

S. HRG. 110-230

**LEGAL ISSUES REGARDING INDIVIDUALS DE-
TAINED BY THE DEPARTMENT OF DEFENSE
AS UNLAWFUL ENEMY COMBATANTS**

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

APRIL 26, 2007

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LEGAL ISSUES REGARDING INDIVIDUALS DETAINED BY THE DEPARTMENT OF DEFENSE AS UNLAWFUL ENEMY COMBATANTS

THURSDAY, APRIL 26, 2007

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

The committee met, pursuant to notice, at 9:38 a.m. in room SH-216, Hart Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Lieberman, Reed, Akaka, Clinton, Pryor, McCaskill, Warner, Sessions, Collins, Chambliss, Cornyn, Thune, and Martinez.

Other Senators present: Senator Leahy.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Peter K. Levine, general counsel; Michael J. McCord, professional staff member; and William G.P. Monahan, counsel.

Minority staff members present: Michael V. Kostiw, Republican staff director; William M. Caniano, professional staff member; Derek J. Maurer, minority counsel; and David M. Morriss, minority counsel.

Staff assistants present: David G. Collins, Fletcher L. Cork, and Jessica L. Kingston.

Committee members' assistants present: Jay Maroney, assistant to Senator Kennedy; Erik Raven, assistant to Senator Byrd; Frederick M. Downey and Vance Serchuk, assistants to Senator Lieberman; Elizabeth King, assistant to Senator Reed; Darcie Tokioka, assistant to Senator Akaka; Andrew Shapiro, assistant to Senator Clinton; M. Bradford Foley, assistant to Senator Pryor; Gordon I. Peterson, assistant to Senator Webb; Jason D. Rauch, assistant to Senator McCaskill; Sandra Luff, assistant to Senator Warner; Todd Stiefler, assistant to Senator Sessions; Mark J. Winter, assistant to Senator Collins; Clyde A. Taylor IV, assistant to Senator Chambliss; Stuart C. Mallory, assistant to Senator Thune; and Brian W. Walsh, assistant to Senator Martinez.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody.

America's standing in the world has taken a nosedive since the world embraced us after September 11. According to a recent poll conducted by the Program on International Policy Attitudes, 67

percent of the people surveyed across 25 countries disapprove of the U.S. handling of Guantanamo detainees. The program director explained that, “The thing that comes up repeatedly is not just anger about Iraq. The common theme is hypocrisy. The reaction tends to be, ‘You are a champion of a certain set of rules. Now you’re breaking your own rules.’”

The Secretary of Defense recognized this problem last month, when he acknowledged that he had recommended closing Guantanamo because there is a taint about it.

America, at its best, is a beacon for human rights and human liberty, and that’s how we like to see ourselves. But much of the world sees us in a very different way when we fail to live up to the standards that we profess. For us, the symbol of American values is the Statue of Liberty. For much of the world, it is that horrific photograph of a hooded prisoner at Abu Ghraib standing on a box, strung up with wires. It’s, no doubt, hard to care about due process for people like Khalid Sheikh Mohammed and Abu Zubaydah, but, as Senator Graham said at the time of our trip to Guantanamo to observe the tribunal for Khalid Sheikh Mohammed, “It’s not about them, it’s about us.”

There are many reasons not to allow abuse of detainees or the use of coerced testimony. It’s morally wrong. It produces unreliable information. It violates domestic and international law. It undermines the support we need in the world community to win the war against terrorism. It jeopardizes our own troops if they are captured.

But there is also this. People are less likely to believe what we say about our detainees if they’ve been abused. Even when an admitted terrorist, like Khalid Sheikh Mohammad, confesses to the most heinous of terrorist acts, the world focuses far too much on how we treated him, and not nearly enough on what, by his own words, he did to us.

In sum, when we fail to uphold our own values, we undermine our own security.

The administration would like us to believe that the detainees’ allegations of abusive treatment are fabrications based on al Qaeda training manuals, but listen to what our own people at Guantanamo were saying:

In late 2002, the Federal Bureau of Investigation (FBI) personnel at Guantanamo objected to aggressive military interrogation techniques. Law enforcement personnel—our law enforcement personnel—questioned the legality of these techniques and told their own FBI leaders back in Washington, “You won’t believe it.” A Department of Defense (DOD) investigation led by Lieutenant General Randall Mark Schmidt, USAF, found that the use of these techniques constituted abusive treatment.

Last September, this committee approved, on a bipartisan 15 to 9 vote, a bill that would have helped address the problems caused by our treatment of detainees by establishing new procedures for trying detainees consistent with the Supreme Court’s ruling in *Hamdan versus Rumsfeld*. However, this bill was never taken up by the full Senate. Instead, the administration persuaded a majority of Congress to: (1) narrow the accepted definitions of “cruel and

inhuman treatment”; (2) authorize the administration to unilaterally redefine its obligations under the Geneva Conventions; (3) allow the use of hearsay and coerced testimony in criminal trials of detainees; (4) insulate senior administration officials from accountability for detainee abuses; (5) bar detainees from ever bringing any legal action challenging any aspect of their detention; and (6) prohibit the courts from providing legal relief for detainees who are found to be improperly held.

Most detainees will never be tried by a military commission, so they will not receive even the limited rights provided by the Military Commissions Act (MCA). Under procedures established by the administration for conducting the Combatant Status Review Tribunals (CSRTs) at Guantanamo, these detainees, which are most of them, can be detained without a criminal trial for life, as enemy combatants, on the basis of coerced testimony and hearsay evidence, without having a lawyer, without knowing what the evidence was against them, and, therefore, without having a reasonable opportunity to disprove the evidence.

In proceedings in Federal District Court in 2004, Justice Department attorneys went so far as to take the position that the executive branch has the authority to unilaterally detain as enemy combatants, “a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but really is a front to finance al Qaeda activities” or “a person who teaches English to the son of an al Qaeda member.”

The administration’s definition of the term “enemy combatant” does not even require that that support provided, as they allege, to terrorist activities be “knowing or intentional.”

Professor Mark Denbeaux, of Seton Hall University, who will be testifying here today, has reviewed the publicly available records of CSRTs—these tribunals that determine the combatant status—which are conducted at Guantanamo. Professor Denbeaux found, among other things, that the Government never called a single witness at any of the 393 proceedings for which full or partial records have been released, and that, for 93 percent of those hearings, the detainee was not provided access to any of the classified or unclassified evidence relied upon by the Government to determine his status.

Professor Denbeaux also reports that only 5 percent of the Guantanamo detainees were captured by U.S. forces on the battlefield, compared to 86 percent who were apprehended either by Pakistan or the Northern Alliance, and turned over to the United States at a time when the United States was offering large bounties for turning over suspected terrorists.

I believe that the current tribunal process falls short of the Supreme Court requirement that an alternative to *habeas corpus* must be adequate and effective to test the legality of a person’s detention. I believe that this process fails to provide the protections that we would insist upon for our own troops, that it fails to meet our standard as a nation, and that it undermines our position in the world and our own security. If so, we have an obligation to act now to establish a process which we can defend.

Senator Warner.

STATEMENT OF SENATOR JOHN WARNER

Senator WARNER. Mr. Chairman, first I'd like to put in a statement on behalf of the distinguished ranking member, Senator McCain, who is unable to be with us here today.

Chairman LEVIN. Thank you.

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT BY SENATOR JOHN MCCAIN

Senator Levin, thank you. The issue of proper treatment of detainees and how to resolve the difficult legal issues involving them is a matter of longstanding interest and concern to this committee and to me personally. We have worked on these issues together for a long time. I appreciate that you have scheduled this important hearing.

Mr. Chairman, I join you in welcoming our distinguished witnesses. They are a diverse group of legal experts who will make a valuable contribution to our consideration of these issues. I have said many times that how we treat detainees is not about them, it is about us. The interests at stake are fundamental—American national security, and our moral standing and leadership position in the world. Concerns about Guantanamo and the detainees held there continue to be a drag on international public opinion about the United States. It negatively impacts our relations with our allies and it makes it harder for them to support us internationally. It provides a symbol for recruiting a new generation of terrorists. We may never satisfy our critics, but we owe it to ourselves and all Americans to ensure that the system we establish for detainees meets our fundamental standards of fairness.

Today's hearing will probe the adequacy of the process for determining enemy combatant status under the procedures set out by the Department of Defense for Combatant Status Review Tribunals (CSRTs). These procedures have been subject to extensive criticism because they are an administrative forum lacking many of the procedural protections of a criminal trial, including due process elements that Congress applied to military commissions in the Military Commissions Act last fall. Issues about rights to legal counsel, access to classified and unclassified evidence and witnesses, coerced statements, use of hearsay, and rights of appeal to Federal courts have been disputed since the CSRTs were established in July 2004. In examining these procedures, Mr. Chairman, it is vital that we get the system right. In this new war, when we detain suspected terrorists for a potentially indefinite duration of hostilities, our moral standing will be measured not only by our procedures for trying war crimes, but also by the standards we apply to determining enemy combatant status.

We must also carefully examine the procedures and standards for continuing to detain an unlawful enemy combatant who is not tried and convicted of a war crime. Not every enemy combatant will be tried for war crimes. In fact, only a small number of detainees at Guantanamo have been identified for war crimes prosecution. The Department of Defense has established Administrative Review Boards (ARBs) to determine annually whether individuals who have been found to be enemy combatants should be released from U.S. custody. ARBs—like CSRTs—are an administrative determination, not a criminal trial, and do not provide the same level of due process protection as military commissions or a trial in Federal court. Unlike CSRTs and verdicts of a military commission, ARB decisions are not subject to independent review by the judiciary. Is this a system that we are going to be satisfied with over the long term? I look forward to hearing our witnesses express their views about what modifications to the ARBs, if any, they believe are necessary.

In our hearing last July, following the Supreme Court's decision in *Hamdan*, I said Congress should follow the Supreme Court's roadmap about the type of procedures that would conform to the principles of U.S. law. This meant, in my opinion, that Congress should establish a new set of rules for military commissions, starting with the Uniformed Code of Military Justice (UCMJ) system for courts-martial, changing it as necessary to deal with the unique circumstances of the war on terror. I continue to believe—consistent with the testimony of our Judge Advocates General—that the UCMJ model is the right starting point for a system to try detainees for war crimes, but that significant departures are necessary to account for the realities of military operations in an ongoing war and our need to protect classified information and intelligence sources and methods. That can be done while maintaining American principles of fundamental fairness and honoring our commitment to Common Article 3 of the Geneva Conventions to provide those "judicial guarantees which are recognized as indispensable by civilized peoples." This hearing will pro-

vide an opportunity for our witnesses to express their views on the balance that was struck by the Military Commissions Act.

In closing, we must keep in mind that what we do about these issues is fundamental to how we define ourselves as a people and how we are seen by the rest of the world. The war on terrorism is a war of ideas as much as it is a war of wills and the use of force to achieve strategic objectives. We must win on every level, or we risk failure.

I thank our witnesses and look forward to their testimony.

Senator WARNER. I'd like to step back. Senator Levin, you have given a lot of specific examples, and let's look at this thing in the context of what we—the United States, as a republic—how we have dealt with this.

We have three branches of government, as you well know. I think, unquestionably, we are proceeding in an orderly fashion to let each of the three branches of government address this complex issue.

First and foremost, I'm rather proud you recited that this committee stepped forward and passed a bill. You may recall, at that time I was privileged to be chairman, you were ranking member, and in some ways I acted not to the full support of my party and our side of the aisle at that time. But we got it through. Then, we did work out a reconciliation of some differences with the administration. The important thing is, the first step was taken with total transparency, total opportunity for debate, and the Congress of the United States, the Senate voting 65 to 34, the House of Representatives voting 250 to 170. So, step one of our triumvirate of branches worked.

Then we moved to step two, and that was the administration beginning to process the cases. That, they've done.

Step three is for the Federal judiciary to review the actions of both Congress and the administration acting in concert with the law to determine its constitutionality. The Supreme Court has given a preliminary ruling on the 15th to determine the possibility that further action should be taken.

What we're trying to do in this hearing is get out ahead of the process that the Founding Fathers laid down for this Government to operate. I wish to remind all present here today, we're dealing about the most serious of consequences. This is a nation at war. We are doing everything to protect our citizens and our Nation. I think we have to be exceedingly careful and act as the Founding Fathers said: step one, Congress; step two, the administration acting, consistent with the law; and step three, the judicial process. After those three steps have been taken, then it's, of course, an option of Congress to step back in and review those actions.

Chairman LEVIN. Thank you. Thank you, Senator Warner.

We're delighted that Senator Patrick Leahy, who is the chairman of the Judiciary Committee, is our first witness. As always, it's great to see you here, Senator Leahy, and we welcome your testimony.

Senator WARNER. Thank you. I join in that welcome, Senator Leahy. I know you spoke very forcefully, in the course of the debates that I've alluded to, as to your views.

**STATEMENT OF HON. PATRICK J. LEAHY, A SENATOR FROM
THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. Thank you, Senator Warner. You're both good friends, and both Senators I respect highly.

I must admit, it feels a little bit different sitting down here. I've spent some time—especially the past few weeks—sitting up where you are.

Both of you talked about this, not only here, but in other days, about the way we treat people who are detained by our Government outside of the judicial system. The laws that we pass governing those detainees provide a window into our own values, our own traditions, our own identity as a country. The issue is central to the way America is viewed in the world, the way we view ourselves as a nation. But, unfortunately, the image of America created by our treatment of detainees and by laws we have passed on this issue is not the kind of image that I, or many of you, would have preferred to present to the world.

Last year's MCA, supported by this committee, and then altered at the request of the White House before Senate passage, I believe was a mistake of historic proportions. It is on the elimination of *habeas corpus* rights that I would like to focus. Speaking first as an American, then as a Senator, then as chairman of the Judiciary Committee, I believe it was the worst of the unfortunate changes made by that hastily passed legislation in the weeks before an election. Senator Specter and I fought hard to remove the disastrous *habeas* provision from the bill; with the support of Senator Levin and many others, we came within a couple of votes of prevailing. I hope we can work together in a bipartisan way to correct this historic wrong. I anticipate the Judiciary Committee will hold a hearing on the issue next month. So, with the help of the chairman and others, I hope we can fix this.

Justice Scalia, a conservative Republican, wrote in the *Hamdi* case, "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive." The remedy that secures that most basic of freedoms, of course, is *habeas corpus*. It provides a check against arbitrary detentions and constitutional violations and guarantees an opportunity to go to court with the aid of a lawyer to prove one's innocence. This fundamental protection is rolled back in an unprecedented and unnecessary way in the MCA.

MCA eliminated that right permanently for any noncitizen labeled an enemy combatant, even if the detainee is awaiting determination of whether the status of enemy combatant even applies. So, the sweep of this *habeas* provision goes far beyond the few hundred detainees currently held at Guantanamo Bay. It includes an estimated 12 million lawful permanent residents in the United States today. These are people who work here lawfully, pay taxes, abide by our laws. It applies to anybody who's visiting the United States legally, and other legal immigrants, as well. These are people we've traditionally welcomed to our shores.

The new law means that any of these people could be detained forever without any ability to challenge their detention in Federal court, and that's forever. I don't use that word lightly, but it's for-

ever. They can't challenge the detention anywhere; simply on the Government's say-so, while they're awaiting determination as to whether they're enemy combatants.

Chairman Levin has used an example. Last fall, I spelled out a nightmare scenario about a hardworking legal permanent resident who makes an innocent donation to a charity to help poor people around the world. That's in the finest American tradition. But if that charity is secretly suspected—the person making the contribution doesn't even know this, but secretly we suspect that it's funding critics of the United States Government, that innocent act could lead to an indefinite and unchallengeable incarceration. On the basis of a charitable donation, perhaps a report of suspicious behavior from an overzealous neighbor, or from information secretly obtained, maybe from a cursory review of what that person borrowed from their public library, the permanent resident could be brought in for questioning, denied a lawyer, confined. They have no recourse in the courts for years or decades or forever.

That's the kind of disappearance that America is rightly criticized and condemned in parts of the world ruled by autocratic regimes. That is not America. That's not the image of America we want the world to have. Most people would view this kind of nightmare scenario as fanciful; but, sadly, it's not.

Indeed, last November, just after enactment of these provisions, the scenario I spelled out was confirmed by the Department of Justice (DOJ) in a legal brief submitted in Federal Court in Virginia. The DOJ, in a brief to dismiss a detainee's *habeas* case, said that the MCA allows the Government to detain any noncitizen designated as an enemy combatant, without giving that person any ability to challenge his detention in court. Even if the Government has made a total mistake, it can't be challenged. This is not just at Guantanamo Bay. The DOJ says it's true even of somebody arrested and imprisoned in the United States. We've removed a vital check that our legal system provides against the Government arbitrarily detaining people for life without charge. It's wrong. It's unconstitutional. I would say, clearly, it is un-American.

A group of four distinguished admirals and generals who have served as senior military lawyers argued passionately for fixing this problem in a letter they sent me last month. I'd ask, Mr. Chairman, consent that that letter be included in the record.

Chairman LEVIN. It will be made part of the record.

[The information referred to follows:]

REAR ADMIRAL DON GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL DAVID M. BRAHMS, USMC (RET.)
BRIGADIER GENERAL JAMES P. CULLEN, USA (RET.)

March 7, 2007

The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

We strongly support your legislation to restore habeas corpus for detainees in US custody. We hope that it quickly becomes law.

Known as the "Great Writ," habeas corpus is the legal proceeding that allows individuals a chance to contest the legality of their detention. It has a long pedigree in Anglo Saxon jurisprudence, dating back to 13th Century England when it established the principle that even Kings are bound by the rule of law. Our Founding Fathers enshrined the writ in the Constitution, describing it as one of the essential components of a free nation.

In discarding habeas corpus, we are jettisoning one of the core principles of our nation precisely when we should be showcasing to the world our respect for the rule of law and basic rights. These are the characteristics that make our nation great. These are the values our men and women in uniform are fighting to preserve.

Abiding by these principles is critical to defeating terrorist enemies. The U.S. Army's Counterinsurgency Manual, which outlines our strategy against non-traditional foes like al Qaeda, makes clear that victory depends on building the support of local populations where our enemies operate through the legitimate exercise of our power. The Manual states: "Respect for preexisting and impersonal legal rules can provide the key to gaining widespread and enduring societal support. . . . Illegitimate actions," including "unlawful detention, torture, and punishment without trial . . . are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law." Our enemies have used our detention of prisoners without trial or access to courts to undermine the legitimacy of our actions and to build support for their despicable cause.

It is certainly true that prisoners of war have never been given access to courts to challenge their detention. But the United States does have a history of providing access to courts to those who have not been granted POW status and are instead being held as unlawful combatants, as are the detainees in this conflict. See., e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942) (rejecting the claim that the Court could not review the habeas claim of enemy aliens held for law of war violations).

POWs are combatants held according to internationally prescribed rules, and are released at the end of the war in which they fought. In a traditional war, it is generally easy to determine who is a combatant and governed by these special rules. But the war we are fighting today is different. Detainees held at Guantanamo Bay were captured in 14 countries around the world, including places as far away from any traditional battlefield as Thailand, Gambia, and Russia. Some were sold to the United States by bounty hunters. Our enemies blend into the civilian population, making the practice of identifying them more

difficult. For all these reasons, the possibility of making mistakes is much higher than in a traditional conflict. In such a situation, it is incumbent on our nation to ensure that there is an independent review of the decision to detain.

The denial of habeas corpus also threatens to harm our national interests by placing American civilians at risk. Imagine if an enemy of the United States arrested an American citizen - a nurse or interpreter or employee of a military contractor - because they once provided assistance to our armed forces, and held that American without charge or opportunity to challenge their detention in court. We would be outraged, and rightly so. Yet, this is the precedent we are setting by holding without charge those deemed to have aided the enemy and denying them access to a court that could review the basis of their detention.

A judicial check on the decision to detain is in the best tradition of the United States - a tradition that ensures accountability, accuracy, and credibility. Restoring habeas corpus will help ensure that we are detaining the right people and showcase to the world our respect for the rule of law and the values that distinguish America from our enemies.

We hope that Congress will act quickly to pass this legislation.

Sincerely,

Rear Admiral Don Guter, USN (Ret.)
Rear Admiral John D. Hutson, USN (Ret.)
Brigadier General David M. Brahms, USMC (Ret.)
Brigadier General James P. Cullen, USA (Ret.)

BIOGRAPHICAL INFORMATION

Rear Admiral Don Guter, USN (Ret.)

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

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

Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire. He also joined Human Rights First's Board of Directors in 2005.

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

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

Brigadier General James P. Cullen, USA (Ret.)

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

Senator LEAHY. They wrote—let me just quote one part—“In discarding *habeas corpus*, we are jettisoning one of the core principles of our Nation precisely when we should be showcasing to the world our respect for the rule of law and basic rights. These are the characteristics that make our Nation great. These are the values our men and women in uniform are fighting to preserve.”

We should take steps to ensure that enemies can be brought to justice. I introduced a bill to do that, back in 2002, as did Senator Specter, when we each proposed to establish military commissions. So, establishing appropriate military commissions is not the question. But what we have to revisit and correct is the suspension of

the Great Writ—the Great Writ—of *Habeas Corpus* for millions of legal immigrants and others, denying their right to challenge indefinite detention just because the Government says they should be.

So, in closing, let me say, it is from strength—it is from strength—that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution, and the rule of law that we can prevail. We should not be legislating from fear. We can ensure our security without giving up our liberty.

I'll keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a nation.

Mr. Chairman, I thank you for the privilege of appearing before this committee. This is the first committee I served on, 32 years ago, when I came to the Senate. I've always respected this committee. It's had some of the finest men who have chaired it, in both parties. I see two of them before me right now.

Mr. Chairman, I can't tell you how passionately I believe, in my own soul, we have to go back America's basic values. That's what's going to make us safe. That's what's going to make us strong.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT BY SENATOR PATRICK LEAHY

I thank Chairman Levin and Ranking Member McCain for granting my request to testify before the Senate Armed Services Committee this morning, and for convening this important hearing. The way that we treat people who are detained by our government outside of the judicial system, and the laws we pass governing those detainees, provide a window into our own values, our own traditions, and our own identity as a country. This issue is central to the way America is viewed in the world and the way we view ourselves as a nation.

Unfortunately, the image of America created by our treatment of detainees and by laws we have passed on this issue is not the kind of image that I, or many of you, would have preferred to present to the world. Last year's Military Commissions Act—reported by this committee and then altered at the request of the White House before Senate passage—was a mistake of historic proportions.

It is on the elimination of *habeas corpus* rights that I would like to focus this morning. Speaking as an American, a Senator, and as the chairman of the Judiciary Committee, I believe that it was the worst of the unfortunate changes made by that hastily-passed legislation in the weeks before an election.

Senator Specter and I fought hard to remove the disastrous *habeas* provision from the bill and, with the support of Senator Levin and many others, came within a couple of votes of prevailing. I hope that we will work together in a bipartisan way to correct this historic wrong. I anticipate that the Judiciary Committee will hold a hearing on this issue next month. With the help of Chairman Levin and others, I hope we can fix this serious and corrosive problem by this summer.

As Justice Scalia wrote in the *Hamdi* case: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive." The remedy that secures that most basic of freedoms is *habeas corpus*. It provides a check against arbitrary detentions and constitutional violations. It guarantees an opportunity to go to court, with the aid of a lawyer, to prove one's innocence.

This fundamental protection was rolled back in an unprecedented and unnecessary way in the Military Commissions Act. The Military Commissions Act eliminated that right, permanently, for any non-citizen labeled an enemy combatant—even if the detainee is "awaiting" determination of that status. The sweep of its *habeas* provision goes far beyond the few hundred detainees currently held at Guantanamo Bay, and includes an estimated 12 million lawful permanent residents in the United States today. These are lawful residents of the United States, people who work and pay taxes, people who abide by our laws and should be entitled to fair treatment.

It applies to anyone who is visiting the United States and other legal immigrants as well. These are people we have traditionally welcomed to our shores and invited to experience the freedoms that made America the most admired country in the world. This new law means that any of these people can be detained, forever—that's right, forever—without any ability to challenge their detention in Federal court, or anywhere else, simply on the Government's say-so that they are awaiting determination as to whether they are enemy combatants.

