Military Justice. As Justice Stevens declared in *Hamdan*, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."

Most importantly, the existing courts-martial are already equipped to deal with the unique circumstances of a terrorism trial and, in fact, have been statutorily authorized to try such cases for ninety years. These military trials use judges and juries that already possess security clearances and can view classified evidence without fear of security compromises. The rules governing courts-martial provide for trials on secure military bases and for courtroom closures when sensitive evidence is presented, another measure that would help guarantee information security. Courts-martial also already utilize measures that would, among other things, protect the identities of witnesses if necessary. In short, the procedures for conducting courts-martial protect vital national security information.

In addition, unlike the rules for tribunals under the MCA, the court-martial rules benefit from the fact that they are fully delineated, tested by litigation, and validated by the Supreme Court. Thus, a system that tries suspected terrorists under these rules of military justice need not be delayed by legal challenges seeking relief from rigged and un-American procedures such as the introduction of evidence resulting from torture. Indeed, all the energy the government currently spends defending these flawed policies could be redirected to actually trying and convicting terrorists under a tough but fair system that is consonant with American values and ideals.

Neither Congress nor the Executive has offered any compelling reason why the established court-martial system would be insufficient to try suspected terrorists. Given its robust safeguards for national security and its careful balance between security and the rights of the defense, the court-martial system is the most acceptable forum in which to try these cases today.

III. Congress Must Take the Lead Now to Repeal the MCA

There is a reason why Law & Order is one of the longest-running shows on television. Trials are gripping, dramatic, and relatively easy to follow. Unlike detention, which involves little drama and no grand moment of resolution, a trial has developments, recognizable characters, and a climax in the form of a verdict. The military trials of the suspected terrorists housed at Guantanamo will be watched by the world because each trial is a self-contained, symbolic event. Yet we must not forget that in these trials, the United States, not just the detainees it is prosecuting, is also facing judgment.

Changing the background set from Guantanamo to a United States military base will not ultimately change the verdict, but it will provide at least an appearance of good

faith and greater fairness. It is a crucial first step—arguably even more important than the repeal of the habeas-stripping provisions in the MCA and DTA. Still, with the world watching, Congress must be sure that these trials measure up to the substantive standards, both constitutional and moral, against which we judge our own court system.

The Administration clings to the belief that Guantanamo is a legal black hole where literally none of the protections of the American constitution apply. This short-sighted theory is directly responsible for the MCA's unconstitutional provisions, and it will corrupt these important trials. Such views must be repudiated and replaced with an appropriate system that reflects the traditions and values of Americans, one built upon the recognition that the war on terror will only be won with the world – and justice – at our side, not at our back.

As I have argued, the likelihood of an adverse Supreme Court ruling on the MCA is high, and Congress will need to return to the drawing board. Intense discussion and compromise followed the Supreme Court decisions in *Rasul* and *Hamdan,* and ultimately Congress updated the law, much the way doctors re-engineer a vaccine, as if the Constitution were a persistent viral strain coming back to haunt it. This Congress has the choice of getting ahead of the curve to rework the law now, and thereby design a habeas procedure that is consistent both with our national security goals and the Constitution, or it can wait for yet another Court decision and return to cutting corners and erasing words and commas.

Senator Arlen Specter, former Chair of the Senate Judiciary Committee, put it bluntly: "While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns."[29] No detainee has been tried in the five and a half years since the war on terror began. International perception of the United States remains embarrassingly low for a country that has always been the world's champion of democracy and the rule of law.

I ask the members of this Committee to realize the power that lies in your hands—the power to ensure the safety of our troops and the dignity of the nation and values they defend. As Senator John Warner eloquently put it last summer, "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."[30] The world's scrutiny is specifically targeted at our handling of Guantanamo Bay, and I applaud Secretary Gates and all others in our government who recognize that the only thing worse than making a mistake is failing to correct it when you still have the chance.

Thank you.

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[29] Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 19, Boumediene v. Bush, No. 06-1195 (March 2007).

[30] Remarks of Sen. John Warner, *Hearing on the Future of Military Commissions to Try Enemy Combatants*, July 13, 2006.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name:_____**Neal Katyal**_____

Capacity in which appearing: (check one)

_x__Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented:_____

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
NONE			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal contracts are held: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.): NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal contracts held: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal grants are held: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.): NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal grants held: NONE

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

TESTIMONY OF
ELISA MASSIMINO

WASHINGTON DIRECTOR
HUMAN RIGHTS FIRST

HEARING ON

THE MILITARY COMMISSIONS ACT AND
THE FUTURE OF DETENTION AT GUANTANAMO BAY

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ARMED SERVICES

MARCH 29, 2007

Introduction

Chairman Skelton, Congressman Hunter and Members of the Committee, thank you for inviting me to be here today to share the views of Human Rights First on these issues of such importance to our Nation. We have appreciated the opportunity to work with your office, Mr. Chairman, as well as with others on the Committee, as you consider how best to ensure that U.S. policy on the detention, interrogation and trial of terrorist suspects is effective, humane and consistent with our laws and values.

My name is Elisa Massimino, and I am the 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.

I. Guantanamo: A Failed Policy

The issue facing you today is one of great urgency and import. The policy of detention, interrogation and trial of terrorist suspects at Guantanamo has been a failure and it is, I respectfully submit, your job to fix it. The decision to hold detainees at Guantanamo in the first place was driven at least in part by a desire on the part of the Administration to insulate U.S. actions taken there – detention, interrogation, and trials – from judicial scrutiny, and even from the realm of law itself. Early on, one administration official called Guantanamo "the legal equivalent of outer space." That goal – to create a law-free zone in which certain people are considered beneath the law – was illegitimate and unworthy of this nation. And any policy bent on achieving it was bound to fail.