Last fall, I spelled out a nightmare scenario about a hard-working legal permanent resident who makes an innocent donation to a charity to help poor people around the world in the finest American tradition. If that charity is secretly suspected by the Government to fund critics of the United States Government, that innocent act could lead to an indefinite and unchallengeable incarceration. On the basis of a charitable donation and perhaps a report of "suspicious behavior" from an overzealous neighbor or from information secretly obtained from a cursory review of the person's library borrowings, the permanent resident could be brought in for questioning, denied a lawyer, confined, and even tortured. Such a person would have no recourse in the courts for years, for decades, forever.

This is the kind of "disappearance" that America has criticized and condemned in parts of the world ruled by autocratic regimes. That is not America. That is not the image of America we want the world to have.

Many people viewed this kind of nightmare scenario as fanciful, but sadly it was not. Indeed, last November just after enactment of these provisions, the scenario I spelled out was confirmed by the Department of Justice in a legal brief submitted in Federal court in Virginia. The Justice Department, in a brief to dismiss a detainee's *habeas* case, said that the Military Commissions Act allows the Government to detain any noncitizen designated as an enemy combatant without giving that person any ability to challenge his detention in court. This is not just at Guantanamo Bay for those who this administration likes to call the worst of the worst. The Justice Department said it is true even for someone arrested and imprisoned in the United States.

We have removed a vital check that our legal system provides against the Government arbitrarily detaining people for life without charge. This is wrong. It is unconstitutional. It is un-American.

A group of four distinguished admirals and generals, who have served as senior military lawyers, argued passionately for fixing this problem in a letter they sent to me last month. They wrote, "In discarding *habeas corpus*, we are jettisoning one of the core principles of our Nation precisely when we should be showcasing to the world our respect for the rule of law and basic rights. These are the characteristics that make our Nation great. These are the values our men and women in uniform are fighting to preserve."

We should take steps to ensure that our enemies can be brought to justice. I introduced a bill to do that back in 2002, as did Senator Specter, when we each proposed to establish military commissions. Establishing appropriate military commissions is not the question. But what we must revisit and correct is the suspension of the writ of *habeas corpus* for millions of legal immigrants and others, denying their right to challenge indefinite detention on the Government's say-so.

It is from strength that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution and the rule of law that we can prevail. We should not be legislating from fear. We can ensure our security without giving up our liberty. I will keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a nation.

Chairman LEVIN. Senator Leahy, thank you for your—[Audience interruption.]

Senator WARNER. Mr. Chairman, if I could just ask our distinguished colleague—

Chairman LEVIN. Before you do that, Senator Warner, let me just ask the audience—they're going to have to refrain from those kind of responses if this hearing is going to continue in a way which this issue is entitled to, which is a hearing where we're going to hear from witnesses, we're going to hear, without demonstration from the audience. The issue is that serious. It requires this kind of respect from the audience for different points of view.

We are going to ask everybody in the audience to please refrain from any further demonstrations.

Senator Leahy, thank you very much for your statement.

Senator WARNER. Could I just ask one word of our distinguished colleague?

Your remarks today coincided with the fervor and the commitment of your remarks during the course of the debate. But when you use the word un-American, how do you wish to revisit that in the context of, a significant majority of both the Senate and the House did approve this legislation?

Senator LEAHY. Mr. Chairman, over the years, the House and the Senate have voted a number of things that we wish we could revisit. I'd go back to the internment of Japanese Americans in World War II. The House and the Senate agreed with the President—and President of my own party—in doing that, and the Governor of California, who later became the Chief Justice of the United States. We were good enough, decades later, to admit that that was a horrible mistake and did not follow our values. We make mistakes.

Senator Warner, I've cast more votes in the United States Senate than all but a dozen people in our Nation's history. I'm proud of that. Did I make mistakes in some of those? I know I have. I'm willing to go back and revisit them. But this is a mistake that will haunt not just us, but our children and our children's children if we don't correct it.

Senator WARNER. I don't wish to ever question the patriotic allegiance of any of our colleagues, no matter how strongly our differences may be, and I just feel that we should allow the republic to function as the Founding Fathers set it. We're getting ahead of the judicial branch. How do you answer that? Why the urgency, at this moment, given that the judicial branch is consistently reviewing these decisions?

Senator LEAHY. The judicial branch is consistently reviewing this, but, since we passed this act, and we've had at least one court opinion that has gone along with our removal of the Great Writ of *Habeas Corpus*. The fact is, we are three independent branches of government. That doesn't mean that we can turn our responsibilities from one branch over to the other branch. We set the jurisdiction—for example, of the Federal courts, that's under the Constitution. We've done this over the years, sometimes wisely, sometimes unwisely. Every one of us, though, should know, in our core of our being, that one of the things that make us a great nation is our commitment to the Great Writ of *Habeas Corpus*. You talk about the Founding Fathers and what we did. The Founding Fathers knew that. The Founding Fathers fought a revolution to make sure we'd have those rights. Let us not, in a matter of a day's debate or something, do away with those rights. We are not harmed, as a nation, by keeping to our traditions and our values and those balances.

Chairman LEVIN. Senator Leahy, let me just ask you a quick question, following up on Senator Warner's question. Do you know of any doctrine that requires, suggests, that Congress needs to await a judicial outcome before it should legislate on an issue, if it believes that it is important and appropriate to legislate?

Senator LEAHY. There is no such doctrine. In fact, over more than two centuries, Congress has acted often without waiting for a judicial determination. *Marbury* versus *Madison* on through, I would say our actions can still be reviewed.

But we all know—and within the service of the three of us, we have done this a number of times.

Chairman LEVIN. Senator Warner, did you want to add anything?

Senator WARNER. No, that's fine.

Chairman LEVIN. Thank you.

Senator Leahy, we thank you for being here this morning.

Senator LEAHY. Thank you. It is a privilege to be here. Thank you, sir.

Senator WARNER. We're privileged to have you before us.

Senator CORNYN. Mr. Chairman, if I could just have about 3 minutes?

Chairman LEVIN. Excuse me, I'm sorry. Senator Leahy, forgive me. I made a mistake in not looking to my colleagues to see if there's any other questions. Forgive me.

Senator Cornyn.

Senator CORNYN. I appreciate it, Mr. Chairman.

I should refer to Senator Leahy as my chairman, as well, of course, we serve together on the Judiciary Committee. He and I have had the privilege of working together on some important legislation, and I know we'll continue to have that opportunity in the future. But he and I obviously disagree on this issue, and I just wanted to ask a couple of very brief questions.

I'm not aware of any recorded English common-law case that grants *habeas corpus* relief to an alien detained as an enemy combatant. I wondered if the Senator was aware of any case that so held?

Senator LEAHY. What I have referred to in this, Mr. Chairman, is the fact that under this law we can detain any alien. We could detain a professor who's here teaching on sabbatical, an alien here with appropriate visas and everything else. That is not the issue.

This is so broad, we can detain anybody. We don't even have to go into the enemy combatant, we can detain anybody, say they are, whether they are or not. We have seen the mistakes that have occurred in this. We know that our Government makes mistakes. I'd point to the example out in Oregon, where a lawyer—different situation—but a lawyer is arrested, his law practice virtually ruined, because he was somehow suspected of being involved in the bombing of a train in Spain. When, finally, it was found out what a mistake it was, our Government has paid him a very large sum of money.

Senator CORNYN. The reason I asked the question, Mr. Chairman, is because I'm not aware of any case from the United States Supreme Court, any English common-law case, that's granted *habeas corpus* relief to an alien detained as an enemy combatant, although it's clear, I think, from my reading of the cases, that an alternative method of providing judicial review is an important factor. I'm familiar with the fact that lawyers disagree all the time. That's what lawyers do. I attribute this to a good-faith disagreement as to what the law requires. But, ultimately, we have to, as

Senator Warner suggested, submit these disputes among lawyers in good faith—the tribunals that are authorized under the law—to resolve those disputes, finally.

Senator LEAHY. Mr. Chairman, I'm not suggesting that if you have an enemy combatant, that we're going to write the law that allows that determination. But we will determine if you're being held properly or not. This is not to give anybody any new rights or any different rights. But if anybody is picked up, and told, "You're an enemy combatant," right now they can't even raise the question, "You have the wrong guy. We know this has happened over and over again, somebody of a similar name, that's similar to what we see, even to our citizens as Americans, when we fly. Senator Ted Kennedy has been stopped half a dozen or more times getting on a plane he's been taking, for 40 years, because his name is on a no-fly list; they got him mixed up with somebody else. A 1-year-old child is stopped until his parents get a passport for him to prove he's not a 40-some-odd-year-old terrorist. Catholic nuns. I could go on and on. The fact is, mistakes are made. You ought to at least be able to go to a court and say, "Hey, you got the wrong person."

Senator CORNYN. Mr. Chairman, again, we disagree. Today's New York Times, in an article titled "Court Asks to Limit Lawyers at Guantanamo," it's noted that, in 2005, Congress designated that the D.C. Court of Appeals was the court as the forum for detainees to challenge, directly, decisions made by the Pentagon's CSRTs designating them as enemy combatants. I believe Congress has amply provided a tribunal and an opportunity for those determinations to be made, and then challenged and reviewed by an impartial Article III Court. Of course, as Senator Leahy acknowledged earlier, a divided panel of the Federal Court of Appeals in Washington upheld that provision in February, and, of course, we'll all have to wait to see if, once it makes its way to the United States Supreme Court, whether that court does it.

But, in closing, I think what Senator Warner has suggested has a lot of merit. We ought to give this law a chance to function, and allow the courts a chance to do their job. But I respect those who hold a different opinion, and we'll all wait to see what the courts decide.

Thank you very much.

Senator LEAHY. Mr. Chairman, I hope everybody will read the letter from the four flag officers who agree with my position and feel that we are not helping our Nation, doing it this way.

Thank you.

Chairman LEVIN. Is there anyone else? Any of my colleagues?

Senator SESSIONS. Mr. Chairman.

Chairman LEVIN. Yes.

Senator SESSIONS. I think that Senator Cornyn, former Justice Cornyn, has given a fair summary of where I see this matter. The Constitution has never given enemy combatants, lawful or unlawful, who have been captured, *habeas corpus* rights. So, what I understand this legislation to do, to be taking us a step we've never done before, and that is to give classical *habeas corpus* rights to enemy combatants, even unlawful enemy combatants who have rejected the rules of warfare.

We have, in fact—and I'll go through, in my remarks later—provided quite a number of hearings and reviews, including an annual review of anybody that's being detained, including a right, as the Senator indicated, to go to court. But it does appear to me that, while there may be some cases that need review, as the system will allow, I do not believe that this Congress should go so far as to provide *habeas corpus* review to noncitizen enemy combatants seized on the battlefield.

Chairman LEVIN. Let me ask Senator Leahy a question.

Am I not correct that your bill does not provide *habeas corpus* rights to anybody? It would eliminate the prohibition that was in the law that Congress adopted against courts granting *habeas corpus*. So, ironically, my two colleagues who have spoken on this, who say we should allow courts to do their job, as a matter of fact, it is Congress—am I not correct?—that passed a law that removed from the courts a chance to do their job as they saw fit, because we prohibit, in our law, courts from granting *habeas corpus*, should they deem it fit. Is that not correct?

Senator LEAHY. The Chairman is absolutely correct.

Chairman LEVIN. So, it's the opposite, I believe, of what you say, Senator Cornyn. I agree with you, there may not be a case where *habeas corpus* was granted to an enemy combatant. That proves, it seems to me, the point that there's no need to take from the court the jurisdiction to grant *habeas corpus*. If, in fact, they've never used that jurisdiction to grant it to an enemy combatant, why in heaven's name would Congress then take a radical step of denying courts the jurisdiction to grant a writ which they have never granted? Why would we interfere with the courts to take from them the right to adjudicate? If Senator Warner is correct, as he often is, that we should allow the courts to do their work, it is our law which takes from the courts the right, should they deem it appropriate, to grant *habeas corpus*.

Senator LEAHY. Not only that, but you're also saying what Admiral Guter, Admiral Hutson, General Brahms, and General Cullen have said in the letter I've given to you, they say, "It's certainly true that prisoners of war have never been given access to courts to challenge their detention. But the United States does have a history of providing access to courts to those who have not been granted prisoner of war (POW) status and are instead being held as unlawful combatants, as are the detainees in this conflict."

Chairman LEVIN. One last question from me, and others may want to jump in here—but is it not true that our Constitution, in Article I, says that, "The privilege of the writ of *habeas corpus* shall not be suspended"—they're referring to Congress—"unless, when in cases of rebellion or invasion, the public safety may require it"? Is that correct reading?

Senator LEAHY. Absolutely. I have the Constitution right here, and that's precisely what it says.

Chairman LEVIN. Let me call on my colleagues.

Senator Cornyn.

Senator CORNYN. I appreciate it. Mr. Chairman, it's my position that, even though there is no legal requirement to provide *habeas corpus* release to an alien that is an enemy combatant, and no one has cited any case to the contrary—that we have gone a step fur-

ther and provided an opportunity for both administrative and judicial review in a court, the DC Court of Appeals, which is acknowledged as the second-highest court in the land. So, rather than deny legal rights to our very enemies, people who do not observe the law of war and who have no regard for the distinction between those who wear the uniform and innocent civilians, we have, because, I believe, we are a great country that believes in the rule of law, gone further than the law required by conferring that right of review.

So, that's, again, where we differ, and I respect your right to your views, and I hope it's a two-way street.

Thank you.

Senator SESSIONS. Mr. Chairman?

Chairman LEVIN. Senator Sessions?

Senator LEAHY. Mr. Chairman, if I might say, in the *Rasul* case, the Supreme Court said the detainees could assert *habeas* rights. Now, that was before we passed this act. We've now removed the right. I'd be glad to stay here as long as you like, but we also have the Director of the FBI before our other committee, and I'm supposed to be chairing that.

Chairman LEVIN. If you have time for one more question for Senator Sessions?

Senator LEAHY. Of course. I'm here at your behest.

Chairman LEVIN. No, no, no, you have other responsibilities. Senator Sessions very quickly.

Senator SESSIONS. I'm like Senator Cornyn, I have both my chairmen here, and my respect for both of you is immense, and both of you are exceedingly fine lawyers—a pretty good Armed Services Committee chairman, but also a great lawyer.

Chairman LEVIN. Among lawyers, that's a compliment. Among the rest of the world, I'm not sure it is. [Laughter.]

Senator SESSIONS. However, I think the true fact, Mr. Chairman—Armed Services Committee Chairman Levin—is that the Constitution does not confer *habeas corpus* rights on people seized on the battlefield. The basis for *Rasul* and the case that indicated that there would be some right was based on a statutory act of Congress. After full debate, we decided that statutory act had, in fact, created the possibility that all the unlawful combatants that we're capturing will end up suing us and overwhelming the court system, and we created a system, as the Senator said, to provide justice without going through the normal *habeas corpus* rights that have never been given under the Constitution to prisoners seized on the battlefield. I think that's a fair summary of it.

Chairman LEVIN. Thank you. Thank you, Senator Sessions.

Thank you, again, Senator Leahy. We appreciate your coming by.

Now we'll call on our second panel: Daniel Dell'Orto, who's the Principal Deputy General Counsel for the DOD; Admiral John Hutson (Retired), former Judge Advocate General of the Navy; Jeffrey Smith, former General Counsel of the Central Intelligence Agency; Neal Katyal—and I may be mispronouncing your name, forgive me if I am—who's professor of law, Georgetown University Law Center; Mark Denbeaux, professor at Seton Hall Law School; and David Rivkin, who's partner of the law firm of Baker Hostetler.

Thank you, gentlemen, for coming by today. We've already indicated what a lively subject this is, even before this panel, which I know will continue the lively debate. We look forward to it.

Mr. Dell'Orto, we thank you for coming. Mr. Dell'Orto, as I said, is the Principal Deputy General Counsel, DOD.

Would you please start?

Senator WARNER. Mr. Chairman, just one reference here. A very distinguished panel, but we have before us Mr. Smith. Mr. Smith was trained by this committee, many, many years, so I hope that that training is manifested today in his remarks. [Laughter.]

Mr. SMITH. Thank you, Senator. It certainly sharpens the intensity of my preparation. [Laughter.]

Senator WARNER. Correct.

Chairman LEVIN. We will remind Senator Warner, after your remarks, of the fact that you were trained here, so that he will then bear responsibility should he, by any chance disagree with anything you might say. [Laughter.]

Now, Mr. Dell'Orto, thank you for coming to join us today, and would you begin?

I think we ought to ask our witnesses—did we give them a time limit? If you could keep your testimony, since there's such a large panel and many Senators interested, to 5 minutes, and we'll put entire statements in the record, we would appreciate it.

Mr. Dell'Orto?

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

Mr. DELL'ORTO. Thank you, Mr. Chairman, Senator Warner, and members of the committee, for the opportunity to testify before you today regarding individuals detained by the DOD as unlawful enemy combatants.

Dr. Samuel Johnson, the esteemed English philosopher, poet, and critic, famously tells us, "The law is the last result of human wisdom acting upon human experience for the benefit of the public." The MCA developed by the President and Congress in light of the Supreme Court's decision in *Hamdan* versus *Rumsfeld*, in conjunction with the other procedures implemented by the U.S. Government relating to the determination of detainee status, represents precisely this combination of wisdom, experience, and concern for the public interest.

The MCA provides a system whereby alien unlawful enemy combatants accused of violations of the Law of Armed Conflict will be tried fairly, while ensuring the national security of the United States and allowing the continued prosecution of the global war on terrorism. Similarly, the CSRT and the Administrative Review Board (ARB) processes provide the detainees with a measure of process significantly beyond that which is required by international law.

The United States is in a state of armed conflict with al Qaeda, the Taliban, and their supporters. During this conflict, persons have been captured by the United States and its allies, and some of those persons have been detained as enemy combatants. The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principal purpose of this detention

is to prevent the persons from returning to the battlefield, as some have done, upon their release.

Detention of enemy combatants in wartime is not criminal punishment, and, therefore, does not require that the individual be charged or tried in a court of law. It is a matter of security and military necessity that has long been recognized as legitimate under international law.

The United States relies today, just as we always have, on commanders in the field to make the initial determination of whether persons detained by U.S. forces qualify as enemy combatants. Since the war in Afghanistan began, the United States has captured, screened, and released approximately 10,000 individuals. Initial screening has resulted in only a small percentage of those captured being transferred to Guantanamo. The United States only wishes to hold those who are enemy combatants who pose a continuing threat to the United States and its allies.

In addition to the screening procedures used initially to screen detainees at the point of capture, the DOD has created two administrative review processes at Guantanamo: CSRTs and ARBs.

The CSRT is a formal review process created by the DOD and incorporated into the Detainee Treatment Act (DTA) of 2005 that provides the detainee with the opportunity to have his status considered by a neutral decisionmaking panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections.

In addition to the opportunity to be heard in person and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process.

Furthermore, a CSRT recorder is obligated to search Government files for evidence suggesting the detainee is not an enemy combatant, and to present such evidence to the tribunal.

Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority empowered to return the record to the tribunal for further proceedings.

In addition, a CSRT decision can be directly appealed to an American domestic Federal civilian court, the United States Court of Appeals for the District of Columbia Circuit. Providing review of an enemy combatant determination in our Nation's own domestic courts is an unprecedented protection in the history of war.

In addition to the CSRT, an ARB conducts an annual review to determine the need to continue the detention of the enemy combatant. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention; intelligence value, as an example.

Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released, or be transferred to his country of nationality. The ARB process is unprecedented, and is not required by the law of war or by international or domestic law. The United States created

this process to ensure that we detain individuals no longer than necessary.

Approximately 390 detainees have been released or transferred out of Guantanamo Bay. Approximately 80 detainees are awaiting transfer or release once their governments provide credible assurances that they will be treated humanely and that the countries will take steps to mitigate the threat those individuals pose to the United States and its allies. This underscores our commitment not to hold any detainee longer than necessary.

Where appropriate, the President has indicated that military commissions should be used to try those suspected of serious war crimes. As you're likely aware, criminal charges were referred this week against a Guantanamo detainee who is accused of, among other things, murdering a U.S. soldier. This individual, and others to follow, will face trial under the military commission procedures found in the MCA of 2006. Transferring trials before military commission from the secure facility at Guantanamo Bay to the continental United States would hamstring the Nation's ability to prosecute terrorist war crimes. The existing civilian court system is ill-equipped to handle the dispensation of justice in the chaotic and irregular circumstances of armed conflict. Rules of evidence and procedure designed for information derived from civilian law enforcement investigations are impracticable for the trial of accused terrorist war criminals. Much of the evidence against these accused war criminals was collected on foreign battlefields, where reading Miranda-style rights warnings and obtaining court-issued search warrants would be impossible, and would, in any case, cripple intelligence-gathering efforts. For this reason, this Nation has, since the earliest days of the republic, used military commissions as a means to try enemy combatants during wartime.

The system created by the MCA and implemented by the Office of Military Commissions is designed to provide for prosecution of accused war criminals before regularly constituted courts, affording all the judicial guarantees recognized as indispensable by civilized peoples. The MCA and the Manual for Military Commissions provide extensive procedural guarantees to commission defendants, including presumption of innocence until proven guilty beyond a reasonable doubt; trial before a commission made up of at least 5 members—12, in capital cases—and an impartial judge; the ability to call witnesses and present evidence; the ability to cross-examine prosecution witnesses; the privilege against self-incrimination; and many others.

The current system, thus, provides an accommodation to unlawful enemy combatants beyond what is required by the Geneva Conventions, and, indeed, is unprecedented in the history of war. To abandon this carefully crafted system and attempt to transplant the trials of enemy combatants into the civilian courts would be ill-advised, as would be transplanting the commissions themselves from the secure facility at Guantanamo to some unspecified location in the United States.

In the 9 months since the Supreme Court's *Hamdan* decision, Congress and the administration have made great strides in moving forward. Congress drafted and enacted legislation. The President signed that legislation into law. The courts have begun ruling

on that legislation, and have rejected challenges to the act. Military commissions have begun again, and are proceeding in earnest. The DOD has been criticized for the delay in conducting military commissions. We are now moving forward. It would be worse than counterproductive to make any changes to the legislation, at this point, while the courts are actively engaged in reviewing the MCA and military commissions are hearing cases.

Together, Congress and the President developed the DTA and the MCA. Those statutes, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, Congress, and numerous military and civilian personnel applied to the Nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and experience, and doing so would do a disservice to the American public.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dell'Orto follows:]

PREPARED STATEMENT BY DANIEL J. DELL'ORTO

Thank you, Mr. Chairman, Ranking Member McCain, and members of the committee for the opportunity to testify before you today regarding individuals detained by the Department of Defense as unlawful enemy combatants.

Dr. Samuel Johnson, the esteemed English philosopher, poet and critic, famously tells us, "The law is the last result of human wisdom acting upon human experience for the benefit of the public." The Military Commissions Act, developed by the President and Congress in light of the Supreme Court's decision in *Hamdan v. Rumsfeld*, in conjunction with the other procedures implemented by the U.S. Government relating to the determination of detainee status, represent precisely this combination of wisdom, experience, and concern for the public interest. The MCA provides a system whereby alien unlawful enemy combatants accused of violations of the law of armed conflict will be tried fairly, while ensuring the National security of the United States and allowing the continued prosecution of the global war on terrorism. Similarly, the Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) processes provide the detainees with a measure of process significantly beyond that which is required by international law.

The United States is in a state of armed conflict with al Qaeda, the Taliban, and their supporters. During this conflict, persons have been captured by the United States and its allies, and some of those persons have been detained as enemy combatants. The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principal purpose of this detention is to prevent the persons from returning to the battlefield, as some have done when released.

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In addition to the opportunity to be heard in person and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process. Furthermore, a CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority, empowered to return the record to the tribunal for further proceedings. In addition, a CSRT decision can be directly appealed to an American domestic Federal civilian court—the United States Court of Appeals for the District of Columbia Circuit. Providing review of an enemy combatant determination in a nation's own domestic courts is an unprecedented protection in the history of war.

In addition to the CSRT, an ARB conducts an annual review to determine the need to continue the detention of the enemy combatant. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention—intelligence value, as an example. Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released, or be transferred to his country of nationality. The ARB process is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

Approximately 390 detainees have been released or transferred out of Guantanamo Bay. Approximately 80 detainees are awaiting transfer or release once their governments provide credible assurances that they will be treated humanely and that the countries will take steps to mitigate the threat those individuals pose to the United States and its allies. This underscores our commitment not to hold any detainee longer than necessary.

Where appropriate, the President has indicated that military commissions should be used to try those suspected of serious war crimes. As you're likely aware, criminal charges were referred this week against a Guantanamo detainee who is accused of, among other things, murdering a U.S. soldier. This individual, and others to follow, will face trial under the military commission procedures found in the Military Commissions Act of 2006. Transferring trials before military commission from the secure facility at Guantanamo Bay, Cuba, to the continental United States would hamstring the Nation's ability to prosecute terrorist war crimes. The existing civilian court system is ill-equipped to handle the dispensation of justice in the chaotic and irregular circumstances of armed conflict. Rules of evidence and procedure designed for information derived from civilian law enforcement investigations are impracticable for the trial of accused terrorist war criminals. Much of the evidence against these accused war criminals was collected on foreign battlefields, where reading Miranda-style rights warnings and obtaining court-issued search warrants would be impossible and would, in any case, cripple intelligence-gathering efforts. For this reason, this nation has, since the earliest days of the Republic, used military commissions as a means to try enemy combatants during wartime.

The system created by the MCA and implemented by the Office of Military Commissions is designed to provide for prosecution of accused war criminals before regularly constituted courts affording all the judicial guarantees recognized as indispensable by civilized peoples. The MCA and the Manual for Military Commissions provide extensive procedural guarantees to commissions defendants, including: presumption of innocence until proven guilty beyond a reasonable doubt, trial before a commission made up of at least 5 members (12 in capital cases) and an impartial military judge, the ability to call witnesses and present evidence, the ability to cross-examine prosecution witnesses, the privilege against self incrimination, the opportunity to be represented free of charge by a military defense counsel with attorney-client privilege, the option of retaining certain additional civilian defense counsel, the right to represent oneself, the right to be present at all sessions of the military commission in which evidence is introduced before the commission, and an extensive appeals process, including ultimate access to our own domestic courts. The current system thus provides an accommodation to unlawful enemy combatants, beyond what is required by the Geneva Conventions and indeed, unprecedented in the history of war.

To abandon this carefully crafted system and attempt to transplant the trials of enemy combatants into the civilian courts would be ill advised, as would be transplanting the commissions themselves from the secure facility at Guantanamo to some unspecified location in the United States. The media circus and massive disruptions that developed around the trial of terrorism defendant Zacharias

Moussaoui in Alexandria, Virginia, were but a small foretaste of what could be expected to surround U.S.-based trials of persons accused of the most serious acts of terrorism. Holding these trials at a stateside military installation would only serve further to concentrate the congestion and chaos that would surround them, effectively shutting down part or all of a secure, operational military base during wartime. If commission defendants were to be transported to the United States for trial, significant additional security and logistical resources would have to be committed to the transport mission—it would not be a simple matter of putting one person on a plane and hoping he would show up for trial.

In the 9 months since the Supreme Court's *Hamdan* decision, Congress and the administration have made great strides in moving forward. Congress drafted and enacted legislation. The President signed that legislation into law. The courts have begun ruling on that legislation and have rejected challenges to the act. Military commissions have begun again and are proceeding in earnest. The Department has been criticized for the delay in conducting military commissions. We are now moving forward. It would be worse than counterproductive to make any changes to the legislation at this point, while the courts are actively engaged in reviewing the MCA and Military Commissions are hearing cases.

Together, Congress and the President developed the Detainee Treatment act and the Military Commissions Act. Those statutes, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, Congress, and numerous military and civilian personnel, applied to the Nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and experience, and doing so would do a disservice to the American public.

Chairman LEVIN. Thank you, Mr. Dell'Orto.

Our next witness will be Rear Admiral John Hutson, United States Navy (Retired). He is the former Judge Advocate General of the Navy.

Admiral Hutson?

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

Admiral HUTSON. Thank you, Mr. Chairman, thank you, Senator Warner, for the opportunity to participate in what I think is a critically important hearing.

I have a prepared statement that I'd ask to be made part of the record.

Chairman LEVIN. All the statements will be made part of the record.

Admiral HUTSON. Thank you.

My years of experience, observation, and studying history have taught me that there is one, and only one, immutable rule of international relations. That is that nation-states will always, always, always do what they believe to be in their self-interest. They may be wrong, they may be shortsighted, but they will always do what they believe is in their self-interest, and that includes the United States.

For generations, the President, Congress, the courts, and the American people have believed that it was in our self-interest to uphold the rule of law and to support human rights. We understood that it was not a rule of law if we only applied it when it was convenient. It was not a human right if we only applied it to our friends, rather than to all humans. Those values were in our self interest because it was our greatest strength. It was what we stood for that gave us our strength.

If you believe that CSRTs, in which the fate of people is determined without access to all the information after the Commander

in Chief and the Secretary of Defense and everybody else has already said, very publicly, the status of the individuals, is in our self-interest; if you believe the military commissions, with secret evidence that have tried successfully, I think it's, one person in the last 5 years, an overly broad definition of "enemy combatant," stripping *habeas corpus* from the detainees; if you believe that that's in our self-interest, if that's what makes us strong, then we should continue that. If you believe as I do, that they are not in our self-interest, that they undermine our national character and our strength, then it's incumbent upon us to stop them.

I like Senator Warner's description of the system, from Congress to the President to the courts, and then back to Congress. In prior wars, that system was upset, to some extent, understandably, and perhaps justifiably, because Congress and the courts very much deferred to the President, as Commander in Chief. As others have said before me, this is unlike other wars, and I think that it is—in this context, in this struggle, it is less appropriate for Congress to simply defer to the Commander in Chief on issues such as these.

Specifically, in summary, I urge you to narrow the definition of "enemy combatant," to disband the ill-conceived CSRTs. That dog won't hunt. They are fundamentally and fatally and irretrievably flawed. I urge you to restore *habeas corpus*, and to restore prosecutions to the Federal court system. I was a very early supporter of military commissions.

I thought military commissions were the way to go. I've testified to that. I've talked to the media about that. I thought they were the way to go. I was wrong. We can't fix them anymore. We've tried. We've tried, a couple of times. They just aren't going to work. We have the greatest court system in the world, and we ought to be using it.

We should be trumpeting, heralding, our judicial system for all the world to see. We should be using it as the example that we want everybody else to emulate, rather than hiding it behind the concertina wire of Guantanamo Bay. We have the opportunity now to demonstrate to the world how strong we are, how just we are. Rather, we are proving to the world that we're frightened, that we don't really stand for the things that we have said, for all these generations, that we stand for. I believe that we cannot, we dare not, fundamentally change who we are in the face of this enemy, because, for this enemy, fundamental changes in our DNA as a nation is victory. They can't beat us on the battlefield. The only thing they can do is try to cause us to change ourselves. They seem to be succeeding in that regard.

We owe it to our forebears, who fought so hard and shed blood to give us this great country, to turn it over to our progeny in the same condition or better than it was when we got it in the first place.

So, again, thank you for this opportunity. I look forward to your questions, specifically, with regard to some of the recommendations that I've made, and thank you for holding this hearing, Mr. Chairman.

[The prepared statement of Admiral Hutson follows:]

PREPARED STATEMENT BY RADM JOHN D. HUTSON, USN (RET.)

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

There are at least two important issues that require the close attention of this committee if we are to extricate ourselves from the morass in which we have languished for over 5 years now. The first is to address the realities of securing detainees and ascertaining their legal status. This includes both the related issues of Combat Status Review Tribunals (CSRTs) and *habeas corpus*. The second is the actual prosecutions of those suspected of having committed crimes against the United States. If we don't get these issues straightened out, we will have failed in a very important and visible aspect of the ongoing struggle against terror. This is part and parcel of the actual prosecution of the war itself.

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

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

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

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

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

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

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

COMBAT STATUS REVIEW TRIBUNALS

It should be pretty clear that if the CSRTs were ever really intended to adjudicate the combatant status of detainees, they are not adequately serving that purpose. The

CSRTs are neither fish nor fowl. They are neither compliant with the laws of war, nor with fundamental due process requirements. Article 5 hearings are intended to make status determinations—who is a prisoner of war. The CSRTs do not do this. Nor do they comply with due process safeguards designed to guard against our detaining the wrong people.

Unlike the Article 5 “Competent Tribunals” required by the Geneva Conventions and utilized successfully in the first Gulf War, CSRTs have been ineffective in determining who is a prisoner of war and whether the United States is holding the right people. The Article 5 Competent Tribunals used in the first Gulf War made determinations very quickly after the individual was captured and in a geographically proximate location. Indeed, Army Regulation 190–8 requires that this determination be made near the time of capture when witnesses and evidence are readily available. As a result, in the first Gulf War, upwards of 75 percent of those detained were released as having been simply caught up in the fog of war.

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

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

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

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

The CSRTs have another fundamental problem, which is the extraordinary breadth of their jurisdiction. This goes far beyond traditional battlefield operations and fails to meet the requirements of the laws of war. Unless you buy into the characterization that the entire world is now a battlefield, it appears that very few of those detained at Guantanamo were captured on any real battlefield. Most were turned over to us by Afghan warlords in exchange for a bounty. Some were arrested from as far away as Gambia, Bosnia, and Thailand. Most of those slated to be tried by military commission have been charged with conspiracy, support, and association type offenses, not traditional military, law of war, or even common law offenses. Of course, the vast majority are not charged with anything at all. Those attributes, combined with an overly broad definition of “unlawful enemy combatant” which potentially includes anyone considered to be a threat to national security, portends mischief and abuse.

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

more due process protections, could actually be dangerous, because it risks further institutionalizing what is essentially an administrative detention system that is completely at the discretion of the President.

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

HABEAS CORPUS

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

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

Although the detainees at Guantanamo are not U.S. citizens or resident aliens, they are in our custody. The purpose of *habeas corpus* is to simply permit the courts to review that custody. We should not be afraid of that review. Unlike prior wars, the end of this struggle will not be readily apparent. There is no one to raise a white flag or sign the surrender document. The capture of bin Laden, if it ever comes, will not end terror. The harsh reality is that our struggle against terror will go on indefinitely. (This is particularly true if we continue to consider it to be a war that can be won by bombs, bullets, and body bags rather than by politics, diplomacy, and economics.) That being the case, the detainees, most of whom have not been charged with a crime and will likely never see the inside of a courtroom, have essentially been sentenced to life without parole.

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

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

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

MILITARY COMMISSIONS

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

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

Admitting coerced evidence is another exhibit. Under the Military Commissions Act, if evidence is obtained through coercion which may include cruel, inhuman, or

degrading (CID) treatment before enactment of the Detainee Treatment Act (December 30, 2005), it is admissible if found to be reliable, probative, and in the interest of justice.

If coerced statements are obtained after that date, they are admissible if the coercion does not rise to the level of CID. The commission may know for a fact of the coercion, but how then can it ever really know of the reliability of the coerced evidence? If the confession of a defendant obtained at a secret CIA prison is offered as evidence, do any of us here have real confidence that it was not obtained under duress or that it is reliable?

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

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

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

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

The proof of the failure of the military commissions is amply demonstrated by their abysmal record. After all this time, with fits and starts, we have managed to convict precisely one detainee who was sentenced to 9 months—to be served in Australia—for a crime that didn't exist as a war crime when he committed it. On the other hand, there are a number of convictions from Federal district courts for serious offenses resulting in serious punishment. Why do we continue to beat our head against the wall of military commissions? We tried them. They haven't worked well. Let's move on to something else and actually get some convictions. If in that process we risk also getting some acquittals, that's the price we pay for due process. We are too great a country to shrink from this. Honestly, the reality is that there are certainly some innocent people being held in Guantanamo.

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

S. 576—A BILL TO PROVIDE FOR THE EFFECTIVE PROSECUTION OF TERRORISTS AND
GUARANTEE DUE PROCESS RIGHTS

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

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

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

THE TERMS “WAR” AND “COMBATANTS”

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Chairman LEVIN. Thank you, Admiral.

Our next witness will be Jeff Smith, former General Counsel of the Central Intelligence Agency (CIA). As Senator Warner has pointed out, formerly a very esteemed staff member of this committee.

STATEMENT OF JEFFREY H. SMITH, FORMER GENERAL COUNSEL OF THE CENTRAL INTELLIGENCE AGENCY

Mr. SMITH. Thank you, Mr. Chairman. It is, indeed, a special honor for me to appear before the committee this morning that I was privileged to serve for nearly 5 years, initially as minority counsel, and then as general counsel under Sam Nunn. It's, I think, especially important that the committee is addressing these enormously important issues that really go to the core of who we are as a nation and how we fight and win our wars. I should say that we are in a war, and it's important that we succeed, but that it's important that we also fight it in a way that, when the war ends or we reach some kind of political settlement, we have not prejudiced our ability to reach that settlement through the manner in which we fight the war.

Mr. Chairman, the President was correct, in my view, when he concluded that many of our laws were inadequate or outmoded when it came to responding to the new threats that we saw after September 11. The President was wrong, however, when he concluded that he could adhere to those laws with which he agreed, and disregard those with which he did not agree.

Law matters, especially in time of war. It matters, because we are a democracy and because we respect the rule of law. It matters, because the law of war governs how we fight, it governs how we treat those whom we capture, and, perhaps most importantly, it governs how we expect our fellow citizens to be treated when they're captured.

Fidelity to the law also matters, because how we fight the war, and how others see us, shapes the political landscape after the war is over. This is especially true of the wars we're currently fighting.

Mr. Chairman, I'm concerned that in our efforts to get tough with the terrorists, with which all agree, we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war. In 6 short years, our disregard for the rule of law has undermined our standing, and, with it, our ability to achieve our objectives in the broader war. Our actions have affected the level of cooperation we have received from allied and friendly governments. Senator McCain has observed this on many occasions, as have other members of this committee.

You've asked me to address, Mr. Chairman, a few specific matters, and I will do so, but there are a couple of principles I'd like to address upfront.

First, I believe the United States must regain its leadership in upholding the law of war and promoting adherence to the Geneva Conventions.

Second, the United States must take concrete steps to convince the world that we do not torture any person held in U.S. custody.

Third, the President has said he wishes to close Guantanamo. I believe it would be an important step, and urge Congress to direct the President to outline a specific plan to close Guantanamo. I recognize that's not easy, a lot of pragmatic considerations, but I think we should have that as an objective.

Fourth, Congress should revise the MCA along the lines suggested by Senator Dodd in S. 576, cosponsored by Senator Kennedy of this committee.

Fifth, the use of renditions, which I've been asked to address, in part because of my role in the intelligence world, has been a very valuable tool in the war on terror and in law enforcement matters. It's recently been called into question, particularly in Europe, but I believe it's an important tool, and I believe the President, perhaps with congressional authority, should issue an Executive order establishing clear criteria for the conduct of renditions, including specific matters to ensure that, to the maximum extent practicable, individuals are not handed over to states where they may be tortured.

Sixth, and of critical importance, the United States must develop clear guidance for the men and women of the Armed Forces and intelligence services who implement these policies and enforce these laws. We ask these brave men and women to take physical risks on our behalf. We should not also ask them to take legal and financial risks. Too frequently, these officers are asked to carry out directives, not knowing whether, when the political winds in Washington shift, they will be left out on a limb and forced to face multiple investigations and possible prosecution for doing what was thought to be proper at the time. We owe it to these men and women to be clear in what we want them to do, and then back them up when they do it.

Mr. Chairman, about 2 minutes of my remaining time on the specifics.

As I've said, I believe S. 576 is important, and I certainly support its adoption.

With respect to the CSRTs, I am sad to say I disagree with Admiral Hutson. I believe they play an important role. I favor the restoration of the right of *habeas corpus* for individuals detained in

Guantanamo, but I believe that CSRTs should have their procedures considerably strengthened, because I do believe they fill an important, but different, function than that of *habeas corpus*. So, I am hopeful that we can find a way to do that. I agree that they are not currently effective, but I believe ways can be made to strengthen them.

Finally, Mr. Chairman, a question has been asked of me of whether I believe that the President should continue to have the right to use the CIA to detain people outside of the military system, the so-called “ghost detainees.” I am skeptical of the need for that, and I’m pleased that the President has now moved all of those individuals into the military system. But I would not, by statute, deny the President the right to do that. We may need to do that, at some point in the future. I hope we don’t, but I’m reluctant to say, “by statute, the President should not have that right.”

With that, Mr. Chairman, I look forward very much to your questions.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT BY JEFFREY H. SMITH¹

Mr. Chairman, Senator McCain, it is a special privilege for me to appear before this committee today to discuss some of the most important legal and policy issues facing this country as we prosecute the wars in Iraq, Afghanistan and the broader war on terror.

I commend this committee for beginning to examine very important questions, including how should we treat detainees; what interrogation techniques are permissible under U.S. and international law; what standards should we use for detaining persons who pose a continuing threat to the United States but have not committed a crime; what procedures should be followed to try those who have committed a crime; what should be done about the detention facility in Guantanamo; should the CIA be able to secretly hold persons outside the United States, the so-called “ghost detainees;” and under what circumstances, if at all, should the United States be able to engage in extraordinary renditions of persons to third countries where they might be tortured?

I hope my comments today will help the committee address these critical questions. In that regard I intend, first, to emphasize the importance of fidelity to the rule of law, not only as a constitutional imperative but also as a strategic necessity as we seek to re-establish our moral leadership and diplomatic standing in the world. Second, I turn to the specific matters you have asked me to address regarding U.S. detention and interrogation policy.

FIDELITY TO THE RULE OF LAW AS A LEGAL AND STRATEGIC IMPERATIVE

Mr. Chairman, the President was correct when he concluded that many of our laws were inadequate or outmoded when it came to responding to the new threats that came into focus in the aftermath of the attacks of September 11, 2001. The President was wrong, however, when he concluded he could adhere to those laws with which he agreed and disregard those with which he did not agree. The administration’s attitude vis-à-vis selective adherence to the law was most famously captured in then-White House Counsel Alberto Gonzales’s memo to the President in which he declared the Geneva Conventions “quaint” and “obsolete,” and thus inapplicable to those who attacked us on September 11.

¹ Senior Partner, Arnold & Porter LLP; former General Counsel, Central Intelligence Agency; and former General Counsel, Senate Armed Services Committee.

I am appearing today at the request of the committee on my own behalf and not on behalf of any clients of our firm. As I have advised the committee, our firm represents the International Counsel Bureau, Kuwaiti counsel for the families of Kuwaiti citizens held in Guantanamo. We understand that the Government of Kuwait makes financial contributions for the legal fees and expenses of the International Counsel Bureau for this representation and accordingly, out of an abundance of caution, we have registered with the Department of Justice under the Foreign Agents Registration Act. I participate in that representation and am registered with the Department.

Mr. Chairman, law matters—especially in time of war. It matters because we are a democracy and because we respect the rule of law. It matters because the law of war governs how we fight the war. It governs how we treat those whom we capture and, perhaps most importantly, it governs how we expect our fellow citizens to be treated when they are captured.

Fidelity to law also matters because how we fight the war—and how others see us shapes the political landscape after the war is over. This is especially true in the wars we are currently fighting.

The war against al Qaeda is, at bottom, a political war fought in small engagements on a global scale, often against non-state actors. The war in Iraq is a combination of counterinsurgency and civil war—a witches' brew that is one of the most difficult challenges our Nation has ever faced. In Afghanistan we are facing a classic insurgency.

In all three wars we are trying to build legal, political and economic institutions that will assure long-term political stability, democracy and economic prosperity in regions of the world where they are rare indeed. In this struggle the rule of law is not only an objective we seek, but also a tool we can use to achieve those broader objectives.

Mr. Chairman, I am deeply concerned that in our efforts to get tough with the terrorists we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war. In 6 short years, our disregard for the rule of law has undermined our standing in the world and, with it, our ability to achieve our objectives in the broader war. As one gleans from news reports and as I have learned through my own conversations with military, intelligence and diplomatic officials, our efforts to foster democracy and the rule of law—and the efforts of those in the region who want change—are too quickly and easily undermined by those who need only gesture toward Abu Ghraib or Guantanamo in order to ensure that millions remain hostile to true reform.

Our actions have also affected the level of cooperation we have received from allied and friendly governments. When the United States is seen as acting arrogantly and ignoring international law, it makes it difficult for other governments to cooperate with us. This committee understands full well that the United States must maintain our leadership in the world, but that we also need the cooperation of other governments. We cannot lead without partners, and partners need to believe in the direction we are leading them.

International cooperation is key to our success in each of the wars we are fighting. Other governments—and their people—often place great weight on complying with international law and the Geneva Conventions. When we are seen as flouting international law and the Conventions, it makes it much more difficult for those governments to cooperate with us. As Senator McCain has said:

Everywhere I go, I encounter this issue of the treatment of prisoners and the photos of Abu Ghraib and what is perceived in the world to be continued mistreatment of prisoners. It is harming our image in the world terribly. We have to clarify that that is not what the United States is all about. That is what makes us different. That is what makes us different from the enemy we are fighting. The most important thing about it is not our image abroad but our respect for ourselves at home.

U.S. DETENTION AND INTERROGATION POLICY

Mr. Chairman, before I turn to some of those specific matters you have asked me to address, I would like to lay out a few principles that I believe should guide your deliberations.

First, the United States must regain its leadership position in upholding the law of war and promoting adherence to the Geneva Conventions. The Geneva Conventions do need, in my judgment, to be re-examined in light of the changing face of international conflict. But rather than just setting the Conventions to the side, we must abide by them and, at the same time, work with the international community to identify and adopt revisions to confront the realities of the war on terror.

Second, the United States should take concrete steps to convince the world that we do not torture any person held in U.S. custody. The President has repeatedly said that the United States does not torture anyone, yet he is unwilling to endorse for use by all agencies the Army Field Manual, which has long been the closest thing our government has to a definitive interpretation of the Geneva Conventions on detainee treatment.

Third, the President has said he wishes to close the detention center at Guantanamo. I believe that would be an important step and urge Congress to direct the President to outline a specific plan to close Guantanamo. Presumably this would

mean returning some of the detainees to their home country to serve a criminal sentence, or to continue in preventative detention. It may also be necessary to open a detention facility in the United States where these individuals could be held and treated in accordance with the Geneva Conventions, including consular access.

Fourth, Congress should revise the Military Commissions Act along the lines suggested by Senator Dodd in S. 576. Key among his proposals is the guarantee of the right of *habeas corpus* for detainees in Guantanamo.

Fifth, the use of renditions has been a very valuable tool in the war on terror and in law enforcement matters. There is, however, a great deal of uncertainty about its legality, especially in Europe. I believe that the President, perhaps with congressional authority, should issue an Executive order establishing clear criteria for the conduct of renditions, including specific measures that must be taken to ensure, to the maximum extent practicable, that individuals are not handed over to States where they will be tortured.

Sixth, and of critical importance, the United States must develop clear guidance for the men and women of the Armed Forces and Intelligence Services who implement these policies and enforce these laws. We ask these brave men and women to take physical risks on our behalf. We should not also ask them to take legal and financial risks. Too frequently these officers are asked to carry out directives not knowing whether, when the political winds shift in Washington, they will be left out on a limb and forced to face multiple investigations and possible prosecution for doing what was thought to be proper at the time. We owe it to these men and women to be clear in what we want them to do and then to back them up when they do it. This does not mean, of course, that actions such as those at Abu Ghraib should be tolerated. Indeed, it is my belief that lack of clear direction and failures in the chain of command contributed directly to the terrible abuses at Abu Ghraib.

Now, Mr. Chairman, let me turn to some of the specifics you have asked me to address.

The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 are important steps in establishing a firm legal basis for our actions. As this committee knows, the President accepted this legislation reluctantly and only under great pressure after the courts repeatedly rebuked his legally unmoored policies. I salute Congress—and the leadership of many on this committee—for taking these initial steps.

However, I also believe that further legislative action is needed. I am therefore pleased to support S. 576, which was introduced by Senator Dodd and co-sponsored by Senator Kennedy and others, that corrects some of the shortcomings in the Military Commissions Act of 2006. The following are my specific comments on the Dodd Kennedy bill.