The policy at Guantanamo has been a failure in several important respects. First, and most obviously, it has failed as a legal matter. The Supreme Court has rejected the government's detention, interrogation and trial policies at Guantanamo every time it has examined them. And it likely will do so again.

Military commissions at Guantanamo have also failed to hold terrorists accountable for the most serious crimes. Unless you count the guilty plea this week of the Australian David Hicks who, after five years in U.S. custody pled guilty to a crime (material support for terrorism) that didn't exist in the laws of war at the time Hicks allegedly committed it, the system has failed to bring a single terrorist to justice.

In addition, fueled by the assertion that it was a "legal black hole," Guantanamo became the laboratory for a policy of torture and calculated cruelty that later migrated to Afghanistan and Iraq and was revealed to the world in the photographs from Abu Ghraib. These policies aided jihadist recruitment and did immense damage to the honor and

reputation of the United States, undermining its ability to lead and damaging the war effort.

But perhaps most importantly from a security perspective, the policy at Guantanamo – which treats terrorists as "combatants" in a "war" against the United States, but rejects application of the laws of war – has had the doubly pernicious effects of degrading the laws of war while conferring on suspected terrorists the elevated status of combatants.[1]

By taking the strategic metaphor of a "war on terror" literally, the United States Government has unwittingly ceded an operational and rhetorical advantage to al Qaeda, allowing them to project themselves to the world – including to potential recruits and a broader audience in the Middle East – as warriors rather than criminals.

Khalid Sheik Mohammed reveled in this status at his "combatant status review tribunal" hearing at Guantanamo two weeks ago. After ticking off an itemized list of 31 separate attacks and plots for which he claimed responsibility (including the 9/11 attacks and the murder of Daniel Pearl), he addressed – as if soldier-to-soldier – the uniformed Navy Captain serving as president of the military tribunal. Proudly claiming the mantle of combatant ("For sure, I am American enemies"), he lamented, in effect, that war is hell and in war people get killed: "[T]he language of any war in the world is killing…the language of war is victims." He compared himself and Osama bin Laden to George Washington ("we consider we and George Washington doing [the] same thing").

Those whose job it is to take the fight to al Qaeda understand instinctively what a profound error it was to reinforce al Qaeda's vision of itself as a revolutionary force in an epic battle with the United States. General David Petraeus, who took command of the Multi-National Forces in Iraq last month, oversaw the drafting of the Army's new Counterinsurgency Manual, which incorporates lessons learned in a variety of counterinsurgency operations, including Iraq. The Manual stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a political struggle, one that must focus on isolating the enemy and delegitimizing it with its potential supporters, rather than elevating it in stature and importance. As the Manual states: "It is easier to separate an insurgency from its resources and let it die than to kill every insurgent… Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power."[2]

But U.S. counterterrorism policy has taken just the opposite approach. Prolonged detention at Guantanamo without access to judicial review, interrogations that violate fundamental human rights norms, and flawed military commissions have nurtured the "recuperative power" of the enemy. It is up to Congress to force a clean break from this misguided approach and begin to construct a counterterrorism policy that conforms to the

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[1] *See* Kenneth Anderson and Elisa Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment*, (Muscatine, Iowa: Stanley Foundation, March 2007) *available at* http://www.stanleyfoundation.org/publications/other/Mass_Ander_07.pdf.

[2] U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-23.

logic of counterinsurgency operations, adheres to fundamental human rights standards and capitalizes on the advantages of our system of laws.

II. The Way Forward

A. Close Guantanamo

Human Rights First takes seriously the human rights and legal challenges posed by the ongoing detention of prisoners at Guantanamo. Closing the prison raises many complex questions about what to do with prisoners being held there – those the United States believes have committed crimes against it, and those being held without charge "until the end of the conflict." We have not been among the groups calling for closure of the prison over the last several years, in large part because, in our view, it matters less *where* prisoners are held than that their detention, interrogation and trial comport with U.S. and international law.

It is, however, beyond serious question – even among many who initially supported the decision to detain prisoners at Guantanamo – that Guantanamo has become an enormous diplomatic liability, impairing the capacity of the United States to lead the world, not only in counterterrorism operations but on many other issues of priority on which international cooperation is necessary. As Secretary of Defense Gates said last week, "There is no question in my mind that Guantanamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States."[3] Indeed, Guantanamo has become an icon, in much the same way as the picture of the hooded Iraqi prisoner at Abu Ghraib has become an icon, a symbol of the willingness of this country – in the face of security threats – to set aside its core values and beliefs. Respect for the law and fundamental rights are not the only things that have disappeared into Guantanamo's "black hole" – American credibility is in there somewhere, too.

Of course, while it is important to take into consideration the views of our closest allies, all of whom have called on the United States to close the prison, no one argues that we should change U.S. policy simply because other nations don't like it. The most important questions this Committee should be asking about the current policy are: Is it smart? Is it working? Does it serve the overall objective? Does it comport with our laws and values? Guantanamo policy fails all those tests.