- I support the restoration of the right of *habeas corpus* to “unlawful enemy combatants” and “lawful enemy combatants” as defined by the Military Commissions Act. This would mean that the detainees in Guantanamo would have the right to file *habeas corpus*. I do not support providing *habeas corpus* to those individuals who may be detained in a theatre of war, such as Iraq or Afghanistan, and held in U.S. or coalition detention facilities in theater.
- I agree with Senator Dodd that the definition of an unlawful enemy combatant should be narrowed to those individuals who directly participate in hostilities against the United States and who are NOT lawful combatants. The definition in the Military Commissions Act of 2006 is, in my judgment, too broad. I should add that the terms “unlawful enemy combatants” and “lawful enemy combatants” are new terms and new concepts in the law of war. As such, they don’t enjoy broad international acceptance and reinforce the need to consult with our allies to revise and modernize the Geneva Conventions.
- I agree that detainees should be entitled to be represented by a civilian defense counsel who is qualified to practice before the Military Commission.
- I agree with the changes suggested by Senator Dodd that a statement obtained by coercive means should not be admissible in a Military Commission.
- I agree that the U.S. Court of Appeals for the Armed Forces should review the decisions by the Military Commissions and that the narrow standard of review in existing law, namely whether the final decision is consistent with the standards and procedures of the Commission, should be repealed. The courts should use existing canons of criminal law to consider appeals.

There are also three additional suggestions I would like to make.

First, the Military Commissions Act gives the prosecution the right to make interlocutory appeals but not the defense. It is not clear to me why the defense should not also have the right to make interlocutory appeals.

Second, in prosecuting the war on terror, we also need to consider how to square evidentiary questions concerning classified information with our expectations of adversarial justice. S. 576 would not alter the basic procedures of the Military Commissions Act, namely that a military judge may order the trial counsel to disclose to the defense counsel classified information about the methods or activities by which the United States obtained an out of court statement; in other words, was a confession or other testimony obtained by coercion or other inappropriate means. I believe that is an important step in the right direction, but I note that the government has the right to assert a national security privilege for classified information which could presumably trump the order of the military judge to disclose it to the defense counsel. I believe this can be remedied by providing that the privilege may not be asserted if the classified information at issue relates to the elucidation of evidence by coercion or other inappropriate means. In particular, I would add the following new subparagraph (D) to 10 U.S.C. § 949d(f)(1):

The privilege referred to in subparagraph (A) may not be claimed if the classified information at issue pertains to whether evidence to be introduced at trial was obtained by coercive or other improper techniques and is the subject of a motion under 10 U.S.C. § 949j(3).

Third, I also believe that the statute should make it clear that defense counsel, whether military or civilian, can be granted clearances to have access to classified information relevant to their defense.

Mr. Chairman, as we discuss the procedures to be followed by the Military Commissions, it is important to understand that the vast majority of individuals we hold in Guantanamo are not likely to be charged with a crime. Rather, they will be held as enemy combatants under the sole authority of the President. Under the current DOD Directive, they may be held if a Combatant Status Review Tribunal (CSRT) determines that they are “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” This is a very broad definition and, when combined with the extremely limited ability of detainees to effectively challenge the factual basis on which they are held, means that they could be held for years, perhaps decades, without meaningful review of their cases. That is not acceptable—and, as I have said earlier—undermines our effectiveness in the war on terror.

I believe that the individuals held at Guantanamo should be able to challenge the basis of their detention, including the accuracy of the underlying information, as we have always done it in our system—with a writ of *habeas corpus*. There are, to be sure, many practical difficulties courts would face in considering these petitions. Much of the information may be classified. Many of the witnesses upon which the government or the petitioner would rely may be overseas and unwilling or unable to provide depositions of the sort ordinarily used in *habeas* proceedings. But I have great confidence in our courts to fashion procedures that will strike the right balance between the security needs of our Nation and the due process to which the detainees are entitled. Indeed, in her plurality opinion in the Hamdi case, Justice O’Connor provided express guidance regarding some of the measures a *habeas* court could adopt in striking a reasonable balance.

As Judge Rogers noted in her recent dissent in the Boumediene case, the CRSTs are no substitute for a *habeas* court. Nevertheless, the CRSTs still serve an important, but different, function and, by advocating restoration of the right for detainees to file a *habeas* petition, I do not advocate eliminating the CSRTs.

The current CSRT procedures are loosely based on the requirements of the Geneva Conventions to assure that capturing states establish a process to determine whether persons captured are legitimately prisoners of war and entitled to protection under the Conventions—a process commonly known as the “Article 5 proceeding.” These proceedings have never been intended as a substitute for a *habeas* proceeding, but rather as an initial, first-pass effort at very rough justice. Those procedures are appropriate for determinations on the battlefield and for in theater detentions. But when an individual is brought to the United States or to territory where we are in essence the sovereign, such as Guantanamo, a higher standard must be met. Therefore, I believe that the procedures for the CSRT should be substantially beefed up, thus giving detainees far greater opportunities to question the basis for their detention. But even these new procedures are not a substitute for a *habeas* petition and I urge Congress to restore the right of *habeas*.

With respect to the Detainee Treatment Act, as I said earlier, I do not believe that there should be two standards for interrogation of detainees. That act, in section 1002, provided that treatment of persons in the custody of the Department of Defense will be governed by the Army Field Manual on Intelligence Interrogations. However, treatment of individuals held by other government agencies was subject only to the general prescription against torture contained in section 1003. I understand that many believe the intelligence community needs additional authority to conduct interrogations that go beyond the procedures permitted by the Army Field Manual. As the committee knows, the Military Commission Act gave the President authority to issue an Executive Order interpreting the Geneva Conventions and presumably spelling out those techniques.

I am not persuaded that two different techniques are required and I believe Congress should hold hearings to carefully examine what techniques are productive and to ensure that all elements of the U.S. Government, both military and civilian, have clear guidance as to what techniques are permitted. I must add that if these more aggressive techniques produce valuable intelligence, why should only the CIA be entitled to use them? If we believe the CIA needs these techniques because they yield vital intelligence, why should our Armed Forces not be able to use them? Are they not entitled to the best intelligence?

In that regard, I would like to call the committee's attention to a recent set of studies published by the National Defense Intelligence College that concluded there was no scientific support for the proposition that coercive techniques produced valuable intelligence. I am well aware there is a lot of anecdotal evidence, including stories as recently as this past Sunday in the New York Times, that coercion works. That does not make these techniques correct nor does it mean that the United States should endorse their use.

You have also asked for my views on whether the CIA should be permitted to maintain "ghost detainees" or "secret prisons." In brief, I believe that any person detained by the United States should be subject to the Detainee Treatment Act and should have his or her status subject to review by the CSRTs. I am pleased that the President has now moved all detainees into that system. The President appears, however, to have reserved the right to revert back to the old practice of detaining persons outside of the system. I am deeply skeptical of either the need or the wisdom for such detentions. That said, I am not certain that I would prohibit by statute the President from ever engaging in such action.

Finally, the committee has asked for my views on the process known as "extraordinary renditions."

Extraordinary renditions, the practice of seizing an individual in one State and moving him or her to another State without following the judicial procedures of a deportation or extradition has been a tool long employed by the United States. Rendition is a valuable option, and I support the practice. In my personal experience, the vast majority of these renditions was used to bring someone to justice, either in the United States or elsewhere, when there was no extradition treaty in place or extradition was not a viable option. Perhaps the most dramatic use of rendition was the seizing of the terrorist Carlos in Sudan and flying him to Paris to stand trial for the murder of French intelligence officers. In addition, we have successfully "rendered" persons back to the United States to stand trial for heinous crimes, and I believe we should continue to have the ability to do that.

In the wake of September 11, however, serious questions have been raised about the increased use of renditions for a different purpose: transferring someone to another state, often not his or her home country, for purposes of interrogation or preventative detention. As the committee knows, individuals who are subject to extraordinary rendition typically have no formal access to the judicial system of the sending state and thus have little opportunity to challenge their transfer. If the end result is not a trial, but simply more detention, the act of rendition is much less transparent.

In my experience the United States never engages in a rendition unless the state where the individual is located gives its consent to the rendition. In 1980, the Justice Department's Office of Legal Counsel issued an opinion that irregular renditions absent consent of the "host" state would violate customary international law because the seizures would be an invasion of sovereignty. That presumes, of course, we are dealing with a functioning state. There could be circumstances in which a fugitive or terrorist is in a part of a country where there is no effective government. In that situation a strong case can be made for seizing a suspect and delivering him to stand trial even without, or over the objections of, the state with authority over that territory. If the purpose of a rendition is merely to "take them off the streets" or subject them to interrogation, the case is less compelling but may nevertheless be an important and valid tool.

The statutory basis for renditions is scarce. As noted by the Congressional Research Service, the only provision in the U.S. Code that appears to expressly authorize an agency's participation in rendition is 10 U.S.C. §374(b)(1)(D), which permits the Department of Defense, upon request from the head of a Federal law enforcement agency, to use DOD personnel and equipment to assist in the rendition of a suspected terrorist from a foreign country to the United States to stand trial.

Other relevant laws include the Convention Against Torture and the International Covenant on Civil and Political Rights. The United States is a party to both Conventions.

Article III of the Convention Against Torture provides that no state "shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." The United States has interpreted the "knowledge" element to mean that it would be unlawful to remove an individual if it were "more likely than not" that the person would be tortured. In the Foreign Affairs Reform and Restructuring Act of 1998, Congress implemented the U.S. obligations under Article III of the Convention Against Torture by declaring that it would be U.S. policy "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 notes.

Article IV of the Convention Against Torture also requires signatory states to criminalize torture as well as attempts to commit torture and related acts of aiding and abetting. The United States, which already banned torturous acts occurring on United States soil, put Article IV into effect by enacting 18 U.S.C. § 2340A. Section 2340A criminalizes torture occurring outside of the United States and provides jurisdiction so long as the offender is a United States national or is present in the United States. The statute requires a showing of specific intent to commit torture and it is therefore doubtful that merely sending someone to a state where torture might occur violates the statute absent a more specific showing of intent.

As the committee knows, it is United States policy to obtain assurances from a state to whom we send an individual that he or she will not be tortured. Because the details of United States requirements are not public, we do not know the specifics of what types of assurances are sought. We also do not know whether there is any requirement of a follow-up to confirm whether those assurances were honored.

Additionally, there is a great deal of concern in Europe and among other allies that the United States has conducted renditions outside of the scope of law. I do not believe that to be the case, despite the arrest warrants issued by independent prosecutors in Italy and Germany for individuals alleged to be CIA officers conducting renditions in those countries.

Nevertheless, there is considerable uncertainty about the legal footing for renditions, and therefore, I believe that Congress should require the President to issue an Executive order establishing solid legal footing and clear criteria for the conduct of extraordinary renditions. The elements of such an Executive order might include the following:

- Criteria for determining who should be rendered to what state and for what purpose;
- A requirement that the United States be highly confident of the accuracy of the information upon which the rendition is based, including the proper identification of the individual;
- A detailed procedure for granting approval at senior levels for the conduct of an operation, perhaps even requiring written approval by a Cabinet or Subcabinet officer;
- A prohibition on sending an individual to a State that is not a party to the Convention Against Torture or the International Covenant on Civil and Political Rights;
- Written assurances from the State to which the individual is being sent that it will adhere to the requirement of these conventions;
- Some means of follow-up, perhaps even follow-up visits by U.S. officers or, in the case of a third party, consular officers of the rendered individual's home country;
- An annual report to Congress on renditions conducted during the previous year, classified as necessary.

In summary, Mr. Chairman, it has been a great honor for me to appear before this committee today and to give you my thoughts on some of the most difficult, demanding and important legal and policy issues we face as a nation. I commend the

committee for tackling these critical issues, as we must get them right as we fight and win the war on terror.

I look forward to your questions.

Chairman LEVIN. Thank you very much.

Next we'll call on Neal Katyal—pronounce your name for me, if you would.

Mr. KATYAL. That was perfect.

Chairman LEVIN. Thank you.

Mr. Katyal is a professor of law at Georgetown University Law Center. Thank you for being with us.

**STATEMENT OF NEAL K. KATYAL, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. KATYAL. Thank you, Mr. Chairman and Senator Warner, for inviting me.

I want to begin by thanking the Chairman's staff, particularly Peter Levine and Bill Monahan. They're outstanding public servants who have spent countless hours with me and folks on the other side during the 2005 DTA debates and the 2006 MCA debates.

Mr. Dell'Orto started this hearing quoting Samuel Johnson. Let me do so, as well. He once called "second marriage" the "triumph of hope over experience." The same, I think, might be said of the MCA. It represents the triumph of unsupported hopes; namely, to avoid the Constitution and judicial review over instructive experience.

Experience said the previous military commission system was a failure. In the 5 years it existed, it spent tens of millions of taxpayer dollars, produced zero trials and zero convictions, and was ultimately held illegal by the Supreme Court. Five wasted years.

While the military commission system was busy wasting resources and producing no results, many terrorism cases were prosecuted successfully in our civilian courts. The DOJ recently stated that it has held over 500 terrorism prosecutions since September 11.

The documented successes of the established judicial system, and the failure of the commission experiment, call into question the need for an alternative judicial system at all. But if military commissions are to be retained, experience suggests the need for reform to make them work fairly, accurately, and economically.

I want to make three points today.

First, while *habeas corpus* has gotten the bulk of attention, I think the reported views of Secretaries Gates and Rice, that the military commission trials should be moved to the United States, are right. It is a crucial first step, perhaps even more important than repealing the MCA's *habeas* provisions. Trials are gripping, dramatic, and easy to follow. This is the reason why shows like *Law & Order* are running so long on television, they're unlike detention, which involve little drama and no grand moment of resolution. The trials at Guantanamo will be watched by the world, and we must not forget that, in them, our Nation, not just the detainees, face judgment. Yet the administration clings to the idea that Guantanamo should be a legal black hole where none of the protections of our great Constitution apply. This shortsighted theory will

corrupt these trials. These ideas should be repudiated and replaced with American traditions and values.

Second, Congress should repeal the MCA and use our proud traditional system of courts-martial to try terrorism suspects, as suggested by Senator Dodd. Here, I want to focus on something basic, which is the role of equality. When I first met Mr. Hamdan, in 2004, at Guantanamo, he asked everyone to leave his cell except for me. I thought he was going to yell at me. He had been detained for a long period of time there. He said to me, "I have one simple question for you." He said, "Why are you doing this? Why are you defending me?" He said, "I thought your last client was Al Gore." I told him the reason why was that my parents had come to this land from India with \$8 in their pockets, and they chose America, because they knew they could arrive on our shores and be treated fairly. There is no other nation on Earth, I told him, who would give me, the son of immigrants, the opportunities I had. I told him I'm deeply patriotic, for these reasons, and that when the President issued his military commission order, it was the first time I felt, in my life, that this vision, my parents' vision, had been 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. That promise is the centerpiece of the equal protection clause, which protects all persons, not simply citizens. When you think about the MCA, think about that. For the first time, Congress has set up a separate and unequal trial system to only apply to the 5 billion people in the world and 12 million green-card holders who live here. A United States citizen gets the Cadillac justice system, the American civilian trial, no matter what he's accused of. A foreigner gets the beat-up Yugo, a stripped-down Guantanamo one. We've never done that before. We've had military commissions since 1847. They've always applied symmetrically to citizens and foreigners alike.

Not only does this offend the Constitution, it's bad policy. As Justice Scalia has warned, the genius of the equal-protection guarantee is to avoid letting Congress sidestep difficult choices by singling out the powerless for disfavor. It's not surprising that this act was introduced on September 6, and passed this body on September 29. It did so in record time, not because, with all due respect, the act was written by Plato, it passed because it only affected the powerless, people who literally had no vote in this chamber. Ultimately, I believe the MCA will be struck down for this, and other, reasons.

Third, and finally, instead of trying to avoid a court ruling on the legitimacy of these military commissions, I believe Congress should expedite it. It should, at the very minimum, repeal the provisions requiring trials to take place before legal challenges can ensue. That's the kind of delay that the administration had told the Supreme Court to take in *Hamdan*. They told the Supreme Court, "Don't decide this case. Let's have the trials first." Think about what would have happened, the atrocious result. We would have had dozens of military commission trials, they would have all gone forward. Some of these folks would have been convicted. Then, all those convictions would have to be overturned because the previous system was illegal.

Before gambling on the administration's shaky legal theories once more, we should be absolutely sure the system will stand up in court. The expedited review is the system we used in the McCain-Feingold Campaign Finance Reform package, and it is crucial here, as well.

In sum, 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 Secretary Gates and all others who recognize that the only thing worse than making a mistake is failing to correct it when you have the chance.

[The prepared statement of Mr. Katyal follows:]

PREPARED STATEMENT BY PROFESSOR NEAL KATYAL

INTRODUCTION

Thank you Chairman Levin, Senator McCain, and members of the Senate 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 November 28, 2001, I testified before the Senate Judiciary Committee about the President's then 2-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 the structural provisions employed by our Founders required these tribunals to be set up by Congress. On June 29, 2006, the Supreme Court agreed in a case I argued, *Hamdan v. Rumsfeld*.¹ The *Hamdan* decision invalidated the makeshift tribunal scheme devised by presidential fiat alone.

Indeed, every time the Supreme Court has ruled on the merits regarding the executive branch's procedures for detainees, it has found them lacking, forcing Congress and the executive branch back to the drawing board at great expense to the Nation in terms of money, time, and the trust of the American people. Now, as the trials of suspected individuals are once more supposedly about to begin, the failings of this piecemeal strategy are more evident than ever. The military commission trial system lacks credibility—both Americans and our global neighbors question the motives and methods of the government's prosecutors and interrogators.

Each week, the headlines bring a new report of a major figure in American life coming out to call for the Guantanamo detention facility to be closed. This week it was someone well known to this committee, General James Jones, who said that "the U.S. should close the Guantanamo military prison 'tomorrow.'"² Recent weeks brought reports stating that the current Secretary of Defense, Robert Gates, and the current Secretary of State, Condoleezza Rice, have also called for Guantanamo's closure.

I believe that both national security and a commitment to justice require—at a minimum—that the military commission trials be moved from Guantanamo to the continental United States. According to front-page news reports, Secretary Gates evidently agrees. The eyes of the world will be on these trials, and it will be extremely detrimental for them to take place in the legal vacuum created by this administration at Guantanamo.

Furthermore, as I told this committee back in July 2006, I believe that it would be far better to use our Nation's tried-and-true court-martial institution to try the individuals at Guantanamo. The court-martial system, complemented by the existing Federal criminal justice apparatus, provides all the tools needed to bring suspected terrorists to account while protecting national security and counterterrorism efforts. The court-martial system does not require us to abandon our most deeply held beliefs about what it means to administer justice. Moreover, as I warned the committee, legislation specifically crafted to target a handful of individuals and do away with important criminal procedure guarantees is not only unnecessary but also unwise. Such a two-tiered justice system threatens our Nation's foundational values, as well as American credibility in the international arena.

Unfortunately, like the Detainee Treatment Act of 2005, the Military Commissions Act of 2006 (MCA) implements precisely such an impoverished two-tiered sys-

¹ 126 S.Ct. 2749 (2006).

² Neil King Jr., *The Courting of General Jones*, Wall St. J., Apr. 23, 2007, at A6.

tem. 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 the arbitrary judgment of the executive.³ 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.⁴ After a trial proceeding at which the executive acts as judge, jury, prosecutor, and possibly executioner, the MCA allows only for the most cursory review by an independent judicial authority. It lightens the Government's burden by casting aside constitutional rights and guarantees as if they are simple inconveniences, the chaff rather than the grain of our democratic order. This is plainly a stop-gap law, designed for expediency and guaranteed convictions, but 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 not only invites 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 responsibility. This committee has asked us here today because it is interested in breaking this counterproductive cycle and is considering enacting a bill that makes sense, one that reverses the current system to ensure fair trials that our Nation can be proud of.

The Founders envisioned a vibrant system of innovation, evolution, and interlocking responsibilities, with Congress at the helm. I applaud this committee for taking this duty seriously. How can we forget the stirring speech of the great statesman, James Madison, as a young Member of Congress, urging the House of Representatives to determine for itself the deep question of whether the proposed Bank of the United States was constitutional?⁵ The need for new direction, and a return to Madison's view of Congress's role, is apparent.

Last month, I testified in the House Armed Services Committee, stating that Congress should act now, rather than later, to restore fundamental rights and establish a framework for the *habeas* procedures that I believe the Supreme Court is likely to require when it considers the MCA. 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 in the war on terror, and the shortcomings present in the current system will be made apparent to all. The military justice system cannot afford another public relations disaster like that following the guilty plea of David Hicks. A politics of responsibility, not reaction, is required.

With that in mind, I would like to offer my thoughts on the most urgent legislative needs at the moment and on the Restoring the Constitution Act.

Moving the Trials to the United States Is a First (But Not Last) Step

Defense Secretary Gates has attempted, bravely, 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 month, 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.⁶ Moving the trials would communicate to the world that America has no intention of relegating these incredibly important trials to a "legal black hole," and that the fundamental trial rights we enjoy at home will not be treated as special privileges, doled out to foreign 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 only a little to substantively further that goal. The MCA denies *habeas* rights to people based on their citizenship, not on the locus of their detention. An alien detainee on trial in Leavenworth, Kansas, and an alien

³The interpretation of the MCA is currently the subject of pending petitions for certiorari before the Supreme Court of the United States in *Hamdan v. Gates* (No. 06-1169). 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).

⁴Indeed, 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*, NAT'L J., Feb. 4, 2006.

⁵James Madison, *Speech in Congress Opposing the National Bank* (Feb. 2, 1791), reprinted in James Madison, *Writings* 480 (Jack N. Rakove ed., 1999).

⁶Thom Shanker and David E. Sanger, *New to Job, Gates Argued for Closing Guantanamo*, N.Y. Times, Mar. 23, 2007, at A1.

detainee on trial in Guantanamo are both excluded under the MCA from our legal system's most crucial protections, including *habeas corpus*. 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.⁷

The Supreme Court has held that geography alone does not create or destroy rights. In *Johnson v. Eisentrager*, 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.⁸ 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.⁹ But, even if geography were determinative, a move from Guantanamo to the United States would itself change only small details: the Court has already determined that the military base is effectively U.S. soil for reviewing detainee claims.¹⁰

In short, while implementation of the Gates plan would serve the important symbolic goal of divorcing these proceedings from the blight of Guantanamo, 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 Supreme Court will ultimately hold that the Constitution's fundamental guarantees govern these trials. Yet if the 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.

In addition to the symbolic value, there are also cost and logistical concerns that weigh in favor of Secretary Gates's proposal to move these trials to America. My understanding is that the Department of Defense is currently planning to spend \$15 million to build a new bare-bones modular courthouse for commission cases. These courthouses, as I understand it, won't even have running water. Yet at this very moment, there are already ample courtrooms on highly secure military bases in the United States that could host commission proceedings—and without having to divert any Defense dollars from more pressing concerns.

Once a military commission case starts, trying it in the United States would be far less expensive than in Guantanamo. For the military commission hearing in the Hicks case that occurred in Guantanamo last month, the military judge, the prosecutors, the defense counsel, their support personnel, and all of the spectators had to fly from Andrews Air Force Base to Guantanamo and back. The only trial participant who was in Guantanamo before the hearing machinery began was the defendant. Moving that one individual to a base on the United States would be far more efficient than flying dozens of individuals back and forth from the continental United States to Guantanamo for every military commission hearing.

Military commission proceedings in the United States would not only be less expensive; they would also be considerably fairer. For example, a witness cannot be subpoenaed to attend a judicial proceeding outside of the United States.¹¹ So a military commission trial in Guantanamo may have to proceed without testimony from a crucial witness due to the lack of subpoena power. But if the trial were held in the United States, witnesses could be subpoenaed to testify. The result is a proceeding that is fairer, more accurate, and more likely to do what a trial is meant to do: find the truth.¹²

⁷ *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

⁸ 339 U.S. 763 (1950).

⁹ *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.

¹⁰ *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

¹¹ See, e.g., Manual for Courts Martial, R. 703, Discussion ("A subpoena may not be used to compel a civilian to travel outside the United States and its territories.").