Secretary Gates is reported to have argued that the continued detention of prisoners at Guantanamo is undermining the war effort and that the prison should be shut down as soon as possible. His views echo the conclusion that has now been reached by a broad spectrum of national security policymakers and Members of Congress that, whatever its original utility, the policy at Guantanamo has outlived its usefulness. State Department and Pentagon officials quoted in the New York Times have said that U.S. policy at Guantanamo is "making it more difficult in some cases to coordinate efforts in

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[3] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," *Washington Post*, March 24, 2007.

counterterrorism, intelligence and law enforcement."[4] Former Secretary of State Colin Powell stated at the Aspen Institute in July 2006 that "Guantanamo ought to be closed immediately," arguing that the value of continuing to hold the detainees was questionable while the price of holding the detainees was too high.[5] According to the Washington Post, former Attorney General John Ashcroft had argued that Guantanamo's liabilities outweighed its usefulness.[6]

Again, this is not surprising. As the Army's Counterinsurgency Manual states: "A Government's respect for preexisting and impersonal legal rules can provide the key to gaining widespread and enduring societal support...Illegitimate actions," such as "unlawful detention, torture, and punishment without trial...are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law." [7]

Despite the self-defeating nature of the policy and the growing consensus that it should end, Administration spokespeople have said as recently as this week that the detention facility at Guantanamo will likely remain open throughout President Bush's term in office. Far from moving to close the facility, this week the Administration transferred a new detainee to Guantanamo, the first new arrival since 2004 (other than the fourteen former ghost detainees moved from secret prisons to the base in September of last year). The Administration asserts that the new transferee, Mohammad Abdul Malik, who reportedly confessed to involvement in the 2002 hotel bombing in Kenya, was sent to Guantanamo because he represents a "significant threat." It is increasingly clear, however, that the reason many detainees were sent to Guantanamo, rather than being indicted and tried in federal court, was not because that was the smartest or most strategic option available, but because it was the one that relieved the government of burden of making difficult choices. But if U.S. counterterrorism policy consists of detaining or killing everyone who harbors hostility towards the United States (and one hopes that is not the policy), we must face the reality that the 385 men at Guantanamo are a drop in that bucket, and that holding them there without charge or trial in fair proceedings will eventually mean that we will need to get a much bigger bucket.

It is up to Congress to solve this problem, and to chart a way out of the trap that Guantanamo has become, not only for the detainees who have been held there for so many years, but for U.S. counterterrorism policy itself. The first step is to shut it down.[8]

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[4] Thom Shanker and David E. Sanger, "New to Job, Gates Argued for Closing Guantánamo Prison," *New York Times*, March 23, 2007.
[5] David E. Sanger, "Setbacks Mark Turning Point on Bush's War Powers," *International Herald Tribune*, July 15, 2006.
[6] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," *Washington Post*, March 24, 2007.
[7] U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-22.
[8] While world attention has been fixated on Guantanamo as the embodiment of U.S. misconduct in counterterrorism policy, Guantanamo is not the only prison with which Congress should be concerned. The continued assertion by the President, even after passage of the Military Commissions Act of 2006, of the authority to seize individuals anywhere in the world and hold them in secret prisons without access to the Red Cross or notification to their families is every bit as – if not more – troubling than the prolonged detention at Guantanamo. Congress should ban the practice of holding ghost prisoners and force the

B. Release or Transfer Detainees Not Charged with Crimes and Bring the Rest to the United States

Last July, President Bush said "I'd like to close Guantanamo, but I also recognize that we're holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts." State Department lawyers continue to shop the world for countries that will agree to take the Guantanamo detainees off our hands, but this attempt to sell the Guantanamo problem "retail" is inadequate and unsatisfactory as it leaves U.S. policy at the mercy of other governments, many of whom have no interest in helping.

Despite the growing sense even inside the Administration that the Guantanamo policy is hurting U.S. interests, paralysis has set in and no one in the Administration appears to be prepared to move. Part of the reason for this is that the current system lacks incentives that would force decisions about who to try and who to release. Under current policy, detainees at Guantanamo can be held without trial for an indefinite period. If they are tried and convicted in a military commission, they remain in detention; if they are tried and acquitted, they may also remain in detention.

If the detainees were brought to the United States, that incentive structure would change, and there would be a new sense of urgency to separate those who the United States suspects of having committed crimes against it from those it does not. Detainees not suspected of having committed crimes against the United States should be released to their home countries, if possible, in accordance with U.S. obligations under international human rights and humanitarian laws. Where release to the home country is not possible (for example, because there is a fear that a detainee will be subjected to torture), detainees should be released to a third country in accordance with U.S. obligations under international human rights and humanitarian laws.

U.S. allies, particularly the Europeans who have called most loudly for the prison to be closed, should do much more to help on this score. The United States climbed into this box alone, but its allies have a shared responsibility to help it get out; this is more than just a U.S. problem now. Manfred Nowak, the Austrian U.N. special rapporteur on torture, has urged that European governments assume greater responsibility for helping with third country resettlement of these people. "Europe should help empty it," Nowak has said. "No country is eager to accept people who are accused of having al-Qaeda links. But there should be burden-sharing." We agree.

If a detainee is suspected of having committed a crime in his home country or a third country, he may be transferred there for prosecution in accordance with international human rights and humanitarian laws.

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closure of any place of detention in which the U.S. holds prisoners in violation of international human rights and humanitarian law.

Detainees suspected of having committed crimes against the United States should be prosecuted, either in a court martial, a military commission that complies with fair trial requirements, or in regular criminal court, depending on the status of the detainee and the type of situation involved. The challenges of prosecuting terrorism cases is addressed further below.

C. Restore Habeas Corpus

My colleagues on this panel will address in detail the constitutional arguments for repealing the MCA's habeas-stripping provisions and for restoring habeas corpus to detainees at Guantanamo, and I will not repeat them here. I strongly concur in those arguments and in the recommendation that Congress should move swiftly to restore habeas to detainees at Guantanamo.