¹² Many additional logistical reasons exist to prefer a trial in the United States to one in Guantanamo. Because military defense counsel are not allowed to speak to their clients over the telephone, any time a defense counsel needs to speak to a client in Guantanamo—even for 10 minutes—it requires a 4-day round trip. This is time that could be put to far more productive uses if the client were anywhere in the continental United States, where a roundtrip from Washington could easily be accomplished in less than a day. Additionally, in one military commission case, the Presiding Officer realized the afternoon before a hearing that the commission did not have a translator who spoke the accused's language. If the trial were held anywhere in the United States, a Farsi translator could have been obtained by the next day. But not at

Concerns for fairness, accuracy, and preservation of scarce military resources all suggest that commission trials should be held in the United States.

More than enough high-security military facilities are located throughout the United States to accommodate such proceedings without raising any security concerns. Indeed, Senator McCain has just advocated moving all of the detainees from Guantanamo to Fort Leavenworth.¹³ Securely moving the much smaller group of detainees subject to commission trials to military confinement facilities in the United States is certainly within the Defense Department's capability.

Separately, Congress should provide for expedited judicial review of the Military Commissions Act. After all, that Act will certainly be the subject of continued litigation.¹⁴ The constitutionality of many of its provisions is in serious doubt. Before investing more years and tens of millions of more dollars in a system that might, like its predecessor, ultimately be invalidated, the best way forward is to provide for expedited judicial review of the military commission system's constitutionality, much as Congress did when it enacted the Bipartisan Campaign Reform Act of 2002.¹⁵ Congress anticipated a constitutional challenge and set up a system to quickly resolve the act's enforceability. That approach succeeded spectacularly when the constitutional challenge to the act moved quickly to the Supreme Court.¹⁶ If Congress were to enact a similar expedited review provision for the Military Commissions Act, then the new system's constitutionality could be quickly assessed. If, as I believe, the new system is unconstitutional, then its defects could be identified and addressed. On the other hand, if the judiciary were to uphold the new system, then it would move forward with greater public and international acceptance because it would have received the Article III courts' seal of approval.

Fortunately, even leaving aside the recent Restoring the Constitution Act introduced by Senator Dodd, there is already a model for such legislation. During the last Congress, now-Chairman Skelton proposed an amendment providing for expedited judicial review for what became the Military Commissions Act of 2006.¹⁷ Consideration of Chairman Skelton's amendment was not allowed last year. But it represents the best way forward for the new military commission system.

In conclusion, 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 on this issue, and, as a practical matter, it would expedite the trials by eliminating the logistical delays and excess costs inherent in having them take place in such a removed locale as Guantanamo.

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 foundational values. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles that are deeply ingrained in both our legal culture and our American narrative. In further contravention of the basic guarantees of a free society, the law burdens the fundamental right of access to the courts. Finally, the commissions sanctioned by the MCA flout international law and dispense with many of the 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, such as the Restoring the Constitution Act, that uses the existing system of courts-martial as the basis of a legal regime to deal with the Guantanamo detainees.

Guantanamo. Because of security concerns, scheduled commission proceedings had to be canceled in June 2006 due to the suicides of three detainees at Guantanamo. Holding the cases at Guantanamo thus carries a great risk of disruption due to operational problems—which might multiply if there were to be a mass exodus of refugees from Cuba at any time while the commission system continues in operation.

¹³ McCain: I Will Close Guantanamo, United Press Int'l, Mar. 19, 2007 ("I would immediately close Guantanamo Bay, move all the prisoners to Fort Leavenworth [Kansas] and truly expedite the judicial proceedings in their cases," he said.)

¹⁴ In his *Hamdan* concurring opinion, Justice Kennedy noted that any new commission system enacted by Congress would "require[e] a new analysis consistent with the Constitution and other governing laws." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2808 (2006) (Kennedy, J., concurring).

¹⁵ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

¹⁶ See *McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁷ See 152 Cong. Rec. H7508 (daily ed. Sept. 27, 2006).

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 all aliens of those rights, even lawful resident aliens living within the United States, who are currently determined, or will be determined, by the executive's makeshift procedures to be "enemy combatants." Citizen detainees remain free to challenge their detention in civilian courts, while alien detainees are now excluded from independent judicial review based on a mere 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 Federal courts. As I explained in my earlier testimony to this committee, the Equal Protection components of the 5th and 14th Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply 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 those who do and do 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 can no longer tolerate this unconstitutional deviation from longstanding American law in the current war on terror.

The commissions set up by the MCA, like President Bush's first attempt to set up a system 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, where "a majority of the persons tried . . . were American citizens."¹⁸ The tribunals in the Civil War naturally applied to citizens as well. In *Ex parte Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen as well as for 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."¹⁹

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 14 Amendment, which provide privileges and immunities to "citizens," the drafters intentionally extended equal protection to all "persons."²⁰ 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."²¹ This language was repeatedly mentioned in the Senate debates on the 14th 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."²² The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people 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 . . . ?"²³

¹⁸ David Glazier, Note, Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2030 (2005).

¹⁹ *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

²⁰ U.S. Const. amend. XIV, § 1; see also Akhil Reed Amar, *America's Constitution: A Biography* 388–89 (2005) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442–47 (1992) (same).

²¹ *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").

²² Amar, *supra* note 20, at 173 (quoting a draft of the 14th Amendment).

²³ 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.

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country understands all too well that the kind of hatred and evil that leads to the massacre of innocent civilians is born both at home and abroad. 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 11, the executive has argued for presidential authority to detain and prosecute U.S. citizens. 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.”²⁴ Likewise, this body did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force Resolution, 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.”²⁵

The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice regardless of their country of origin. Terrorism does not discriminate in choosing its disciples and neither should we in punishing those who employ this perfidious and cowardly tactic. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out their 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.”²⁶ 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 make no sense.

Further, in the wake of international disdain for and suspicion of 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. A letter signed by dozens of former diplomats that was sent to each of you attests that the Gates plan is critical to remove this credibility gap: “To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests in the larger world.”²⁷ This asymmetry will not go unnoticed.

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. The recently departed General Counsel of the Navy, Alberto Mora, in an editorial co-written with Ambassador Thomas Pickering, put it well:

Our country’s detention policy has undermined its reputation around the world and has weakened support for the fight against terrorism. Restoring *habeas corpus* rights would help repair the damage and demonstrate U.S. commitment to a counterterrorism policy that is tough but that also respects individual rights. Congress should restore the *habeas corpus* rights that were eliminated by the Military Commissions Act, and President Bush should sign that bill into law.²⁸

²⁴ 504 U.S. 507, 519 (2004).

²⁵ 115 Stat. 224, note following 50 U.S.C. § 1541.

²⁶ 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 (expressing concern that al Qaeda is aiming to recruit American citizens for domestic terror attacks).

²⁷ Letter from William D. Rogers et al. to Members of Congress, Sept. 25, 2006.

²⁸ Alberto Mora & Thomas Pickering, Extend Legal Rights to Guantanamo, Wash. Post, Mar. 4, 2007, at B7.

The MCA's Attempt To Strip Federal Courts of Habeas Jurisdiction over Alien Detainees Is Unconstitutional

Because Congress has not invoked its Suspension Clause power, it may not eliminate the core *habeas* rights enshrined into our Constitution.²⁹ 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.³⁰ As one of this nation's greatest legal scholars, Paul Bator, once wrote: “The classical function of the writ of *habeas corpus* was to assure the liberty of subjects against detention by the executive or the military. . . .”

Indeed, even if Congress were to invoke its Suspension Clause power, it lacks *carte blanche* authority to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension of *habeas* only when in “Cases of Rebellion or Invasion the public Safety may require it.”³¹ 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.³² Like Indiana, “Guantanamo Bay . . . is . . . far removed from any hostilities.”³³ In fact, the detention cells at Guantanamo Bay have served the explicit purpose of holding captured suspects in U.S. custody away from the tumult of the battlefield abroad.

Second, 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.

Third, 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 extended to every individual in U.S. jurisdiction—citizen or alien, traitor, or enemy combatant. See, e.g., *Quirin*, 317 U.S. at 24–25 (deciding *habeas corpus* application by enemy aliens on the merits, despite a Presidential proclamation to the contrary); see also *In re Yamashita*, 327 U.S. 1, 9 (1946) (stating that Congress “has not withdrawn [jurisdiction], and the executive branch of the Government could not, unless there was suspension of the writ [of] . . . *habeas corpus*”); *id.* at 30 (Murphy, J., dissenting) (stating that the majority “fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent” by affording rights of *habeas corpus* and rejecting the “obnoxious doctrine asserted by the Government”).

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.”³⁴ 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.³⁵ Indeed, considering that “[t]he United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base,”³⁶ the Court ob-

²⁹ 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).

³⁰ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963).

³¹ U.S. Const. art. I, § 9, cl. 2.

³² 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.”).

³³ *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

³⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 775, 771 (1950).

³⁵ 542 U.S. at 480–84.

³⁶ *Id.* at 480.

served that alien detainees held at Guantanamo are not categorically barred from seeking review of their claims. The majority opinion included a pointed footnote strongly suggesting that the detainees were protected by the Constitution.³⁷ 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.³⁸ 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, Virginia to the very same. The MCA, in its attempt to relegate alien detainees to a lesser brand of justice and to 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.

Fourth, 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 Guantanamo would lift at least some of the perception of injustice that currently clouds the proceedings. But to truly bring the military commission system into accord with American values and traditions, detainees must be allowed to test the validity of their detention and trials before judicial authorities independent of the executive.

The MCA Establishes a Trial System That Violates Both Domestic and International Law

In addition to violating principles of Equal Protection and access to the Great Writ 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. What the MCA does retain of the Geneva Conventions is, under the administration's view, thin gruel. For instance, while grave breaches of Common Article 3 are subject to criminal sanction, a court may not consider international or foreign law (which might be the only applicable authority) to determine what would constitute such a grave breach. American personnel accused of violating Common Article 3 have a ready defense: as long as they believed in good faith that their actions were lawful (which might include reliance on administration memos expounding on the legality of 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.

Congress Should Repeal the MCA and Enact a System To Deal with These Prosecutions Based on the Uniform Code of Military Justice and Courts-Martial.

Contrary to the stark dichotomy presented by the media and talk-show hosts, the choice here is not between the unconstitutional tribunals under the MCA and the

³⁷The 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 2 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.

³⁸Id. at 488 (Kennedy, J., concurring in the judgment).

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. It can be found in the long-standing 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.”³⁹

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 90 years. These military trials use judges and juries who 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, measures that would further 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 were specifically designed to 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, validated by the Supreme Court, and respected by the world at large. Thus, a system that tries suspected terrorists under these rules of military justice need not be delayed or overturned by legal challenges seeking relief from rigged and un-American procedures such as the introduction of evidence resulting from torture. Indeed, all the energy that 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 ideal forum in which to try these cases and the only acceptable one that we have today.

Congress Must Take the Lead Now to Repeal the MCA

There is a reason why Law and 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. 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 U.S. 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 opportunity to get ahead of the curve by rework the law now, and thereby design a *habeas* procedure that is consistent with both 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, the ranking member on the Senate Judiciary Committee, put it bluntly: “While this exchange of ideas is surely healthy and appropriate, the

³⁹*Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 (2006).

conversation has begun to generate diminishing returns.”⁴⁰ No detainee has been tried in the 5½ 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.

The Restoring the Constitution Act of 2007

Senator Dodd has introduced legislation that would remedy the constitutional problems I have pointed out. It makes significant changes in the following four arenas:

Detentions: The Act would restore *habeas corpus* rights to detainees, establish a definition of “enemy combatant” that attempts to prevent the arbitrary detention of people who are captured outside the zone of war, and eliminate the unconstitutionally disparate treatment of aliens and citizens.

Trials: The Act would ban the use of evidence obtained by torture and coercion, and apply the procedures and evidentiary rules of our court-martial system to the military trials, subject to exceptions only when the Secretary of Defense and the Attorney General have both considered the case. It would also help level the playing field between the prosecution and the defense by making it easier to challenge hearsay evidence.

Appeals: The Act would channel judicial review of these trials to the Court of Appeals for the Armed Forces, which has handled highly sensitive cases relating to this country’s military operations for the past half century. Outside the trial context, any challenges to the Military Commissions Act would be heard by a three-judge panel of the Federal district court for the District of Columbia on an expedited schedule, with direct review by the Supreme Court. This system, which is currently in place for voting rights cases, guarantees immediate resolution of questions implicating fundamental rights.

International Obligations: The Act would require genuine compliance with the Geneva Conventions, preventing the President from interpreting them without the input of the other branches. It would also classify cruel, inhuman, and degrading treatment as a war crime, and bring our definition of this treatment in line with the longstanding interpretations in treaty law.

In short, the Restoring the Constitution Act would restructure, from the ground up, our current legal system for detainees in the war on terror. By restoring *habeas corpus* and implementing greater procedural protections, it ensures greater credibility for the trials and any eventual convictions that result. By providing for expedited review, it enables resolution of difficult issues that have thus far held up this country’s ability to do justice in the war on terror. It is the type of legislation that leaders throughout the world have asked Congress to provide, and the type of legislation that our Nation’s proud tradition demands.

As with any legislation that makes deep structural changes to constitutionally sensitive policy, the Restoring the Constitution Act would benefit greatly from the addition of a sunset clause. Setting a time limit on the law would not only ensure quicker passage of this necessary legislation; it is also the smartest move to make when there are long time-horizons involved. Just as the Patriot Act’s sunset clause permitted review and ultimately rejection of provisions that were out of step with court decisions and the changing national security landscape, a sunset clause in Senator Dodd’s bill would allow future revision once we see how these trials operate in practice.

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, the values they defend with their lives, and the dignity of our entire nation. 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.”⁴¹ We are here now, 10 months after the Supreme Court decision in *Hamdan*, and nearly 6 years after the horrible attacks of September 11, and still no trials have begun. Yet the eyes of the world continue to watch Guantanamo Bay. For that reason (among many others), I applaud Secretary Gates, members of this committee, Senator Dodd, and all others in our Gov-

⁴⁰Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 19, *Boumediene v. Bush*, 127 S.Ct. 1478 (2007) (No. 06–1195).

⁴¹Remarks of Senator John Warner, Hearing on the Future of Military Commissions To Try Enemy Combatants, July 13, 2006.

ernment who recognize that the only thing worse than making a mistake is failing to correct it when you still have the chance.

Thank you.

Chairman LEVIN. Thank you, Mr.—[audience interruption.]
Excuse me. Please, no demonstrations, or you'll have to leave.
Mr. Denbeaux?

**STATEMENT OF MARK P. DENBEAUX, PROFESSOR OF LAW,
SETON HALL LAW SCHOOL**

Mr. DENBEAUX. Thank you very much.

Unlike Mr. Smith, I've never been on your staff, I've never been before the Senate, and I've never testified, so I hope you'll bear with me.

Chairman LEVIN. So far, you're just doing great, by the way.
[Laughter.]

Mr. DENBEAUX. Thank you very much. I guess, as you said last time, I'll wait til the end to see how you think I did.

When I—this is a personal beginning—after *Rasul*, my co-counsel, my co-author, and my eldest son asked me what I thought about Guantanamo. I'm ashamed to say that I said I hadn't thought much about it at all. He asked if I thought we had the right people there. I replied, "We probably did." Then he asked whether my father, his grandfather, who was a chaplain with General Patton, would have believed that the United States Army, marching across Germany during World War II, could have accurately selected the 500 bad German civilians from all the rest. I said, "I'm sure he would not have believed that the third Army could have made those distinctions in combat as it was moving along, and it wouldn't have bothered." But, I said, "My father also wouldn't have cared, because my father didn't believe that there were any good Germans during that period of time." My son, Joshua, said, "Isn't that the whole point?"

I'm grateful to him for that, because I then started looking into this. Frankly, I think, in one sense, it's my lips moving, but it's the Government documents talking, because what I did as a result of the efforts of a series of my law students who decided to look and see what the Government records actually said. One of the things that I discovered was that what our U.S. Government said before *habeas corpus* was granted even temporarily, which was also before any of the Government documents for the CSRT proceedings had to be prepared, and before they had to publish any of those documents, we learned that the Government had made a series of statements that were totally false. One of the scary parts about that is, those statements are very difficult to pull out of the record once they have been made. One of those statements was, "The detainees held at there at Guantanamo Bay are the worst of the worst."

I had a poignant moment when a student came into my office, and he said, "Where are the worst of the worst?" He'd been looking through all of them, and he showed me a record. This is the entire CSRT charge against one person. It said—this is in its entirety—"Detainee is associated with the Taliban. He indicates he was conscripted into the Taliban. He was engaged in hostilities against the U.S. or its coalition partners. One, he was a cook's assistant for the Taliban forces. Two, he fled from Narin to Kabul during the North-

ern Alliance attack, and surrendered to the Northern Alliance.” That’s the entire charge upon which he was being held. My student said, “All right. We have the assistant cook. Where’s Mr. Big? Where’s the cook? Why do we have the sous chef and not the chef?” He turned and walked out of the room.

I don’t have an answer to that. I think all Americans should ask that, but especially those of you who say, “We have the worst of the worst at Guantanamo Bay,” because what’s really scary is, when you look at the Government records and find out who is there. They say all the time, “They’re the worst of the worst.” If you look at our records, we’ll find out that 55 percent—and this is the Government’s own records from their CSRTs—are not even accused of committing a single hostile act. So, these enemy combatants, 55 percent of them are enemy civilians, as my students point out.

But you don’t have to be a combatant to be an enemy combatant, to be the worst of the worst, to be held in Guantanamo. But you also don’t have to be a member of al Qaeda. It turns out that 60 percent of all those detained in Guantanamo are not even accused by the U.S. Government of being fighters for, or members of, either al Qaeda or the Taliban.

Another point that’s been made by several of you today—and it’s distressing, because it’s not true, based on the Government’s own records—the number of members of the executive branch who have consistently said the detainees were captured on the battlefields of Afghanistan, shooting at Americans. Our Government’s own records show that 66 percent of detainees weren’t even captured in Afghanistan, yet people keep saying they were captured in Afghanistan, shooting at U.S. forces. The second percent is, depending if you give the Government the maximum benefit of the doubt, only 8 percent of those detainees were ever captured by Americans. If you look at all of the charges against everybody in the CSRTs, eight individuals are alleged to have fired weapons at U.S. forces. Now, those people are enemy combatants. I’m not here to argue they’re not. They deserve to be prosecuted. The CSRT process, if that were to go through the proper process—and it’s true, they should be held there—but it’s very distressing.

I want to say another factor the Government records show. For those who have been told that we’re holding those people because they’re the repositories of useful information, General Schmidt’s report indicates that over more than 30 months of interrogation the DOD conducted 24,000 interrogations of those detained in Guantanamo. That sounds like a lot. But there are 759 detainees. That averages one interrogation a month. We’re holding people there for their intelligence purposes in order to interrogate them once a month during the first 30 months of their detention. At least one FBI agent has reported that most of the interrogations last approximately 3 hours. It’s deeply troubling, if you’re worried about our security, to believe that we’re holding those people there in order to interrogate them, in order to spend approximately one afternoon a month finding out what they know.

Now, one of the really distressing parts of this is, I believe, in all fairness, anybody who believes that those detainees are the worst of the worst, that they were captured on the battlefield, that

they shot at Americans, is simply been misled by information made public before *habeas corpus*. We would not know now, if *habeas corpus* had not existed, that those statements were false. We would not be able to refute those false statements that have penetrated all levels of our government, all branches of our government, the press, and the popular world, but they're false.

Now, how is it that those detainees are still there? The CSRT proceedings, which, by the way, the very first attempt to create the CSRT proceedings, the establishment of the procedures, their implementation, and the completion and the final decision in the first CSRT proceeding, took 24 days. So, when you talk about working out a complicated, sophisticated process to find out if you do have the right people there, they didn't complete the process for almost 3 weeks. Within 3 days of the completion of the process, they had their first CSRT proceeding. On that same day, the decision was made, and on that same day, the detainee was found to be an enemy combatant. The assistant cook was found to be an enemy combatant, and, to the best of our ability to check those records, that assistant cook remains in Guantanamo, to this day, after 5 years, with no impartial review.

Now, I want to talk about what the CSRT proceedings are, and how they operate. I appreciate the chairman citing some of our information. But it's really very distressing.

It turns out that a detainee is assigned a personal representative, and the personal representative may not be a lawyer. In fact, the personal representative must come in—and there's a script—he has to come in and tell the detainee, "I am not your lawyer. I'm not your advocate. What you tell me may be shared with the panel. How can I help you?" The average length of those interviews is less than 90 minutes, and that includes translation time. Those often happen within 48 hours of the hearing. A significant number happen the same day as the hearing. Then the detainee is brought into the room, and 200 of them, after being given that offer by the personal representative, choose not to come. Two hundred do not. The remainder do come in. They're brought in the usual shackles. They're shackled to the floor. They're alone in a room, seated against the wall, with a tribunal on one side. This is their chance to have a hearing.

At this hearing, the rules say they're entitled to question witnesses. To my absolute shock, in 100 percent of the cases the Government's made public, the United States produced zero witnesses, so the opportunity, under the process, to question witnesses is a complete sham, not because it isn't offered, but because the Government doesn't exercise it, because in this impartial hearing, the Government is entitled to rely on the classified secret evidence the detainee never sees, and it's presumed to be reliable and valid. So, the Government doesn't call a witness. In fact, in 94 percent of the cases, it produces no documentary evidence for the detainee to see. So, detainees actually have their impartial hearing when they walk into a room, only to discover that no evidence will be presented against them, they'll hear no evidence, they see no evidence, and then the Government turns to them and says, "Well, now you may speak." Most of the detainees believe it's another form of interrogation, because they hear nothing and they're asked to speak. Then,

after that, they're told, "You may call witnesses." Every detainee who ever asked for any witness who was not a fellow detainee was always turned down because the witness was not reasonably available. Even when the detainees would say, "Would you please allow, by telephone, to call my brother? Here's the phone number," our Government would decide to work through the Afghani Embassy to find the person, and there would be a brother waiting by a phone, and they wouldn't call them. Now, those detainees were then, at the end of the hearing, the personal representatives, 98 percent of the time, had the opportunity to speak, and didn't.

I probably used up all my time, Senator, but if I could just end with one point—in terms of impartial, they say this can be reviewed. They can be reviewed. Do you know, every time a detainee won, even in that process, they were reviewed, and every time they were reviewed, when they won, it was sent back down again. Two detainees won, went up through the chain of command, came back down again, and it turned out they were tried again. One detainee won twice, and they sent it back down a third time. That's the impartial review they give.

Now, the question is, what can be done to solve this? When I was a young man, and I was trying to get by on cars, I used spit, baling wire, and glue to keep a car going. I actually believed that it was economical and efficient. I think we've all experienced that. It isn't economical, and it isn't efficient. But, I'll tell you, even in my youth I never tried to fix a car after it hit a bridge abutment at a high speed.

The CSRTs are a vehicle that has hit a bridge abutment at a high speed. You can't tinker with these and fix it. They are totaled, they never operated, they're not distinguishing people. Every detainee loses.

My final point is only this. When we talk about *habeas corpus*, all I want to do is to allow the courts to evaluate whether we have the right people. My problem with this process isn't giving them rights. My problem is, we have the wrong people there, if you believe our own Government's records. The question is, what do you say to those people who have been held wrongly, after their CSRT has confirmed, nonetheless, to be enemy combatants wrongly, what do you say to them? We're not talking about *habeas corpus* in terms of postconviction release, where they've had the trial. This is the purpose *habeas corpus* was for. When the sheriff of Nottingham wanted to lock somebody up in the time of Robin Hood and Magna Carta, what Magna Carta said was, you couldn't hold him for no reason without any hearing, indefinitely. You had to produce the body and explain why. Detainees in the United States always ask for second bites of the apple. The people detained in Guantanamo have never had a first bite at the apple. They haven't had a nibble. I ask you simply to appreciate how the system has failed us, based not on what I say, but what our own records say, and only our own records.

Thank you very much.