It is worth noting, however, that the debate in Congress about whether detainees at Guantanamo are or should be entitled to raise habeas claims has to a large extent been a dialogue of the deaf. On one side is the argument that granting habeas rights to Guantanamo detainees would be unprecedented; prisoners of war have never been entitled to access to the courts to challenge their detention. On the other is the assertion that anyone in U.S. custody is entitled under the Constitution to habeas corpus, a vital mechanism to check the excesses of executive power against the individual, which can only be suspended "when in Cases of Rebellion or Invasion the public Safety may require it," something Congress has authorized only four times in the Nation's history: the Civil War; in the immediate aftermath of the Civil War to quell rebellions in South Carolina; in the Philippines during a rebellion; and temporarily in Hawaii immediately after the attack on Pearl Harbor

Both sides are right in a way. But the argument against habeas here assumes its premise – that the detainees at Guantanamo are all properly considered wartime prisoners whose detention is regulated by the laws of war. The past five years have clearly shown that some of the detainees have been wrongly held. Habeas corpus is the safety net designed to ensure that a person deprived of liberty is lawfully detained. Unfortunately, the debate over habeas has been contentious in large part because of the misguided insistence on shoe-horning these detainees into a combatant framework. Once you step outside of that framework, it is clear that habeas is required.

D. Amend the Definition of Enemy Combatant

Even if Congress restores the right to habeas for detainees at Guantanamo, however, it should not use that as an excuse to defer to the courts on the critical issue of what constitutes an enemy combatant. The Military Commissions Act defines a combatant not only as those who take part in hostilities, but includes people who "purposefully and materially" support hostilities against the United States, including people arrested far from the battlefield. This definition converts people who would never be considered combatants under the laws of war – such as a doctor who operates on a wounded rebel or a permanent resident of the United States who commits a criminal act

completely unrelated to armed conflict – into "combatants" who can be placed in military custody and tried by a military commission. Even more troubling, the MCA deems anyone – regardless of whether they fit the above definition – who has been determined to be an "unlawful enemy combatant" based on a determination of a combatant status review tribunal or "another competent tribunal" established by the president or the secretary of defense to be an enemy combatant. This "you're a combatant if we say you are" approach not only flies in the face of established humanitarian law, it has ramifications that go far beyond the status of detainees at Guantanamo.

Under the laws of war, combatants may in most situations be lawfully attacked and killed; civilians (unless they take part in hostilities) cannot. The MCA definition blurs that vital distinction, with potentially dangerous consequences. Congress should consider carefully the precedent it will set if this definition is allowed to stand. For example, is it in the interest of the United States to endorse a definition of enemy combatant that would allow Russian President Vladimir Putin to pick up anyone he deems to have provided "material support" to the Chechens (as many human rights NGOs in Russia who document abuses in Chechnya could be under this broad definition) and treat them as if they were combatants? Would we be comfortable with the Chinese government using this definition to label peaceful Uighers as enemy combatants? Or President Uribe in Colombia, who earlier this year described some members of the political opposition as "terrorists in business suits?" What about the American citizen in Kenya, cleared by the FBI of terrorist connections, but deemed by the Kenyan government to have "engaged in guerrilla war against the democratically elected government" of Somalia and rendered last month by the Kenyans to Ethiopia?

E. Repeal the MCA

In July of last year, I testified before the Senate Armed Services Committee which was at that time deliberating how to try terrorist suspects in the wake of the Supreme Court's ruling in the *Hamdan* case that the Administration's military commissions were unlawful. At that hearing, I argued that terrorist suspects at Guantanamo should be tried either pursuant to the rules for courts martial under the UCMJ or in regular federal courts. Such trials would satisfy the requirement of the laws of war – and of our own laws – that sentences be carried out pursuant to a "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[9] That remains our view.

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[9] *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 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/7c4d08d9

Human Rights First opposed the Military Commissions Act. Even some Members of Congress who voted for it did so while expressing the hope that the courts would step in to remedy its many defects.

With respect, Mr. Chairman, this is no way to run a railroad. Congress should not wait for the courts to come to the rescue, nor should it merely tinker with the machinery of military commissions. Instead, Congress should scrap the Military Commissions Act altogether, and embrace its responsibility to ensure that suspected terrorists are brought to justice in proceedings worthy of this country.

The defects of the MCA are many and have been well-documented by Human Rights First and others. They encompass issues beyond those related to the rules for military commissions, including unconstitutional restrictions on habeas, an overly broad definition of enemy combatant, a narrowing of the scope of acts punishable as war crimes and significantly undermining the means of enforcing compliance with the Geneva Conventions. One approach Congress could take would be to identify a list – and we certainly have one – of the most egregious flaws and amend the statute to fix them.

The Military Commissions fly in the face of 200 years of U.S. court decisions by permitting evidence obtained through coercion – including cruel, inhuman and degrading treatment, if obtained before December 20, 2005. A coerced statement can be admitted if found to be "reliable," sufficiently probative, and its admission is "in the interest of justice," and if the interrogation techniques used to obtain the information are classified, it could be extremely difficult for a defendant to show that coerced evidence should not be admitted. Although evidence obtained through torture is not permitted in Military Commissions, there is an increased likelihood that convictions may rest on such evidence because the rules allow for coerced evidence and hearsay and permit the prosecution to keep sources and methods used to obtain evidence from the defendant.

In violation of a fundamental tenet of the rule of law, defendants before a Military Commission can be convicted for acts that were not illegal when they were committed. Basic due process requires that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was taken. But Military Commissions may punish individuals for offenses — including the crimes of conspiracy and "providing material support for terrorism" — that were either (i) not illegal before the passage of the MCA, or (ii) not recognized as war crimes under the laws of war.

The scope of judicial review of Military Commissions decisions is restricted and inadequate. The review by the initial appeals court, the Court of Military Commission Review, is limited only to matters of law (not fact) that "prejudiced a substantial trial right" of the defendant. This provision would prevent the first appellate court, the U.S. Court of Appeals for the District of Columbia, and the U.S. Supreme Court from

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considering factual appeals, including possible appeals based on a defendant's factual innocence.