[The prepared statement of Mr. Denbeaux follows:]

PREPARED STATEMENT BY MARK P. DENBEAUX

Before *habeas corpus* was recognized for Guantanamo detainees, the executive branch of our Government claimed loudly and often that those detained in Guantanamo were the worst of the worst; that they were captured on battlefields in Afghanistan shooting at Americans. Those in the executive branch of our Government said also that those detained at Guantanamo possessed important information which we needed to acquire to protect our National security. Another executive department claim was that those detained at Guantanamo were held because of their membership in groups that were hostile to the United States.

After the Supreme Court, to its everlasting honor, recognized that *habeas corpus* applied to those detained at Guantanamo, the executive branch had to prepare documents which were thereafter released. A careful review of these documents, a review that assumes every word in the Government's records to be true and a review that accords the Government's records every benefit of the doubt when evaluating them, reveals that almost everything said by our highest officials about who was detained at Guantanamo and why they were detained was false.

Because *habeas corpus* was recognized for those detained at Guantanamo, we now know that our Government's statements that said those detained at Guantanamo were the "worst of the worst" were false.

Because *habeas corpus* was recognized for those detained at Guantanamo, we now know that all our Government's statements that the detainees there were captured on the battlefields of Afghanistan shooting at Americans were also false.

Because *habeas corpus* was recognized for those detained at Guantanamo, we now know that our Government's statements that said those detained had important information critical to our National security, are belied by the efforts of those interrogating at Guantanamo.

Because *habeas corpus* was recognized for Guantanamo detainees, we now know that our Government's statements that said the detainees were members of groups presenting a danger to the United States were grossly exaggerated.

Our Government's records produced in response to *habeas corpus* reveal that "the worst of the worst" are not. Our Government's records produced in response to *habeas corpus* reveal that 55 percent of those detained at Guantanamo are not accused of committing a single hostile act. Our Government's records reveal that at least 60 percent of those detained are neither "members of" nor "fighters for" al Qaeda or "members of" or "fighters for" the Taliban. Our Government's records reveal that 60 percent of those detained are held only because they have an "association" with some group, whether al Qaeda, Taliban, or otherwise. Our Government's records also reveal that the Taliban was the governing authority of Afghanistan at the time.

Our Government's records produced in response to *habeas corpus* reveal that those detained at Guantanamo were not captured on the battlefields of Afghanistan shooting at Americans. According to our government's records, 92 percent of those detained at Guantanamo were not captured by Americans; 66 percent were not even picked up in Afghanistan and only a handful of detainees were ever accused of shooting any weapons at Americans.

One of the Seton Hall Law School students asked me, "Where are the bad guys?" The student then showed me the Government's evidence against a detainee who had been conscripted by the Taliban as an assistant cook. Our Government's evidence against that detainee in its entirety states:

- a. Detainee is associated with the Taliban
 - i. The detainee indicates that he was conscripted into the Taliban.
- b. Detainee engaged in hostilities against the U.S. or its coalition partners.
 - i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.

My student said, "OK, We have the assistant cook. Where is Mr. Big? Where is the cook?"

All Americans should ask that question. I have no answer.

Because *habeas corpus* was recognized for those detained at Guantanamo, we now know that our Government did not believe its own statements that the detainees at Guantanamo possessed information essential to our National security.

According to Department of Defense (DOD) reports during the first 30 months of the detainees' detention at Guantanamo (from January 2002 until July 2004), each detainee was interrogated barely once a month. Only two conclusions can be drawn from this leisurely pace of interrogation: our Government did not believe that the

detainees possessed information critical to our National security, or the DOD was too busy to perform expedited interrogations.

Because *habeas corpus* was recognized for those detained at Guantanamo, we now know that our Government's statements that those detained at Guantanamo were members of groups hostile to the United States conflicts with State Department policies governing entry into the United States. Documents released pursuant to *habeas corpus* litigation reveal that the DOD considered membership in any of 72 "enemy" groups to be grounds for detention at Guantanamo. The State Department permits members of 52 of those 72 groups entry into the United States. Hence 72 percent of the groups considered by the DOD to be so hostile to the United States to warrant detention of their members at Guantanamo, the State Department welcomes to our shores.

THE EXECUTIVE BRANCH RESPONSE TO THE RECOGNITION OF *HABEAS CORPUS* WAS TO
CREATE THE COMBAT STATUS REVIEW TRIBUNAL PROCEDURES

Immediately after recognition of *habeas corpus* for Guantanamo detainees, the DOD created the Combat Status Review Tribunal (CSRT) process. After holding detainees at Guantanamo for more than 30 months with no review, the DOD created the CSRT process, implemented it and held its first hearing within 24 days. That first detainee's hearing was decided the same day it was held. The decision confirmed the detainee's enemy combatant status.

The CSRT process did not require our Government to call witnesses or to produce any unclassified evidence. The CSRT process permitted our Government to rely upon classified evidence presumed to be valid and withheld from the detainee. Detainees never heard any government witnesses and almost never saw any documentary evidence upon which our Government relied in determining that the detainees were enemy combatants.

The detainees were never permitted to produce any witnesses at their CSRT hearing except for some of the fellow detainees requested. Only 4 percent of the detainees ever heard or saw any of our Government's evidence against them. Only 11 percent of the detainees were permitted to produce any evidence in their own defense at their CSRT hearings. During the CSRT process, the detainee was given an opportunity to speak and was then escorted from the hearing room. Immediately after removal of the detainee from the CSRT hearing room, the CSRT met and decided the case. The CSRT process confirmed the initial determination that every detainee was an enemy combatant.

The CSRT process found the assistant cook conscripted by the Taliban to be an enemy combatant. To our knowledge, the assistant remains detained at Guantanamo.

THE COMBATANT STATUS REVIEW TRIBUNAL PROCESS CANNOT REPLACE AN IMPARTIAL
JUDICIAL HEARING

The failures of the CSRT procedures cannot be cured by more process. The executive branch of our Government cannot judge itself. The question of who is and/or who is not an enemy combatant must be determined by an impartial judge.

CSRTs for the detainees, no matter how designed and implemented, cannot be permitted to be the decisionmaker as to the legitimacy of those detained. The executive branch of our Government has abused its power and has operated without oversight. The executive branch of our Government held all detainees at Guantanamo without offering any review of detention for over 30 months. Only after *habeas corpus* was recognized for the detainees at Guantanamo did the executive branch quickly prepare a hearing process then implement it in a perfunctory manner. The executive branch abused its power in order to ratify its prior decisions as to who is and is not an enemy combatant. The executive branch decided that the conscripted assistant cook must be held at Guantanamo indefinitely.

Our legal system was not designed to trust the executive branch to detain people indefinitely. Our constitutional system requires checks and balances. Those detained at Guantanamo should have lawyers as advocates appearing before impartial tribunals to determine if they are enemy combatants. That is *habeas corpus*.

THE MYTHS

Because of the tight security imposed by the DOD, the American public knows remarkably little about Guantanamo. What it does know is largely colored by dramatic statements of military and civilian DOD officials defending the system they have created; statements which often seemed designed to reduce a complicated and painful reality to a bumper-sticker bromide. Increasingly, these statements are being challenged by the reporting of a number of journalists and the representations

of attorneys for many of the detainees. As detainees are released, we even have evidence based on their individual experiences.

What the Seton Hall Guantanamo Project has attempted to do, however, is qualitatively different and ultimately more revealing. For example, in our first report we ignored everything the detainees said in their CSRTs. We ignored as well the contentions of their lawyers in court proceedings. Rather than relying on the fragmentary evidence provided by critics of the Defense Department, the project used the DOD's own data to generate a series of largely quantitative reports about those who are being detained and their treatment, both in terms of their incarceration and in their review by the CSRTs. These reports, which can be found in full on the Seton Hall Law School webpage, <http://law.shu.edu/news/guantanamo-reports.htm>, are the result of the work of myself, my son, Joshua W. Denbeaux, and a truly remarkable group of students at Seton Hall Law School, whose names appear at the end of this statement.

While far more information is available in the reports, this statement attempts to identify the most prominent myths about Guantanamo and show how the DOD's own records cast serious doubt about the accuracy of these perceptions.

Myth Number 1: Guantanamo Holds the "Worst of the Worst."

Reality: While there may be a few high-value prisoners, the average detainee is someone who poses little or no threat to the United States.

The DOD repeatedly describes those detained in Guantanamo as the worst of the worst.¹ Additionally, on March 28, 2002, in a DOD briefing, former Secretary of Defense Donald Rumsfeld said:

As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.²

In reality, more than 55 percent of those detained in Guantanamo are not accused of ever having committed a single hostile act against the United States or its coalition forces.³ In contrast to Secretary Rumsfeld's classifications, these detainees should be described as enemy noncombatants or civilians.

Only 8 percent of the detainees were characterized by the DOD as "al Qaeda fighters."⁴ Of the remaining detainees, 40 percent have no definitive connection with al Qaeda at all and 18 percent have no definitive affiliation with either al Qaeda or the Taliban.⁵

Even the acts of hostility alleged against the remaining 45 percent are often very slight. This is true even though the Government's definition of a hostile act is not demanding. As an example, the following was the evidence the Government determined sufficient to constitute a "hostile act" by one of the 45 percent so accused. According to the military determination:

The detainee participated in military operations against the United States and its coalition partners.

1. The detainee fled, along with others, when the United States forces bombed their camp.
2. The detainee was captured in Pakistan, along with other Uigher fighters.⁶

A second example is even more powerful. What follows is the entire record for another detainee:

¹The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Admiral John D. Stufflebeem, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

²Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says, (2002, October 23). The New York Times, p 14. Retrieved February 7, 2006 from Lexis-Nexis database.

³Mark Denbeaux, et. al., Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data (2006), <http://law.shu.edu/news/guantanamo-report-final-2-08-06.pdf>.

⁴Id.

⁵Id.

⁶Id. [Emphasis supplied].

- c. Detainee is associated with the Taliban
 - i. The detainee indicates that he was conscripted into the Taliban.
- d. Detainee engaged in hostilities against the U.S. or its coalition partners.
 - i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
 - ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.⁷

It seems unlikely that the Government actually believes that this kind of allegation establishes that the detainee is the "worst of the worst." The reality is that a very large fraction of the detainees seem to be, at most, a ragtag collection of "support" personnel for low-level foot soldiers.

Myth Number 2: Guantanamo holds fighters for al Qaeda and the Taliban.

Reality: Fewer than 10 percent conceivably fit that description.

Although it is frequently stated that those detained in Guantanamo are members of al Qaeda, the Government's own documents show that that is not true. According to Defense Department records, 60 percent of those detained at Guantanamo are not even alleged to be "fighters for," or "members of" either al Qaeda or the Taliban.⁸ These 60 percent are being held merely because they are "associated" with some group—al Qaeda, Taliban, or otherwise.

In the regions of Afghanistan where the Taliban ruled, it would be almost impossible not to have some "association" with the Taliban, especially in the broad manner that the Government has defined the term. Moreover, the nexus between such a detainee and such organizations varies considerably. While 8 percent are detained because they are deemed "fighters for" one of these groups (and therefore, conceivably, among the worst of the worst), another 30 percent are considered "members of" the groups, and therefore possibly more central to terrorist work.⁹ That leaves a large majority—60 percent detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2 percent of the prisoners, their nexus to any terrorist group is unidentified.¹⁰

Myth Number 3: The detainees were captured by American troops on the battlefield in Afghanistan.

Reality: No more than 8 percent could possibly fit this description.

Secretary of State Condoleezza Rice claimed that the problem with closing Guantanamo is the question of what to do about "the hundreds of dangerous people who were picked up on battlefields in Afghanistan, who were picked up because of their associations with al Qaeda?"¹¹ She repeated an irresponsible myth that has been habitually cited by government officials, despite the fact that the Government's own documents demonstrate its falsity. Her statement echoes that which Justice Scalia made, just prior to oral arguments in a case before the Supreme Court addressing the rights of detainees: "I had a son on that battlefield and they were shooting at my son and I'm not about to give this man who was captured in a war a full jury trial."¹²

While it is typically believed that detainees were captured by American troops on the battlefields of Afghanistan fresh from shooting at American soldiers, American troops captured only 8 percent of the detainees.¹³ Remarkably, 66 percent of those detained at Guantanamo were not captured in Afghanistan, much less on the battlefield.¹⁴ Rather, this group was handed over to the United States by Pakistan. Another 20 percent were delivered to the U.S. by the Northern Alliance.¹⁵

While the identity of his captors does not prove that a detainee was not engaged in hostile acts against the U.S., there are serious reasons to doubt the reliability of a process that was driven by American-paid rewards to bounty hunters who were

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ John D. Banusiewicz, Rice Responds to Call for Guantanamo Detention Facility's Closing, American Forces Information Service, May 21, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=15706>.

¹² Supreme Court: Detainees' Rights-Scalia Speaks His Mind, Newsweek, April 3, 2006, <http://www.msnbc.msn.com/id/12017271/site/newsweek/>.

¹³ Mark Denbeaux, et. al., Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of DOD Data (2006), <http://law.shu.edu/news/guantanamo-report-final-2-08-06.pdf>.

¹⁴ Id.

¹⁵ Id.

themselves typically far from any combat and often spoke different languages than their captives.

Myth Number 4: The detainees are affiliated with groups that are all terrorist organizations.

Reality: Many of the detainees are held for affiliations which, even if true, would not prevent them from entry to the U.S.

One of the bases for the detention of those held as enemy combatants in Guantanamo is their affiliation with 1 of 72 groups which the DOD had determined were terrorist organizations. However, State Department policies and procedures would let the members of 72 percent of those groups enter the United States.¹⁶

The DOD identified 72 terrorist organizations in the CSRTs. It considers affiliation with any one of these groups sufficient to establish that a Guantanamo detainee is an “enemy combatant” for the purpose of his continued detention.

Fifty-two of those groups, 72 percent of the total, are not on either the Patriot Act Terrorist Exclusion List or on two separate State Department Designated and Other Foreign Terrorist Organizations lists (jointly referred to as the State Department Other Lists).¹⁷ These lists are compiled for the purposes of enabling the Government to protect our borders from terrorists entering the United States.

If DOD is correct in identifying all 72 groups as terroristic, then the State Department is allowing members of terrorist organizations free access into the United States. Conversely, if the State Department is correct that these groups are not a threat to national security, then many detainees at Guantanamo are being held because of a nexus with an organization that is no threat to the United States.

Myth Number 5: Even if the detainees are not now a threat to national security, they have valuable information that can be used in America’s war on terror.

Reality: There is little interrogation taking place.

The rationale for the detention of the detainees is: preventive detention in order to preclude these individuals from acting against U.S. interests; and/or interrogation to obtain information important to our National security. For the 92 percent of the detainees who are not fighters, detention must rest upon the value that they have to our National security through effective interrogation. Startlingly, however, government documents reveal that, during the first 39 months of detention at Guantanamo (from January 11, 2002 through April 1, 2005), the DOD interrogated a detainee on average a little over once a month.¹⁸

Myth Number 6: The Government knows who it is holding.

Reality: After 3 or more years of detention, the Government cannot correctly identify many of the detainees.

There is reason to believe that after years of interrogation the interrogators do not know the correct names of those detained in Guantanamo. The DOD does not have an accurate list of even the names of the detainees at Guantanamo. According to the DOD, there have been 759 detainees at Guantanamo. A review of all of the Government’s lists and records, however, reveals over 1,000 different names.¹⁹

While some of the duplication is undoubtedly the result of difficulties of transliterating Arabic to English, there are instances where individuals seem to have been held merely because they shared a name with someone else.

For instance, a detainee named Mohammad Al Harbi, ISN #333, was told that he was being detained because his name was on a list that the United States Government contained the names of al Qaeda members. His response:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my names and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name Al Harbi tells you where they came from in Saudi Arabia. Where I

¹⁶Mark Denbeaux, et. al., Second Report on Guantanamo Detainees: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy (2006), <http://law.shu.edu/news/second-report-guantanamo-detainees-3-20-final.pdf>.

¹⁷Id.

¹⁸This number is partially derived from the DOD’s Schmidt Report, <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>, which indicates approximately 24,000 interrogations were completed as of April 1, 2005, the date of publication. Given that the first detainees arrived January 11, 2002 and that government records indicate 558 detainees had CSRTs which were completed in early 2005; this comes to 43 interrogations per detainee over the 39 months between January 2002 and April 2005.

¹⁹Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern Habeas Corpus? (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

live, it is not uncommon to be in a group of 8 to 10 people and 1 or 2 of them will be named Mohammed Al Harbi. In fact, I know of 2 Mohammed Al Harbis here in Guantanamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.²⁰

Myth Number 7: The CSRT process is designed to identify “enemy combatants.”

Reality: The definition of “enemy combatants” is overly broad.

The CSRT begins with a kind of Orwellian double-speak: the CSRT’s mission is to determine whether a detainee is an “enemy combatant,” remarkably, however, one need not be either an enemy or a combatant to be an “enemy combatant” for purposes of the tribunals. One can be an “enemy” merely by “association” with members of al Qaeda or the Taliban.²¹ Almost any person in the portions of Afghanistan under the Taliban’s control would satisfy the “association” requirement. As for being a “combatant,” we have already seen that most of the detainees are not alleged to have done anything that would normally qualify as “combat,” including not being found anywhere near a battlefield.

As a process designed to “confirm” the enemy combatant status which has already been determined through “multiple levels of review”²² by DOD officials, the CSRT ends predictably: In every single instance, the detainee is ultimately determined to be an enemy combatant. This is true even for the 38 detainees that were released or scheduled for release as a result of their CSRT as well as others that have been released. Such individuals are not freed because they have been found not to be enemy combatants. Rather, in a continuation of Orwellian diction, they are described as “no longer enemy combatants.” Given that one did not have to be a combatant in the first place to be designated as an “enemy combatant,” it is not clear what the DOD could possibly mean by classifying an individual as “no longer” such a person.

It is less surprising that the detainees were all ultimately found to be enemy combatants when it is realized that in 3 of the 66 contested cases available for review, the tribunal found the detainee to be not/no-longer an enemy combatant.²³ In each case, the DOD ordered a new tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two tribunals, before a third tribunal was convened which then found the detainee to be an enemy combatant. A small mercy is the failure to inform detainees of their initial success—given that detainee wins are apparently reversed upon further review.

Myth Number 8: Detainees are given a meaningful opportunity to consult with a representative.

Reality: The “personal representative” is not the detainee’s advocate.

Yet all of this is scarcely surprising given procedures that seem to have been designed to channel the CSRTs to this result. One hallmark of traditional adjudication is legal representation. While the prosecutor for the CSRT is a lawyer, the detainee is explicitly prevented from having a lawyer. He is allowed only a “personal representative,” who must not be a lawyer and must also advise the detainee that he is not functioning as his attorney:

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to di-

²⁰ Id.

²¹ In an August 13, 2004 News Briefing available at: <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2560>, Gordon England, Secretary of the Navy and former Secretary Rumsfeld’s designee for the tribunal process at Guantanamo stated that, “The definition of an enemy combatant is in the implementing orders, which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners.” Enclosure (1) page 1 of the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba states “an ‘enemy combatant’ for purposes of this order shall mean an individual who is part of or supporting Taliban or al Qaida, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

²² Enclosure (1) page 1, Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>, [emphasis added].

²³ Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern *Habeas Corpus*? (2007), <http://law.shu.edu/news/final—no—hearing—hearings—report.pdf>.

vulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so.²⁴

At that point, the personal representative asks the detainee if he would like the personal representative's help.

After receiving this information, 32 percent of the detainees opted not to participate in the CSRT proceeding.²⁵ Those detainees who did chose to participate received almost no consultation with their personal representative. When they did meet, 78 percent of detainees met only once with their personal representative.²⁶ The meetings were typically brief: some lasted only 10 minutes; more than half lasted an hour or less and 91 percent lasted 2 hours or less.²⁷ In most cases, they met only once (78 percent) for no more than 90 minutes (80 percent) only a week before the hearing (79 percent).²⁸ Almost one quarter of the meetings took place the day of, or the day before, the hearing.²⁹

During the hearing, the personal representative said nothing 12 percent of the time.³⁰ Even when the personal representative spoke, he made no substantive statements in 36 percent of the cases.³¹ In the 52 percent of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.³² At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98 percent of the cases.³³ The Tribunal's decision was made on the same day as the hearing in 81 percent of the cases.³⁴

Myth Number 9: Detainees are given a meaningful opportunity to challenge the Government's reasons for detention.

Reality: The Government never called a single witness and for 93 percent of the detainees presented no other evidence.

The detainee is always presented with a "summary" of classified evidence, which functions more like an indictment or complaint than an evidentiary showing. It is the detainee's only basis to know the reasons the Government considers him to be an enemy combatant, but the CSRT Tribunal characterizes this summary as "conclusory" and not persuasive.

That would suggest that the real basis for the detention would emerge during the evidentiary stage. However, the Government did not produce any witnesses in any hearing. Further, it did not present any documentary evidence to the detainees in 93 percent of the cases.³⁵ In every case, the Government relied upon classified evidence, which was (1) not shown to the detainee and (2) presumed to be reliable and valid. All requests by detainees to inspect the classified evidence were denied.

The fact that detainees were only rarely allowed to see unclassified evidence is surprising, since the CSRT guidelines require that the detainee be allowed to see unclassified evidence. Unclassified evidence was submitted to the Tribunal in 48 percent of the cases, however detainees were only allowed to review this unclassified evidence 7 percent of the time.³⁶ Even so, the review of unclassified evidence may not be beneficial to the detainee since the most damaging evidence presented by the Government is presumably classified.

Myth Number 10: Detainees were allowed to present evidence on their own behalf.

Reality: Detainees were not allowed to produce any witness evidence other than, in a very few cases, other detainees, and they were only allowed to produce *pro forma* evidence, such as letters, that were from relatives.

All requests by detainees for witnesses not already detained in Guantanamo were denied. Requests by detainees for witnesses were denied in 74 percent of the

²⁴ Enclosure (3) page 3, Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>, [emphasis added].

²⁵ Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern *Habeas Corpus?* (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern *Habeas Corpus?* (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

³⁶ Id.

cases.³⁷ In the remaining 26 percent of the cases, 22 percent of the detainees were permitted to call some witnesses and 4 percent were permitted to call all of the witnesses that they requested.³⁸ Among detainees who participated, requests to produce documentary evidence were denied 60 percent of the time.³⁹ When detainees requested documentary evidence, 25 percent of the time the detainees were permitted to produce all of their requested documentary evidence; and 15 percent of the time the detainees were permitted to produce some of their documentary evidence.⁴⁰

The only documentary evidence that the detainees were allowed to produce was from family and friends. In 89 percent of the cases no evidence was presented on behalf of the detainee other than the detainee's statement.⁴¹

While particular examples are collected in Seton Hall's No Hearing Hearings report, some instances stand out. For example, Mohammad Atiq Al Harbi (ISN #333) appeared before a Tribunal and identified documents available to the United States that would prove that his classification as an enemy combatant was wrong. There is no record that any such documents were ever considered or even sought by the CSRT. Similarly, there was a question as to Emad Abdalla Hassan's (ISN #680) passport, which he claimed would show the dates of his entry into Pakistan, but the passport was neither located nor produced, and the detainee was promptly found to be an enemy combatant.

In still a third instance, an Algerian detainee requested court documents from his hearing in Bosnia at which the Bosnian courts had acquitted him of terrorist activities. The Tribunal concluded that these official Court documents were not "reasonably available" even though the Unclassified Summary of the Basis for Decision discussed another document from the same Bosnian legal proceedings. In a fourth case, Khi Ali Gul, ISN# 928, requested that his brother be produced as a witness and provided the Tribunal with his brother's telephone number and address in Afghanistan. Instead of calling the phone number provided, which might have produced an immediate result, the Government instead sent a request to the Afghan embassy. The Afghan embassy did not respond within 30 days and the witness was not produced. The witness was then found not to be reasonably available by the Tribunal, the detainee determined to be an Enemy Combatant, and the hearing was never reopened.

Myth Number 11: The CSRT did not credit evidence obtained by coercion.

Reality: The CSRTs made no effort to ascertain whether evidence claimed to have been coerced was legitimately obtained.

The Detainee Treatment Act of 2005 was a strong statement by Congress that testimony obtained by "coercion" should play no part in the CSRT process.⁴² However, this statute was enacted in December 2005, after the CSRT process was complete. No Tribunal apparently considered the extent to which any evidence was obtained through coercion, and no review process resulted in reconsideration on this ground.