Finally, the Military Commission rules for classified evidence are so broad that they would prevent the defense from seeing evidence that tends to show innocence or a lack of responsibility. Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The government has no duty to disclose classified information that could result in a more lenient sentence for the defendant. The judge is specifically permitted to limit the scope of examination of witnesses on the stand, which could hamper the ability of the defense to challenge a witness's testimony or basis for classification.

One of the most telling indictments of the original military commissions was the way the ad hoc and constantly-changing system looked up close, in practice. It often looked as if the rules were being written in real time, the very antithesis of the rule of law. Unfortunately, little has changed under the new MCA system. This week, a Human Rights First staff member is at Guantanamo for the first proceedings under the newly constituted MCA commissions, and it is clear that there is little to distinguish the new system from the old. Even after the issuance of a military commissions manual, the fundamental ad hoc character of the system has not changed.[10]

There is no question that the commissions are staffed by many talented, dedicated and honorable service personnel. But the system itself is illegitimate, and no amount of good will or good lawyering can change that. It is abundantly clear from our observations 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 post-MCA system in operation at Guantanamo does not come close to passing that test.

F. Try Suspects in Courts Martial or Federal Courts

As you recently remarked, Mr. Chairman, "The last thing that we would want is to convict an individual for terrorism and then have that conviction overturned because of fatal flaws in the Military Commissions law passed in the previous Congress." We agree. That risk is quite real. Khalid Sheik Mohammed would likely have few defenses in a fair

[10] For example, on Monday morning, defendant David Hicks had three civilian lawyers; by the end of the day, he had only one. Why? One of his civilian defense counsel was told he would have to sign a form, created by the judge, vowing to comply with DOD regulations for civilian defense counsel. But the regulations have not yet been issued by DOD. So the lawyer, reluctant to agree to rules he had not seen for fear of risking ethical violations, agreed to abide by "existing" rules for civilian defense counsel. That wasn't good enough. The judge told the lawyer he could not represent Hicks, though he could sit at counsel table and consult. Another member of the defense team was excluded by the judge based on his interpretation of a contested – and poorly drafted – provision of the rules for military lawyers detailed to represent detainees.

trial. But in a military commission under the current rules, he will have the defense that the trial is not fair. The United States can deprive him of that defense by moving his trial to either a court martial or, preferably, to a regular federal criminal proceeding. That not only would guard against the risk you identified, but it is just smart counterterrorism policy. As the Counterinsurgency Manual points out, "to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support."

Trials in federal court would also offer the advantage of a venue capable of exercising jurisdiction over a much broader spectrum of criminal conduct. The decision to treat terrorism suspects as "enemy combatants" was made in order to justify targeting, detention and trial practices that could not be supported outside of an armed conflict paradigm. There are many reasons, legal and practical, why this decision was, and continues to be, a mistake. One reason is that it has led to the establishment of military commissions that have jurisdiction only over war crimes, limiting the offenses with which terrorist suspects can be charged. This limitation led the administration and Congress to try to expand the jurisdiction of military commissions to include acts such as intentionally causing serious bodily injury; mutilating or maiming; murder and destruction of property in violation of the law of war; terrorism; material support for terrorism; and conspiracy that do not constitute war crimes by simply *calling them* war crimes.

These acts are not criminal under the laws of war if the targets are legitimate military objectives. And though they are war crimes if committed "in violation of the laws of war," it appears from the charges brought so far that they are erroneously being construed to include any act of unprivileged belligerency, which is not a violation of the laws of war. Application of these new crimes to events that occurred before the passage of the law is a textbook violation of the prohibition of ex post facto prosecution, raising additional and legitimate bases for defense counsel to challenge the military commission convictions. These problems can be avoided by using civilian criminal courts and the broader spectrum of established criminal laws available there.

On the other side of the ledger, those who insist that it would be impossible to try terrorist suspects in the federal courts say that such trials would be too dangerous for judges, juries and witnesses. But the risks of reprisals against juries, witnesses, and judges – while extremely serious – is certainly nothing new.

The judiciary has long taken measures to prevent threats of violence from undermining the trial process. We protect those involved in the trial of murderous mob bosses through witness relocation, anonymous juries, and employing the Marshal Service for the safety of judges. We secure courtrooms with Plexiglas shields, extra layers of security screening, metal detectors, and additional police. Our experience with prosecution of organized crime, including violent members of drug cartels throughout much of the 20th Century, indicates that terrorism cases present no unique challenge in this realm.

Those skeptical of the feasibility of moving these cases to federal court also assert that such prosecutions would force the government to reveal classified information to the defense in order to satisfy constitutional requirements for a fair trial. Leaving aside the fact that terrorist suspects *are* being tried in the federal courts, these are serious concerns that should be explored and fully addressed. But the fact that terrorism cases pose difficult challenges for the criminal justice system should not preclude trials from proceeding successfully to conviction without damage to sensitive information. Given the enormous strategic and political costs of the alternative – the status quo – it is incumbent upon those who would abandon the criminal justice system to demonstrate why the existing procedures, such as the Classified Information Procedures Act (CIPA), designed to protect against such disclosures are insufficient to protect the government's legitimate interests in these cases. Many judges believe that these procedures are adequate to meet the special challenges presented by terrorism cases. Judge Royce Lamberth recently remarked: "I have found the Classified Information Procedure Act to provide all the tools that I have needed as a district judge to successfully navigate the tricky questions presented in spy cases, as well as terrorist cases." In fact, of the hundreds of CIPA motions filed in criminal cases since the law came into effect, there have been no reversible errors found on appeal. Human Rights First is studying these issues carefully. We urge Congress to consider them as well and to explore whether amendments to CIPA or other measures are needed in order to move forward with these prosecutions in federal court.

Conclusion

How we treat terrorist suspects – 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 distinction between the United States and its terrorist enemies has narrowed over the course of this conflict. This is in part because of lapses in U.S. compliance with human rights norms, but also because U.S. counterterrorism policy has unwittingly elevated al Qaeda by treating it as a military adversary contending with the United States on a global battlefield.

Four years ago, when Judge William Young sentenced al Qaeda terrorist Richard Reid to life plus 110 years in federal prison, this is what he said:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.
>
> Here in this court where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.
>
> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the

> officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist.
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> ***
>
> So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.
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> ***
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> You're no big deal.[11]

Some administration officials argue that adhering to these standards of justice and the rule of law is too great a liability. They say that these rules make for an unfair fight – we fight with one hand tied behind our backs while the enemies do as they please. But while terrorists employ methods that we abhor, we too have an advantage in that asymmetrical conflict: our institutions and values set us apart from our enemies. The goal of terrorists, as Will Taft, the former Legal Advisor to the Department of State described it, is the "negation of law."[12] Yet in many ways, that same impulse – the "negation of law" – was the genesis of the detainee policies at Guantanamo. It is time for a clean break from those policies. This Congress has the opportunity to set a new course, one that takes seriously the long and difficult road ahead in combating the threat of terrorism, while recognizing that adherence to our values and our system of laws is a source of strength in that effort.

Thank you.

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[11] CNN.com, "Reid: 'I am at war with your country'," *CNN.com*, January 31, 2003 at http://www.cnn.com/2003/LAW/01/31/reid.transcript/.

[12] William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319 (2003).

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Elisa Massimino

Capacity in which appearing: (check one)

___Individual

✓ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: Human Rights First

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
none			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
none			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
none			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

DOCUMENTS SUBMITTED FOR THE RECORD

MARCH 29, 2007

Combatant Status Review Tribunal (CSRT) Process at Guantanamo

Article 5 of the Third Geneva Convention requires a tribunal to determine whether a belligerent, or combatant, is entitled to prisoner of war (POW) status under the Convention only if there is doubt as to whether the combatant is entitled to such status. The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention's criteria for POW status.[1] Because there is no doubt under international law about whether al-Qaida, the Taliban, their affiliates and supporters, are entitled to POW status (they are not), there is no need or requirement to convene tribunals under Article 5 of the Third Geneva Convention in order to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status.

In evaluating the entitlements of a U.S. citizen designated as an enemy combatant, a plurality of the U.S. Supreme Court in *Hamdi* held that the Due Process Clause of the U.S. Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." A plurality of the Court further observed: "There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the procedures found in Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, October 1, 1997. In a conflict in which the Third Geneva Convention applies, U.S. forces use the procedures found in AR 190-8 to conduct Article 5 tribunals when such tribunals are required.

As a result of Supreme Court decisions in June 2004 (*Rasul, Hamdi*), the U.S. Government on July 7, 2004, established the Combatant Status Review Tribunal (CSRT) process at U.S. Naval Base Guantanamo Bay, Cuba. The CSRT process supplements DoD's already existing screening procedures and provides an opportunity for detainees to contest their designation as enemy combatants, and thereby the basis for their detention. Consistent with the Supreme Court guidance applicable to situations involving U.S. citizens, the tribunals draw upon procedures found in AR 190-8.

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[1] In February 2002, the President determined that neither the Taliban nor the al-Qaida detainees are entitled to Prisoner of War (POW) status under the Geneva Convention. Although the United States never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Convention, and the President determined that the Taliban are covered by the Convention. They did not qualify as POWs, however, because they did not satisfy the Convention's four conditions for such status: they were not part of a military hierarchy; they did not wear uniforms or other distinctive signs visible at a distance; they did not carry arms openly; and they did not conduct their military operations in accordance with the laws and customs of war. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status. See http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html and http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

The below chart compares the CSRT procedures with the procedures found in AR 190-8:

Characteristic	Army Regulation 190-8	CSRT
Applicability of tribunal proceeding	Person who has committed a belligerent act and is in the custody of the U.S. Armed Forces and for whom there is doubt as to status.	All detainees at GTMO. The President has previously determined that al Qaeda and Taliban detainees are not entitled to POW status.
Frequency of review	No provision for more than one review.	One-time. Can be reconvened to reevaluate a detainee's status in light of new information.
Notice provided to detainee	Advised of rights at the beginning of the hearing.	Advised of rights in advance of and at beginning of the hearing. The detainee is provided with an unclassified summary of the evidence in advance of the hearing.
Tribunal composition	The Tribunal is composed of 3 commissioned officers including at least one field grade officer. Recorder: Non-voting officer, preferably a member of the Judge Advocate General's Corps (JAG). The Recorder prepares the record of the Tribunal and forwards it to the first Staff Judge Advocate (SJA) in the internment facility's chain of command. Legal adviser: None for the Tribunal. The record of every Tribunal proceeding resulting in the denial of POW status is reviewed for legal sufficiency when the record is received at the office of the SJA for the convening authority.	The Tribunal is composed of 3 neutral commissioned officers not involved in the capture, detention or interrogation of the detainee. All are field grade officers, and the senior member is an 0-6 (Colonel/Navy Captain). Recorder: Non-voting officer serving in the grade of 0-3 (Captain/Navy Lieutenant) or above. The Recorder obtains and presents all relevant evidence to the Tribunal. The Recorder also prepares the record of the Tribunal and forwards it for a legal review to the legal adviser. Legal Adviser: A JAG is available to advise the Tribunal on legal and procedural matters. The record of every Tribunal is reviewed for legal sufficiency by a JAG.