Obviously, the effects of claimed torture, or coercion more generally, would apply to inculpatory statements from the detainee himself and should have been weighed in any consideration of supposed admissions. Additionally, the possibility of coercion should also have been considered by a Tribunal weighing all statements and information relating to the detainee. This is related to, but not the same as, hearsay concerns, which the Tribunal is required to consider.⁴³

The record, however, does not indicate such an inquiry by any tribunal. Instead, the Tribunal makes note of allegations of torture, and refers them to the convening authority. While further investigation may often have been warranted, it is surprising that several tribunals found a detainee to be an enemy combatant before receiving any results from the investigation they had requested. While there is no way

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² 109 P.L. 148. The Detainee Treatment Act of 2005 provides in part:

(b) Consideration of Statements Derived with Coercion.—

(1) Assessment.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative Tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

⁴³ See generally, Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Jul. 29, 2004), <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

to ascertain the extent, if any, that witness statements might have been affected by coercion, fully 18 percent of the detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the tribunal or the personal representative.⁴⁴ In each case, the panel proceeded to decide the case before any investigation was undertaken. At least 17 allegations by detainees of abuse were referred by the CSRT to the DOD but were apparently then ignored and never investigated.⁴⁵

Myth Number 12: The detainees are treated firmly but fairly.

Reality: Guantanamo treatment is, at best, harsh and dehumanizing, and it remains so for detainees even when they have been determined to be no longer enemy combatants.

At Guantanamo, detainees are rarely treated as individuals. For example, every detainee, regardless of the charges against him and regardless of his status, must be shackled to the floor when being interviewed by counsel. This is true even for those detainees whom the United States has approved for release and who are awaiting transfer to another country.

For the vast majority of the detainees, the only contact with someone from the outside world has been his *habeas* counsel. The restrictions on the interaction between the detainee and that counsel coupled with Government imposed limitations on communication reinforce the detainee's isolation. No telephone calls are permitted. Letters may be sent, but require a series of steps that inhibit communication.⁴⁶ The only other possibility is to visit the detainee in Guantanamo. That requires pre-approval from the DOD, plane reservations, "theater" and country passes, passports, etc.

The camp is run as if all of the detainees are dangerous, angry and hostile. Once viewed as "the worst of the worst," they are treated accordingly even though the Government's own records of detainee behavior at Guantanamo demonstrate that the detainees are surprisingly well behaved and that their misbehavior is infrequent and relatively mild.

Over 2 years and 8 months, there were 499 disciplinary violations for 759 detainees.⁴⁷ Even assuming no recidivism (obviously, an unlikely assumption), at least one third of the detainees never committed a Disciplinary Violation. The camp averages one disciplinary violation every 2 days.⁴⁸ For 736 of the 952 days covered by the Incident Reports (77 percent of the days), the Government has released no report of a disciplinary violation.⁴⁹ In fact there are far more days without disciplinary violations than even this number would indicate. That is because 46 percent of the disciplinary violations occurred during a 92-day hunger strike that followed allegations of Koran abuse by guards.⁵⁰

Government records reflect that detainees committed acts defined by the Government as "manipulative self-injurious behavior" more often than they commit disciplinary violations.⁵¹ The picture of detainee self-harm, including suicide attempts, is far more serious than disciplinary violations, both in the number of incidents and in the seriousness of harm. The detainees attempt suicide or self-harm with far greater frequency than they violate other disciplinary rules. A comparison of detainee self-destructive acts, such as attempted suicides and other self-harm, with detainee disciplinary violations is striking.

Detainees committed 460 acts of "manipulative self-injurious behavior" in 2003 and 2004, an average of one such act every day and a half (1: 1.59 days).⁵² Detainees committed 499 disciplinary violations over 2 years and 8 months, an average

⁴⁴ Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern *Habeas Corpus*? (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

⁴⁵ Based upon DOD documents obtained through Freedom of Information Act (FOIA) litigation initiated by the American Civil Liberties Union. Available at: <http://www.aclu.org/projects/foiasearch/pdf/DODDON000569.pdf>.

⁴⁶ The letter must be (1) written in English and then translated; (2) mailed to a secure facility, (3) where it is reviewed (4) sent to Lynx airline which (5) holds it until some *habeas* counsel can pick it up and fly with it to Guantanamo, where (6) a military escort takes it to the camp and (7) it is given to the detainee. If the detainee wishes to respond, he asks for paper and writing implement, and the process begins in reverse.

⁴⁷ Mark Denbeaux, et. al., The Guantanamo Detainees During Detention: Data From DOD Records (2006), <http://law.shu.edu/news/guantanamo-third-report-7-11-06.pdf>

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

of one incident every 2 days (1:1.91 days).⁵³ Put another way, there are more “hanging gestures” by detainees than there are physical assaults on guards, based upon 120 “hanging gestures” for 2003 and 95 assaults and 22 attempted assaults for the 2 years and 8 months of reported disciplinary violations.⁵⁴

More than 70 percent of the disciplinary violations, including “assaults,” are for relatively trivial offenses, and even the most serious are offensive but not dangerous.⁵⁵ Nearly half (43 percent) of the reported Disciplinary Violations were for spitting at staff.⁵⁶ The disciplinary reports reveal that the most serious injuries sustained by guards as a result of prisoner misconduct are a handful of cuts and scratches.

Myth Number 13: The CSRT process is viewed as legitimate factfinding by the military.

Reality: The result is preordained and the processes are disregarded throughout, to the detriment of the participating military personnel as well as the detainees.

The process begins by an affirmation that each detainee has been repeatedly found to be an enemy combatant though many levels of review. It would take an unusually independent officer sitting on a CSRT to declare that many of his predecessors in the detainment process were all in error. As to each detainee, the Government provides what it denominates as a “summary of evidence.” Each summary contains the following sentence:

The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is. . . .⁵⁷

[Emphasis supplied].

Since the Government had “previously determined” that each detainee at Guantanamo Bay was an enemy combatant prior to a CSRT hearing, the “summary of evidence” released by the Government at the CSRT is not the Government’s allegations against each detainee but a summary of the Government’s proofs upon which the Government found that each detainee, is in fact, an enemy combatant.

These perfunctory hearings, with their preordained results are disposed of summarily, even though former Secretary Rumsfeld in February 2004 said:

The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I’m sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothes, by carrying multiple identification documentations, by having 3, 6, 8, in 1 case 13 different . . . aliases. . . . Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance.⁵⁸

Even though the bases upon which detainees are detained are ambiguous, complicated and obtained during disorder, the detainees always lose and they always lose very quickly and perfunctorily. Every detainee is found to be some form of enemy combatant. Even those detainees that were eventually scheduled for released based on a CSRT never lose their enemy combatant status.

Myth Number 14: Habeas Corpus is not needed because the CSRT process can be cured.

Reality: More, less, different, or better CSRT procedures can not cure defects of unfair and rigged decisionmaking.

Whether because of bad faith, or incompetence; these problems in combination with incurable structural deficiencies, make it clear that the CSRTs are irreparably flawed. The only cure for these defects is judicial factfinding and impartiality.

It is clear from the Government’s own documents that we wrongly hold many detainees and the process makes no distinction between who does or does not belong in Guantanamo. No discrimination was made. All were detained.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Mark Denbeaux, et. al., NO HEARING HEARINGS CSRT: The Modern *Habeas Corpus?* (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

⁵⁸ Defense Secretary Rumsfeld Speaks to Miami Chamber of Commerce, CNN, February 13, 2004, available at: <http://edition.cnn.com/Transcripts/0402/13/se.02.html>.

However, compelling evidence exists that is far more egregious: the process will not find for the detainees regardless of the evidence.

The only question now is what can be done. The courts must be allowed to entertain *habeas corpus* petitions for those detained there. There is no administrative short cut.

Seton Hall's reports have quantified the available data contained in the Government's own records. Yet there are facets of the CSRT process that cannot be evaluated. CSRT Tribunal decisions cannot be evaluated due to secret evidence and secret Tribunal deliberations. Therefore it is impossible to conclude whether the irreparable problems with the CSRT are caused by bad faith and/or incompetence. However there is data contained in the Government's own CSRT records of an alarming number of instances in which the process of judging the detainees violated acceptable standards of fairness.

The evidence of disturbing evaluations of detainees are contained in several specific instances in which the CSRT has found against the detainee after having been advised that the evidence, the process and/or the results were not warranted.

In one instance, the personal representative made the following comments regarding the Record of Proceedings for ISN #32:

I do not believe the Tribunal gave full weight to the exhibits regarding ISN [redacted]'s truthfulness regarding the timeframes in which he saw various other ISNs in Afghanistan. It is unfortunate that the 302 in question was so heavily redacted that the Tribunal could not see that while ISN [redacted] may have been a couple months off in his recollection of ISN [redacted]'s appearance with an AK 47, that he was 6 months to 1 year off in his recollections of other Yemeni detainees he identified. I do feel with some certainty that ISN [redacted] has lied about other detainees to receive preferable treatment and to cause them problems while in custody. Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof).⁵⁹

The detainee was found to be an enemy combatant on the above record despite the personal representative's description of the evidence.

Another example involves the review of the legal advisor. The legal advisor is assigned by the DOD to oversee the propriety of the CSRT process in each case. The failure of the CSRT process is demonstrated by the statement of the legal advisor in reviewing the Tribunal's decision for ISN #552:

Indeed, the evidence considered persuasive by the tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no firsthand knowledge of the events they describe.

The detainee was nonetheless found to be an enemy combatant after the legal advisor made his report.

In addition to these two examples, there are at least four tribunals among the 66 contested CSRTs available for review which further demonstrates the fundamental flaws of the CSRT process. Two detainees each won one hearing before being found to be enemy combatants and one detainee won two hearings before eventually being found to be an enemy combatant. In each case the process was continued because of the actions of DOD officials above the CSRT process.

It must be noted that in each instance in which a detainee was first found to not be an enemy combatant, the detainee was never told of the finding nor that his case was being reconsidered. Therefore in each of the detainee's succeeding CSRT proceedings the detainee was not present and not able to testify, despite having done so successfully in his initial, successful CSRT proceeding.

Anecdotal evidence such as this has its limitations. However, these six examples (the personal representative's and the legal advisor's objection to the evidence and the four reversed CSRT findings) are out of 66 contested CSRT proceedings and are not trivial. It is not possible to determine whether these incidents are aberrations because the Government has withheld the other records of the CSRT proceedings that would allow such a quantitative analysis. These other records are currently being sought by Seton Hall under a pending FOIA application.

In addition to the six instances that are already referenced, instances in which the CSRT administrative process denied detainees the right to produce exculpatory evidence on their behalf are also significant. Denials of requests for exculpatory evidence like passports, medical records, foreign court proceedings, and outside witnesses seem to be the rule rather than the exception.

⁵⁹Mark Denbeaux, et. al., No Hearing Hearings CSRT: The Modern *Habeas Corpus*? (2007), <http://law.shu.edu/news/final-no-hearing-hearings-report.pdf>.

Another failure of the CSRT process can be found within those hearings (48 percent of those available to be reviewed) in which the Tribunal secretly considered documentary evidence that the detainee was entitled to see but was never shown.

Whatever the limitations of these data, it presents a picture which does not inspire confidence in those who have administered the process of determining who is and who is not an enemy combatant.

CONCLUSION

I do not believe that everyone in Guantanamo is an innocent person; I believe that there are likely some truly dangerous people there. None of the Guantanamo Bay Bar Association is naïve. All of us want a trial to determine whether our client is the right person. If so, so be it. One of the tragedies of Guantanamo, however, is that none of us—the Bar Association or Congress or the American public—can have any confidence that any of the CSRTs have in fact identified those that are still worth detaining and those that are not.

ACKNOWLEDGEMENTS

Neither this statement nor the reports upon which it draws would have been possible without the generous support of Seton Hall University School of Law. Although Guantanamo is inherently controversial, the Law School's Guantanamo Project has strived to maintain scholarly objectivity in its efforts to factually investigate the details of, and justifications for, the United States' actions there.

The Guantanamo Reports would not have been possible without the work of my son and co-author Joshua Denbeaux, but neither would they have seen the light of day but for the dedication, commitment, and hard work of a number of Seton Hall students.

I want to thank the students that co-authored these reports. They have reviewed and evaluated hundreds of thousands of pages of documents and created a highly sophisticated database and then drafted, written, and edited all of our reports.

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Chairman LEVIN. Thank you, Mr. Denbeaux.

Next is David Rivkin, Jr., who is a partner at the firm of Baker Hostetler.

We welcome you, Mr. Rivkin. Please proceed.

STATEMENT OF DAVID B. RIVKIN, JR., PARTNER, LAW FIRM OF BAKER HOSTETLER

Mr. RIVKIN. Thank you. Chairman Levin, Senator Warner, I wanted to thank the committee for giving me a chance to share my views on the MCA of 2006, the DTA, the procedures used by DOD to determine detainee status under the international Law of Armed Conflict, and to try some of them for war crimes.

Fundamentally, I believe that both MCA and DTA comport with the Constitution and more than meet applicable international law standards. Their procedures are streamlined, yet fair. They essentially provide detainees with judicial process that is more than suf-

ficient to enable them, at appropriate times, to mount a meaningful challenge to the core Government decisions that impacted them.

Meanwhile, the actual procedures used by the DOD to determine their status—and we heard, today, about CSRTs to try them for war crimes by military commissions—in my view, are constitutionally sufficient, and give them far more due process—far more due process—than they’ve had in the past under any competent tribunal convened, for example, under Article 5 of Geneva Convention III or any military commission in American history or history of any other country.

To me, the fact that DOD, in addition to these procedures, also implemented something called ARBs, which focus primarily on whether or not an individual is an enemy combatant, to question whether or not individuals detained in U.S. custody pose a continued danger, and whether or not viable alternatives exist to their continued detention underscores the extent to which the United States has opted, with input from both political branches, to provide captured enemy combatants with additional rights that go far beyond those provided for under the Constitution or International Law of Armed Conflict.

Let me try and underscore this point somewhat dramatically. Since the notion of enabling captured enemy combatants to be released on parole—and, even then, it applied not to everybody, but to officers and the gentlemen—fell out of practice in late 19th century. The current U.S. practice of releasing captured enemy combatants before the end of hostilities, ladies and gentlemen, is historically unprecedented, and does represent a very generous act on the part of the United States. Of course, we all know that, because you cannot always be right, I agree with my colleagues who claim the Government does make mistakes, a number of those individuals went back to combat. It must be a very difficult situation to explain to somebody who’s lost a loved one how that person got killed, not by an individual before we had a chance to apprehend him, but by somebody who was actually in U.S. custody and was let go.

Now, primarily planning to talk about *habeas*, I believe, today, and I don’t need to describe in detail how the DTA and MCA work with designating the United States Court of Appeals for the District of Columbia Circuit as the exclusive venue for dealing with appeals from a decision of CSRTs and military commissions.

Now, substantively, the judicial review timelines aside, is limited to essentially two questions: whether or not a given CSRT or military commission operated consistent with the rules and standards adopted by it, and also whether or not a CSRT or military commission reached a decision that “is consistent with the Constitution and laws of the United States.”

Now, this review has been derided, I would say, as being austere and inadequate; in particular, because it allegedly does not grapple with the facts. I think it is a misreading of the statute and applicable case law. The scope of judicial review, in my opinion, is sufficient not only for noncitizens held abroad, but is constitutionally sufficient for U.S. citizens themselves. The fact that the review does not commence at the District Court level and does not follow,

in all the particulars, the existing Federal statutory *habeas* procedures codified at 28 U.S.C. 2241, is constitutionally unexceptional.

Contrary to our critics' assertions that these procedures are deficient because they don't allow for review of factual issues, I believe that the scope of *habeas* review provided by DTA's MCA is not limited to merely reviewing the legality of procedures. A detainee should be able to claim that he is, in fact, not an enemy combatant, that he's an innocent civilian, a shepherd, if you will, or an aid worker, and that the relevant factual record of a CSRT military commission would be judicially reviewable. Indeed, there is nothing particularly noble about it. This is exactly the same type of review, but not to saboteurs, of whom at least one was a U.S. citizen, in *Ex Parte Quirin*, received before the United States Supreme Court, at least for people who think that was a long time ago. That is still a good case. That case was referred to in approval in Supreme Court's opinion in *Hamdi v. Rumsfeld*. Of course, recently the D.C. Circuit upheld the constitutionality of the MCA against attack by the detainees who were asserting pre-existing claims in *Boumediene v. Bush*.

Now, I know predicting what the Supreme Court is going to do is chancy business, but, with all respect to my good colleague Professor Katyal, to me the fact that six Supreme Court Justices, including two Justices, Stevens and Kennedy, who were in the majority in the recent *Hamdan* decision, struck down the pre-MCA version of military commissions, let stand the D.C. Circuit's *Boumediene* decision and refused to consider the facial challenge to the MCA, is highly significant. In my view, it certainly casts substantial doubt on the critics' contention that MCA is palpably unconstitutional.

Now, we're not going to get, at least now, in the detailed discussion about the procedures used by CSRTs and military commissions. They've been much criticized. But I would challenge my critics, and others who criticize those procedures, to look at the facts.

Facts, as reflected in state practice of other countries, to comment on tribunals convened under Article 5 of Geneva III, to show this committee, or anybody else for that matter, how these other historical precedents implemented by countries like Britain and Canada are more plentiful or more robust in their procedures than CSRT, because, with all due respect, the answer is they are not. The only appropriate point of reference for assessing the sufficiency of procedures used by CSRTs and military commissions is not our civilian criminal justice system, with all due respect, but their historical international counterparts. I'm going to repeat myself to say, you get a lot more due process in CSRT and military commission that you've gotten either in Article 5 tribunals convened under Geneva III or in World-War-II-style military commissions.

Let me just briefly make a couple of points reflecting the discussion that went on before.

I understand that we're not popular in the world. I don't disagree with some of the opinion polls that have been cited. With all due respect, having looked at the subject carefully, having written about it, having engaged with a lot of our European friends and colleagues in debates, I'm afraid that even if we close Guantanamo tomorrow, even if we were to deploy the criminal justice system as

the exclusive avenue for dealing with enemy combatants, that would not vitiate the problem. Simply put, there is a huge doctrinal, philosophical gulf between us and most of our allies on the issue of the laws of war. It's a very complicated subject. But, to me, it is not a fair proposition that if we were to close Guantanamo or move the trials here, that would fundamentally change the equation. I could be wrong on that.

Two other points, briefly.

On the whole issue of, why do we need a second-tier justice system? Why shouldn't we use at least courts-martial? I would submit to you that the way a society treats a given class of problem is not only driven by fairness to the accused—it is that, of course—but it also tells us a great deal about how society views a particular type of problem. If you look at this historically, the reason to use military commissions and not courts-martial are not just utilitarian, it's not a question where it's easier to convict somebody; there's enormous and fundamental differences between unlawful combatants and lawful combatants. Unlawful combatants being the enemy of humanity, committing disproportion of war crimes and just being absolutely bad people. These are institutions and practices that ought to be delegitimized and suppressed, and that has always been the case, historically. One of a few remaining ways, especially because we do give a lot more due process to unlawful enemy combatants than in the past, and properly so, the only way in which those differences are still manifest, are still palpable, is trying them by fair procedures under a different system called military commissions, and not by courts-martial.

Last, but not least, with all due respect to my colleague, Professor Denbeaux, under the laws of war, the fact that you are a cook absolutely makes you a combatant subject to detention. So, in his case, if you have somebody who admitted to being an assistant cook for a particular Taliban detachment, given the fact that Taliban is an unlawful combatant entity, I'm very sorry to say that individual is an unlawful combatant. No other particular review as to his motivations, as to whether or not he was pressed, or how much he did, need not be done. You do not need to fire guns, or machine guns, you do not need to charge the enemy trenches to be considered an enemy combatant. A person who repairs vehicles for a military unit is an enemy combatant. So is the cook. So is the person who processes payroll. This is a fundamental difference between the military system that looks at individuals in that context and the civilian justice system.

Thank you. I'm looking forward to the questions from the committee.

[The prepared statement of Mr. Rivkin follows:]

PREPARED STATEMENT BY DAVID B. RIVKIN, JR.

I would like to thank the Senate Committee on Armed Services for inviting me to share my views on the Military Commissions Act (MCA) of 2006, the Detainee Treatment Act (DTA), and the procedures used by the Department of Defense (DOD) to determine detainees' status under the international Law of Armed Conflict (LOAC) and try some of them for war crimes.

Fundamentally, I believe that the MCA and DTA comport with the United States Constitution and more than meet the applicable LOAC standards. In this regard, the MCA and DTA procedures are streamlined, yet fair. They provide detainees with judicial process that is more than sufficient to enable them to mount a meaningful

challenge at the appropriate time to their detention. Meanwhile, the actual procedures currently used by the DOD to determine the status of detainees—Combatants Status Review Tribunals (CSRTs)—and to try them for war crimes—Military Commissions—are constitutionally sufficient and give to the detainees far more due process than they have had under any other “competent tribunals” convened, for example, under Article 5 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva III) or any Military Commission in history.

The fact that DOD also holds on an annual basis Administrative Review Boards, which focus primarily on the question of whether detainees held in U.S. custody pose continued danger and whether viable alternatives exist to their continued detention further underscores the extent to which the U.S. has opted to provide captured enemy combatants with additional rights, that go above and beyond those required under LOAC or the Constitution. To underscore this point, since the notion of enabling captured enemy combatants to be released “on parole” fell out of practice by the late 19th century, the current U.S. practice of releasing captured enemy combatants before the end of hostilities is historically unprecedented. Likewise, the historic practice has been to punish harshly captured individuals, determined to be unlawful enemy combatants, largely irrespective of the extent to which they personally were involved in any specific combat activities, primarily because unlawful combatancy was viewed a supremely dangerous phenomenon, to be suppressed and delegitimized. By contrast, the current U.S. practice has been not to prosecute at all, at least so far, the vast majority of individuals determined to be unlawful enemy combatants. The fact that this procedural and substantive generosity has not been widely hailed and appears not to even been noticed by most of the critics is unfortunate.

The MCA and DTA make the United States Court of Appeals for the District of Columbia Circuit the exclusive venue for handling any legal challenges by detainees and limits the Court to exercising jurisdiction until after a CSRT or Military Commission has exercised a final decision. Substantively, judicial review is limited essentially to two questions: whether the CSRT or Military Commission operated consistent with the rules and standards adopted by it, and whether the CSRT or Military Commission reached a decision that is “consistent with the Constitution and laws of the United States.”

In my view, this scope of judicial review is not only sufficient for non-citizens held abroad, but is constitutionally sufficient for United States citizens themselves. In this regard, the fact that the review does not commence at the district court level, and does not follow in all particulars the existing Federal statutory *habeas* procedures codified at 28 U.S.C. § 2241, is constitutionally unexceptional. This proposition is well-established by the existing Supreme Court precedence. For example, in *Suain v. Pressley*, 430 U.S. 372, 381 (1977), the Supreme Court stated that “the substitution [for a traditional *habeas* procedure] 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*.” More recently, the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), that this *habeas*-type review could be had in a United States court of appeals. Hence, the DTA and MCA set up a perfectly permissible form of statutorily-conferred *habeas* review by the D.C. Circuit.

Also, contrary to the critics’ assertions that DTA- and MCA-prescribed procedures are deficient because they do not allow for the judicial review of factual issues, I believe that the scope of *habeas corpus* review provided by the DTA and MCA is not limited to reviewing merely the legality of CSRT or Military Commission procedures. Under *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), it is unconstitutional to bring civilians before Military Commissions or to hold them as enemy combatants if civilian Article III courts are open and functioning. Accordingly, a detainee should be able to claim that he is not, in fact, an enemy combatant, and the relevant factual record of the CSRT or the Military Commission would be judicially reviewable. In this regard, the DTA and MCA language clearly allows such a review and the D.C. Circuit will have access to the entire factual record, generated by a CSRT or Military Commission, including the classified portions thereof.

Indeed, this is the same type of review given to Nazi saboteurs (of whom at least one was a U.S. citizen) in *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Supreme Court rejected their contention that they were civilians, not subject to military jurisdiction. It is also supported by the Supreme Court’s recent opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which emphasizes that the Government needs to provide “credible evidence” that the detainee is, in fact, an enemy combatant, and the burden then shifts to the detainee to offer more persuasive evidence that he is not an enemy combatant. To be sure, *habeas* review of this factual determination should not be de novo, but instead should be based on the Supreme Court’s “credible

evidence” standard. This concept comports both with the U.S. Constitution and LOAC.