Characteristic	Army Regulation 190-8	CSRT
	Person to provide assistance to the detainee: None.	Personal Representative: Each detainee has the assistance of a Personal Representative (PR). The PR meets with the detainee to explain the CSRT process and assists the detainee in reviewing relevant unclassified information, preparing and presenting information, and questioning witnesses at the CSRT hearing. The personal representative is an officer serving in the grade of 0-4 (Major/Navy Lieutenant Commander) or above.
Participation by military judges	None. However, preference is to have a JAG serve as the non-voting recorder.	None. However, one of the voting officers must be a JAG.
Attendance by detainee	The detainee is allowed to attend all open sessions, which includes all proceedings except those involving deliberation and voting by members, and testimony or other matters that would compromise national security if held in the open.	Same as under AR 190-8.
Witnesses	Detainee may call witnesses if they are reasonably available and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted. The commanders of military witnesses determine whether they are reasonably available.	Detainee may call witnesses if they are relevant and reasonably available, and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted. Telephonic or videoconference testimony is also permitted. The President of the Tribunal determines whether witnesses are relevant and reasonably available.
Detainee testimony	Detainee may testify or otherwise address the Tribunal, but cannot be compelled to testify.	Same at AR 190-8.
Standard of proof	Preponderance of evidence. Majority vote.	Preponderance of evidence Majority vote.

Characteristic	Army Regulation 190-8	CSRT
		There is a rebuttable presumption that the government evidence submitted by the Recorder is genuine and accurate.
Presumption of status	A person shall enjoy the protection of the Third Geneva Convention until such time as his or her status has been determined by a competent tribunal.	Protected (POW) status not applicable. As to enemy combatant status, prior to the CSRT, battlefield and subsequent determinations of each Guantanamo detainee who was initially detained by DoD have found the detainee to be an enemy combatant. The CSRT process is a fact-based proceeding to determine whether each detainee is still properly classified as an enemy combatant, and to permit each detainee the opportunity to contest such designation.
Type of evidence considered. Is coercion evaluated?	Testimonial and written evidence is permitted. AR 190-8 contains no requirement to evaluate whether statements were the result of coercion.	Testimonial and written evidence is permitted. The Detainee Treatment Act (DTA) requires the CSRT to assess whether any statement being considered by the CSRT was obtained as a result of coercion, and the probative value, if any, of such statement.
Access to evidence by detainee	None.	The detainee may review unclassified information relating to the basis for his or her detention. The detainee also has the opportunity to present reasonably available information relevant to why the detainee should not be classified as an enemy combatant. Evidence on the detainee's behalf may be presented in documentary form and through written statements, preferably sworn. The detainee's Personal Representative (PR) shall have the opportunity to review the government information relevant to the detainee and to consult with the detainee concerning his (or her) status as an

Characteristic	Army Regulation 190-8	CSRT
		enemy combatant and any challenge thereto; the PR may only share unclassified portions of the government information with the detainee. The President of the Tribunal is the decision authority on the relevance and reasonable availability of evidence.
Assistance provided to detainee	Interpreter provided if necessary.	Interpreter provided if necessary. A Personal Representative (PR) is provided to every detainee. The PR meets with the detainee to explain the CSRT process, assist the detainee in participating in the process, and assist the detainee in collecting relevant and reasonably available information in preparation for the CSRT.
Further review of decision outside of the Department of Defense	None.	Under the Detainee Treatment Act and the Military Commissions Act, the Court of Appeals for the District of Columbia has the authority to determine if the detainee's CSRT was conducted consistent with the standards and procedures for CSRTs. The Court of Appeals also has the authority to determine whether those standards and procedures are consistent with the Constitution and laws of the United States, to the extent they are applicable at Guantanamo.

As noted above, the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) permit the Court of Appeals for the District of Columbia Circuit to review CSRT determinations of detainees at Guantanamo. Below is an excerpt from a recent Federal court filing by the U.S. Government describing how this review compares to various types of habeas corpus review in federal courts:

> … The availability of such review negates any argument under the Suspension Clause. First, the MCA and DTA provide alien detainees with greater rights than that traditionally available in the military tribunal context. The Supreme Court has held that the habeas review traditionally afforded in the context of military

tribunals does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question of whether the military tribunal had jurisdiction over the charged offender and offense. *See Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ('If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decision'); *id.* at 17 ('We do not here appraise the evidence on which petitioner was convicted' because such a question is 'within the peculiar competence of the military officers composing the commission and were for it to decide'); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ('We are not here concerned with any question of the guilt or innocence of petitioners'). *See also Eisentrager*, 339 U.S. at 786. By providing for constitutional and other legal claims, including issues of compliance with the military's own procedures and evidentiary sufficiency, the DTA and MCA actually provide petitioners with greater rights of judicial review than that traditionally afforded to those convicted of war crimes by a military commission.

Second, traditional *habeas* review in alien-specific contexts involved, in general, review of questions of law, but 'other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive.' *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (noting with respect to deportation orders under historical immigration laws that 'the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.'). Similarly, under the DTA, to the extent an alien-petitioner has concerns about the legal adequacy of the CSRT standards and procedures used to make an 'enemy combatant' determination, he may squarely raise those claims and have them adjudicated in the Court of Appeals. *See* DTA § 1005(e)(2)(C). Further, the Court of Appeals' review involves an assessment by that Court of whether the CSRT, in reaching its decision, complied with 'the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence.' *See id.* § 1005(e)(2)(C)(i).

Furthermore, it cannot be that to be constitutionally adequate, a substitute for *habeas* must entitle a petitioner to full *de novo* review by a court. Any such assertion would not only be inconsistent with traditional *habeas* practice, *see supra*, it could not be reconciled with *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004), in which the controlling opinion made clear that constitutional requirements for detaining even citizens in this country as enemy combatants 'could be met by an appropriately authorized and properly constituted military tribunal' modeled upon military procedures implementing the Geneva Conventions for determining the status of detainees potentially entitled to prisoner-of-war status. *See id.* at 2651 (plurality opinion). Acknowledging 'the weighty and sensitive governmental interests in ensuring that those who have in

fact fought with the enemy during a war do not return to battle against the United States,' *id.* at 2647, as well as the need to 'tailor[] [enemy combatant proceedings] to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict,' *id.* at 2649, the Plurality noted that proceedings by which the military determined enemy combatant status legitimately could be severely limited in scope, in ways that are not characteristic of traditional judicial proceedings, including permitting hearsay from the Government, establishing a presumption in favor of the Government, and limiting factual disputes to the alleged combatant's acts. *Id.* Such an approach, now affirmed by Congress through its approval of the CSRT process used for enemy combatant status determinations, *see* DTA § 1005(e)(2), simply cannot be reconciled with an argument that wide-ranging, *de novo* court review of the outcome of those proceedings is necessary to avoid Suspension Clause concerns.

For these reasons, the exclusive-review scheme afforded by the DTA is more than adequate for Suspension Clause purposes, even if petitioners could avail themselves of the Constitution, which they cannot.

March 8, 2007

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Republican Leader
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John A. Boehner
Republican Leader
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressional Leaders,

We, the undersigned organizations, write to you in defense of America's freedoms.

We urge your support for and swift passage of legislation to restore the right of habeas corpus to non-citizens detained by the United States, a right which was eviscerated by Section 7 of the Military Commissions Act of 2006. Section 7 denies detainees designated as "enemy combatants," as well as persons awaiting enemy combatant designation, the right to a fair hearing in which to plead their innocence before a judge. Enemy combatant designations are made upon the flimsiest of evidence and are subject only to highly limited court review. Without the right of habeas corpus, these persons are subject to indefinite detention, with no meaningful opportunity to petition for release or to protest their treatment or conditions of confinement, no matter how inhumane these conditions or treatment may be.

The right of habeas corpus, which permits a prisoner a fair hearing before a neutral judge, is the most fundamental check on executive power in our Constitution. The Supreme Court has asserted that habeas "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Thomas Jefferson called habeas corpus one of the "essential principles of our government," and extolled habeas for "secur[ing] every man here, alien or citizen, against everything which is not law, whatever shape it may assume." Habeas corpus gives meaning to our due process principles by demanding that the government justify to a court why a person should be deprived of his or her liberty.

At present, very few of the nearly 400 Guantanamo detainees have been charged and none has yet been brought to trial, while many have been imprisoned for over five years. Many of these individuals were turned over to U.S. forces far from any battlefield in exchange for financial bounties, and many may be innocent. The government plans to hold military trials for only about 80 of the detainees. At present, the rest have no prospects for release and will remain confined indefinitely at the discretion of the government.

The impact of Section 7 extends far beyond the walls of Guantanamo. It includes individuals detained by U.S. forces anywhere in the world, including within the borders of the United States.

The elimination of habeas corpus for detainees is fundamentally un-American and contradicts the basic values of fairness and respect for the rule of law to which all Americans

subscribe. It diminishes our credibility, standing, and respect in the world and undermines our quest for staunch allies among the world community in the fight against international terrorism.

In the face of external threats, adhering to our values does not make us less secure, but rather strengthens us as a nation. We now have an historic opportunity to change course. We respectfully urge you to expedite passage of legislation amending the MCA to fully restore the habeas corpus jurisdiction of federal courts over pending military detainee cases. It is time once again to be an example to the world of a free, just, and democratic society.

Respectfully,

AIDS Legal Referral Panel
Alliance for Justice
American-Arab Anti-Discrimination Committee
Americans for Democratic Action
American Humanist Association
American Muslim Council
American Immigration Lawyers Association
Asian American Justice Center
Asian American Legal Defense and Education Fund
Baptist Peace Fellowship of North America
Bill of Rights Defense Committee
California Women's Agenda
Center for Constitutional Rights
Center for Law and Social Policy
Center for Victims of Torture
Central American Resource Center
Citizen Outreach Project
Citizens Committee for the Right to Keep and Bear Arms
Coalition for Economic Equity
Coalition for Civil Rights and Democratic Liberties
Committee for Judicial Independence
Council on American-Islamic Relations
Defending Dissent Foundation
Education Law Center
Electronic Frontier Foundation
Equal Justice Society
Equality Mississippi
Fairfax County Privacy Council
Fair Trial Initiative
Friends Committee for National Legislation
Government Accountability Project
Guatemala Human Rights Commission
International Justice Network
Justice Policy Institute
Lawyers' Committee for Civil Rights of the Bay Area
Leadership Conference on Civil Rights
Legal Momentum
Liberty Coalition

Maryknoll Office for Global Concerns
Mexican American Legal Defense and Education Fund
National Association for the Advancement of Colored People
National Association of Criminal Defense Lawyers
National Center for Lesbian Rights
National Law Center on Homelessness & Poverty
National Lawyers Guild
National Legal Aid & Defender Association
National Religious Campaign Against Torture
NETWORK: A Catholic Social Justice Lobby
Northern Virginians for Peace and Justice
People for the American Way
Physicians for Human Rights
Presbyterian Church, (USA)
Privacy Times
Progressive Jewish Alliance
Public Advocates
Public Citizen
Public Justice Center
Rabbis for Human Rights – North American
Rutherford Institute
Sikh American Legal Defense and Education Fund
Society of American Law Teachers
Sugar Law Center for Economic and Social Justice
The Episcopal Church
The Shalom Center
Unitarian Universalist Service Committee
United Methodist Church
U.S. Bill of Rights Foundation
Vermonters for a Real 9/11 Investigation
Washington Council of Lawyers
Wisconsin Council of Churches
Women's International League for Peace & Freedom - DC Branch
Working Assets
World Organization for Human Rights USA

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