Recently, the D.C. Circuit upheld the constitutionality of the MCA against attack by detainees, who were asserting preexisting *habeas* claims in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. 2007), cert. den’d, 547 U.S. — (2007). These petitioners argued that the MCA/DTA statutory judicial review scheme violates the Constitution’s “Suspension Clause,” which states that “[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, §9, cl. 2. In the case of the *Boumediene* petitioners, it is my understanding that these detainees have all had their status reviewed and confirmed by CSRTs, and now have separate *habeas corpus* actions in the D.C. Circuit challenging their detention.

Significantly, the Supreme Court refused to review the D.C. Circuit’s decision. Writing separately in support of the Supreme Court’s denial of certiorari, Justices Stevens and Kennedy suggested that the MCA and DTA should be interpreted as extending statutory *habeas corpus* jurisdiction to persons if “the Government has unreasonably delayed proceedings under the [DTA].” This is a pretty aggressive statutory interpretation and is not the one easily supportable by the plain meaning of the MCA. In this regard, section 7 of the MCA clearly withdrew Federal court jurisdiction over *habeas corpus* claims of detainees awaiting a status determination, and emphasized that all challenges to such determinations must be made in the D.C. Circuit, according to the DTA’s terms.

In any case, the fact that at least six Supreme Court Justices, including two Justices—Stevens and Kennedy—who were in the majority in the recent *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) decision, which struck down the pre-MCA version of Military Commissions, let stand the D.C. Circuit’s *Boumediene v. Bush* decision, and refused to consider a facial challenge to the constitutionality of the MCA is highly significant. It certainly casts substantial doubt on the critics’ contention that MCA is palpably unconstitutional.

I would also like to address briefly the procedures used by CSRTs and Military Commissions. While many have criticized the procedures used by these bodies, the practical realities of the situation support the current DTA and MCA procedures. The fact is that, throughout history, it has been difficult to distinguish between irregular combatants and civilians. That is part of the reason why Taliban and al Qaeda members do not make themselves known. True to form, nearly all detainees claim to be shepherds, students, pilgrims, or relief workers, collude amongst themselves to support their stories, and name persons thousands of miles away who can “verify” that they are not enemy combatants.

Accordingly, the only appropriate point of reference for assessing the procedures used by the CSRTs and Military Commissions is their historical and international counterparts—Tribunals organized under Article 5 of the Geneva III to identify enemy combatants, and the Military Commissions used by the United States in, and in the aftermath of, World War II. Here, it is undisputed that the CSRTs and Military Commissions offer far more process to the Guantanamo detainees than either Geneva III’s Article 5 Tribunals or World War II-style Military Commissions.

To be sure, if you compare the CSRTs and Military Commissions to civilian courts, they undoubtedly feature more austere procedures. However, the CSRTs and Military Commissions are meant to address a different military reality, and it does disservice both to our legal traditions and to the “rule of law” to pretend otherwise. The simple fact is that up to today, our legal institutions have recognized the propriety of using specialized military bodies in time of war, where civilian courts lack competence. I expect this to continue.

Finally, I would like to comment briefly on one aspect of S. 576, the “Restoring the Constitution Act of 2007.” While I believe that the act is neither desirable as a matter of policy—I would certainly take exception to its provisions requiring broad disclosure of intelligence sources, methods and activities—nor necessary as a matter of law, the act’s repeal of the MCA and DTA-related revisions to 28 U.S.C. §2241, the Federal *habeas corpus* statute, is particularly ill-advised at this time. This is because all, or nearly all, Guantanamo-based detainees currently have *habeas corpus* petitions challenging their status determination pending in the D.C. Circuit. These petitions were stayed pending the resolution of the pre-existing *habeas* petitions, which were dismissed in *Boumediene*. As a result, the D.C. Circuit will begin reviewing CSRT decisions shortly, and the detainees will have received judicial review of their determinations in the relatively near future, with Supreme Court review also almost certainly forthcoming.

The Restoring the Constitution Act would almost certainly short-circuit this process, very likely leading to vexatious litigation about what is being reviewed in what *habeas corpus* petition, the effects of preclusion doctrines on subsequent *habeas* peti-

tions, and the like. I would respectfully urge the Senate not to enact this bill, but instead wait for final judicial resolution of pending *habeas corpus* petitions before acting further.

Chairman LEVIN. Thank you very much, Mr. Rivkin.

Let's try an 8-minute round for round one.

Mr. Smith, you indicated that we should maintain the CSRT system, but we should reform it. Is that correct?

Mr. SMITH. That's correct.

Chairman LEVIN. What reforms do you recommend, and why?

Mr. SMITH. Mr. Chairman, first of all, I want to be very clear, I am in favor of restoring the right to *habeas corpus*; that is to say, as you said earlier, repealing that section of the MCA that denied the courts jurisdiction to hear *habeas* cases. But I believe the CSRTs can fulfill a vital role. I believe they are not currently doing so, because the procedures are inadequate, but I believe that under Article 5 of Geneva III, there is an important role to be held by—or to be fulfilled by those review tribunals.

Insofar as increasing their effectiveness, I agree with much of what has been said.

Chairman LEVIN. By whom?

Mr. SMITH. By my colleagues here who favor giving them an attorney, giving them some degree of access to the evidence against them. We could have cleared attorneys on their behalf able to see the evidence that the Government has. It seems to me that's an important step. The detainees themselves, in many instances, probably should not be entitled to see it, but I think their lawyers ought to see it.

Then, second, I think there ought to be meaningful review in the Court of Appeals. The current review is so constrained that it reviews only the issue of whether or not the tribunal stayed within the four corners of their authority. That's so limited that it's not meaningful. So, I would give them much stronger review, but I would have, ultimately, the right to file *habeas* once the CSRTs have been exhausted.

Chairman LEVIN. What other changes would you make in the CSRT law? For instance, would you say that if witnesses are available, you should not use hearsay testimony? I think that's in the Dodd bill, although I'm not positive.

Mr. SMITH. I'm not sure I would go quite that far, Mr. Chairman. This is something less than a full-scale *habeas*. It's designed to be a sort of first rough-cut justice to say, do we have the right person? I do think there's clearly a difference between those individuals whom we capture and hold in Iraq or Afghanistan. I think we're not talking about those individuals.

Chairman LEVIN. We're not.

Mr. SMITH. We're talking about those individuals who, for whatever reason, we believe are a sufficient threat to kill Americans that they should be detained specially at Guantanamo, or some other place, if we close Guantanamo. The concern I have is that under the current scheme, as Senator Leahy said, they can be locked up forever. This is a war with a very uncertain end. In that sense, it's different than World War II, it's different than Korea, where we did have some end in sight.

Chairman LEVIN. You want to preserve CSRTs, though, and I want to just go into what other changes would you make, and why, in the law, beside the one you say. First, the current representative, you say—or, I assume you believe—doesn't fulfill a proper function, because that representative doesn't have any fiduciary duty to the detainee; as a matter of fact, could be interrogated by the Government as to what the detainee told him. So, you would recommend a lawyer at those hearings, those detainee hearings. Second, as I understand it, he would have some access to the evidence, at least by a cleared lawyer, to know what it is that the evidence is that is being used by the Government to decide whether or not that person should be held. Are there any other changes you'd make?

Mr. SMITH. Yes, Mr. Chairman. I'd change two other things. First, I'd change the presumption of guilt. At the moment, the burden is on the detainee to prove that he should not be held; the Government is entitled to a presumption that he's legitimately a combatant. I would change that around and put the burden on the Government to prove that he's being held on a legitimate basis.

The other thing is, I would not permit the use of any evidence obtained by coercion and torture, and I would permit the detainee rights to be able to get at whether any evidence was obtained by coercion or torture.

Chairman LEVIN. Thank you.

Mr. Dell'Orto, in your opening statement you say that the CSRT recorder is required to search Government files, "for evidence suggesting the detainee is not an enemy combatant, and to present such evidence to the tribunal." It is our understanding the recorder receives a package of evidence from the Office for the Administrative Review of the Detention of Enemy Combatants in Washington, and does not have access to any other Government files. Am I right?

Mr. DELL'ORTO. I think you're generally right, Mr. Chairman, but I do think he can have access to the other materials if he so desires, and there are people on the other side who are seeking, as they review the information, certainly are obligated to take a look for anything that might indicate that the detainee is not an unlawful combatant.

Chairman LEVIN. Am I correct that the recorder is given a packet of information and that is where he reviews the evidence from?

Mr. DELL'ORTO. Yes.

Chairman LEVIN. Do you disagree, Mr. Dell'Orto, with the accuracy of the data that Professor Denbeaux has presented on the CSRT process, particularly the two items that he mentioned here this morning, that 66 percent of the people who are being held were not captured in Afghanistan? Do you have any reason to disagree with that?

Mr. DELL'ORTO. I've read the reports. I don't have firsthand knowledge of information that would enable me to either confirm or rebut those. I do know that certain people are undergoing reviews of the records that we have to establish whether that information, that data, is correct. On certain aspects of what I've read in the report, based on information I do know, I would say that I disagree.

Chairman LEVIN. Would you get, for the committee, any specific disagreements that you have factually, with the reports of Mr. Denbeaux?

I don't mean right now, but for the record.

Mr. DELL'ORTO. I understand. Within a relatively short period of time, although I think one of the reviews is going to take us about another 30 days.

[The information referred to follows:]

The Department of Defense asked the Combating Terrorism Center (CTC) at West Point to conduct its own analysis of the documents used in the Seton Hall report titled "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data." The CTC posted its report on July 25, 2007; it can be found at <http://www.ctc.usma.edu/CSRT/CTC-CSRT-Report-072407.pdf> (see Annex A). [Information retained in committee files.]

Chairman LEVIN. That's fine. That would be very helpful.

Mr. DELL'ORTO. Sure.

Chairman LEVIN. If you'd send Mr. Denbeaux a copy of your review, we'd appreciate it.

Mr. DELL'ORTO. At least one of them will be classified, so I'll have to provide that only to the committee, Mr. Chairman.

Chairman LEVIN. All right. But at least the unclassified part, if you'd share that with Mr. Denbeaux.

The definition of "enemy combatant" is a big issue here. The District Court for the District of Columbia reviewed the administration's position on the scope of the term "enemy combatant," and the counsel for the Government argued that the executive branch has the authority to detain the following individuals until the conclusion of the war on terrorism: the first example was a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but really is a front to finance al Qaeda activities." Apparently, the counsel for the Government said, yes, that that little old lady, without any requirement that there be knowing and willful support for al Qaeda, simply writing checks to a person who the lady believes is a harmless person, is just a charity that helps orphans. Do you agree with that answer?

Mr. DELL'ORTO. I guess I would want to see the question in a larger context. I would say that, as we in the DOD make our assessments of unlawful enemy combatants in our operational scheme, we are probably more conservative than that view in making those sorts of assessments.

Chairman LEVIN. Do you require any knowledge or intent on the part of the person, that little old lady?

Mr. DELL'ORTO. Generally, I think, for our purposes, when we are engaged in reviews of targeting capture decisions, we probably would require a little bit more in the way of *indicia*. But I wouldn't say that that's a wrong assertion, but I do know that we apply a more conservative approach toward that particular assessment.

Chairman LEVIN. I would hope so, but you would take the position that you have the right to hold somebody who writes those checks, who has no knowledge or intent that that charity is, in fact, a front to finance al Qaeda—would you agree with that answer, that you have the right to do it? Put aside your practice for a moment.

Mr. DELL'ORTO. On the extreme end of that sort of an assessment, I'd want to be able to consider it a little bit more, Mr. Chairman.

Chairman LEVIN. When you say "consider it more," does that mean that you have doubts about that answer? Give us a little more than "consider it more."

Mr. DELL'ORTO. Again, I think that's a bare-bones hypothetical. I'd want to know more about the case—how frequent was the practice? What was the organization? Where was it listed? Where was it identified? We talk about people with knowledge. There's more than just what they actually know, but what they probably should know is a factor to be taken into consideration.

Chairman LEVIN. But the counsel for the Government did not say that he needed, or she needed, to know more. They knew enough. It's not enough for you. Is that fair to say?

Mr. DELL'ORTO. I would say I'd want to know more, yes, Mr. Chairman.

Chairman LEVIN. Senator Warner?

Senator WARNER. Thank you, Mr. Chairman.

Basically, I still strongly adhere to my earlier comments that we should let the sequence of actions by the three components of our Government to run their course. Nevertheless, I was greatly taken with Mr. Smith's thoughts about certain revisions that he would recommend, in response to Senator Levin's question, to the CSRT and ARB processes.

Given that I'm not advocating any support for a change of law at this time, are there some thoughts within DOD, and the DOJ maybe, to take into consideration the views that we've heard and that you and others are advocating have been—available to you for some time, to change some of the procedures now?

Mr. DELL'ORTO. Senator Warner, I have to admit, I don't quite understand Mr. Smith's approach to both reinstating the statutory *habeas* access and the CSRT. To have the dual process doesn't seem to make sense to me.

Again, I think, at this point, with the MCA, a relatively recent legislative initiative and its signing into law, and our grappling with all that came from that with respect to, in particular, the military commissions themselves. There may be other discussions underway, but I'm not aware of any—as to whether we should, at this point, undertake a revision, in any way, of the CSRT process.

Senator WARNER. Then, why don't you go back and assess, from your other colleagues in DOJ, the views, and just advise the committee in your written response to the record?

Mr. DELL'ORTO. Okay.

Senator WARNER. Thank you.

Mr. DELL'ORTO. We will.

[The information referred to follows:]

The CSRT process as it stands is a fair, rigorous, and fact-based administrative process that is supported by a U.S. Government interagency coordination process designed to evaluate enemy combatant status. At this time, we do not believe revision of that process is necessary.

Senator WARNER. Mr. Smith, you've had a long and distinguished career regarding security issues in this country, and I thought you spoke very boldly about your views with regard to our intelligence-

gathering and the necessity to have certain areas remain in effect simply for national security reasons in this time of war. But what about the provisions in S. 576 about the expanded discovery rights? Do you have any views on the implications of those expanded provisions as it would affect our security?

Mr. SMITH. I do, Senator Warner. I think that the expanded right of defense counsel to get clearances—and, by the way, one of the things I suggest in my statement is that the defense counsel—S. 576 permits civilian defense counsel to be appointed—I think either civilian or military defense counsel should be granted clearances, if they are eligible, and I think they should be permitted to see the underlying evidence that would be used against a detainee. I've been involved in a number of litigations in criminal matters over the years, where defense counsel have gotten access to highly classified, codeword information, and they've respected it, and not being able to share it with their client, the defendant, and that works. It requires a lot of effort on the part of the court, but it does work. I think it can be done. I think it would not necessarily be harmful to the Nation's security.

Senator WARNER. But S. 576 would authorize a military judge, upon motion from defense counsel, to disclose the intelligence sources, methods, or activities by which the United States obtained an out-of-court statement, intended to be introduced at trial, that the military judge determines that the intelligence sources, methods, and activities might affect the weight to be given an out-of-court statement. Now, seems to me we're moving very close to a fine line of impairing our intelligence-collecting, if that sort of situation prevails.

Mr. SMITH. I'd be very troubled if it did, Senator Warner. My experience with both—I've not tried a court-martial in decades, but my experience with military judges, and certainly civilian judges, is, they make good decisions. As I strike the balance, I would be prepared to give defense counsel access to that kind of information. To make it clear, I would not be in favor of giving it to the detainees. But I believe our system works quite well with responsible counsel, and there are sometimes irresponsible counsel. But I think responsible counsel can be trusted.

Senator WARNER. History shows that while we have a great deal of confidence in our judiciary system, each day courts are reversing the findings and directions of lower courts, and such a finding and direction by a lower court to release that evidence, it's out and gone by the time the review panel says it was injudicious to do so. That's what concerns me.

We go, then, to Mr. Rivkin. If *habeas corpus* jurisdiction were restored for alien unlawful enemy combatants, should *habeas corpus* be reviewed to the fundamental question of the determination of enemy combatant status, or should it extend to all conditions of capture and confinement?

Mr. RIVKIN. Senator Warner, I think it should be the latter. One of the things that we have not touched upon so far, that it is not—repeat, not—just a question of testing the adequacy of the Government's determination that somebody's an enemy combatant. I happen to think that, whether you call it *habeas*, whether you call it judicial review of a Government's decision, it's very important, and

the way in which it's done in the DTA and MCA is entirely appropriate, and consistent, as a matter of fact, with Supreme Court teachings on that.

But your question goes to another issue. Believe it or not, we now have people who have sued the Government under so-called Bivens-type actions—this is a famous early-1970s case styled, if I'm not mistaken, Bivens against 26 Federal agents—which basically goes to the deprivation of an ability to recover, if you will, of deprivations of individual civil rights in the context of badly handled apprehension. I happen to actually support Bivens-type jurisprudence in its proper place. But do we really want to have Bivens-type actions brought against aliens for apprehensions conducted overseas in a combat environment? One of the reasons, of course, to have Bivens-style actions, just like Miranda-type jurisprudence, is because you want to give clear standards of behavior, inculcate better behavior on the part of police and Government agents operating in a law enforcement context.

Senator Warner, we, as a society, made a decision, in the last 30 or 40 years, to basically place such enormous importance on inculcating those good standards, that we created rules that allow guilty parties go free. But that is in the domestic law enforcement environment, where the Government enjoys the monopoly in force, and where the rules are fairly straightforward. To me, unprecedented would be a charitable way of putting it—to allow people captured in Pakistan—and this is not a hypothetical—they haven't gotten very far, so far, but we have Bivens-type actions pending, brought by lawyers, very good and aggressive lawyers, against Government agents, presumably military and intelligence agents, for activities conducted outside the United States. I'm not even talking about interrogation here, and levels of coercion, but just how the person was apprehended. Do you really want to tell our soldiers whether you can throw somebody to the ground as you arrest them in a combat environment, what's the level of force to exert?

So, the problem we have, quite frankly—and this is the problem I mentioned earlier, about the fundamental differences between us and Europeans. A fundamental difference in this country—critics don't understand the difference between legal approaches appropriate for wartime context and the criminal justice system.

Senator WARNER. I think that's important. We have to fight the war.

Could we just ask Mr. Denbeaux—I was very taken by your reference to your family, and served with distinction in a great chapter of history that I am old enough to remember quite vividly, myself. I thought, given your objectivity, that you might wish to comment on my views that—let's let the court system run its course before Congress tries to jump in and rewrite this law.

Mr. DENBEAUX. Okay. With total and complete respect, as I listened to your statement, what dawned on me was, you think it's been done in an orderly way. My own view of the last 5½ years is of disorder and tardiness. One of my problems is, it's one thing to set up a system and have it work from the beginning, quickly; it's something else to try to say, after 5½ years, let's now let the process work orderly, as it keeps getting changed right in front of everybody's eyes.

My assistant cook, who Mr. Rivkin thinks is, and should be, an enemy combatant, has been waiting for 5½ years for somebody to review it, his decision and others—and I think my problem is that I believe all the evidence shows our courts can handle these quickly. I don't think most of these cases are very hard. When the Government says they were shooting at American soldiers, I don't think there's a Federal District Court in the United States that's going to say no.

I think, in answer to the question about what should be done, I actually am somewhat conservative on the doctrine of *habeas corpus* in the Federal courts. I think they really can handle it, and we're spending a lot of time trying to find any way but having *habeas corpus*.

I don't care what way we come up with. If you had an impartial tribunal—and my big problem is, I don't see how to design that now in a process that's been done over and over and over again, and come to the same result.

Senator WARNER. Thank you. My time is up.

Mr. DENBEAUX. I apologize if I went too long.

Chairman LEVIN. Thank you.

Thank you, Senator Warner.

Senator Akaka.

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

I want to add my welcome to Senator Leahy, who preceded you, and also welcome our panel members who are joining us today. I want to tell you that what you are contributing here will be helpful to the committee.

I think that the passing the MCA, Mr. Chairman, during the past session of Congress, has left me, and many of my colleagues, feeling unsatisfied with the final law. While it may have been a good start, I think it is clear that we still have more work to do to ensure that these military commissions are conducted in a manner that upholds the values, as was mentioned frequently here today, on which our great democracy was founded.

After the Supreme Court's decision in the *Hamdi* case in 2004, Mr. Dell'Orto, the DOD established CSRTs with the stated objective of providing Guantanamo detainees, "the opportunity to contest designation as an enemy combatant." However, it is clear from the CSRT procedures enacted by the military that the detainee really does not have an opportunity to seriously contest his designation as an unlawful enemy combatant.

My question to you is, why is the detainee not allowed to have any advocate or lawyer to represent him? I note that he is assigned a personal representative, who specifically does not represent him in the proceedings, which makes a title of personal representative a misnomer, to say the least. So, why is a detainee not allowed to have any advocate or lawyer to represent him?

Mr. DELL'ORTO. Senator Akaka, let me talk about how you get CSRTs, as derived from other recognized processes for an individual to contest his designation as a combatant.

The standard in our Geneva conflicts, which are conflicts involving lawful combatants, through that shorthand way, are processes generally laid out in Army Regulation 190–8, which is a recognized process—the so-called Article 5 tribunal. That is the mechanism by

which an individual, picked up on a more normal conventional battlefield, is assessed for whether he should be detained as an enemy combatant. If you compare the 190–8 process to the CSRTs, you find that there is no aspect of the CSRT process that provides less in the way of rights to a combatant than 190–8 does. In many ways, the CSRT process provides more.

For instance, you asked about a personal representative. One thing I want to correct from what was stated earlier: The personal representative, currently, is cleared to see all of the classified information. He can see all of it. He cannot show it to the person he is assisting, but he is cleared to see all of it. So, he does see all of that information. But, in a 190–8 setting, a conventional conflict, Geneva-governed conflict, the individual who is picked up on the battlefield has no personal representative. It's him, alone.

So, my response is that if we look at the CSRT process and say, "Well, why doesn't he have this? Why doesn't he have that?" My response is, "He already has more than we give lawful combatants on a conventional battlefield." I find it remarkable that we are criticized for providing greater rights to an unlawful enemy combatant in this setting than we do to a lawful combatant in a Geneva-governed more conventional conflict.

Then, the question is, how far do you take that? Do we take this to the point where it's a full-blown criminal trial? I think that's where you're headed if we start getting counsel involved, an adversary proceeding, and things of that nature. We are rapidly moving this toward a much more formalized and criminal-justice-like setting.

Senator AKAKA. Mr. Smith, in your statement, you stated that we need further legislation to supplement the MCA and the DTA. You indicated, among other things, that you would add the terms, "unlawful enemy combatant" and "lawful enemy combatant." You stated that these are new terms and new concepts in the law of war, and that they do not have broad international acceptance. In your opinion, why do we need two different categories of enemy? What might this mean to DOD of the treatment of our troops who are captured by the enemy and determined to be unlawful combatants in the eyes of the enemy?

Mr. SMITH. Senator, I'm very pleased you asked that question. These are new terms in the law of war. I believe that we should talk to our allies about whether or not we wish to make that distinction. I am not persuaded that, in the end, it's really a good idea. I harken back to the mid-1970s, when there was a series of revisions to the Geneva Conventions in the mid-1970s, and we were struggling with things like non-international conflicts, and the issue began to emerge about, what are the different types of combatants? There are a lot of governments—the British, for example, were worried about whether or not the IRA would be considered to be lawful combatants, and somehow entitled to Geneva Convention treatments. I recognize that as a problem.

But I'm a bit of a purist on this matter. I believe that anybody the United States picks up on the battlefield should be treated by the Geneva Conventions. I'm troubled by the initial distinctions made by this administration to try to say that there were some people that had no rights at all under the Geneva Conventions.

We've migrated a little bit in the right direction, but I would like to see us undertake a thoughtful review, with our allies, with respect to the applicability of the Geneva Conventions to these new wars that we face. I'm not persuaded, at the end of the day, that it is a good idea to have these two categories, because, as you rightly point out, it invites different treatment, and I'm troubled by that.

Senator AKAKA. Do you know of any other countries that differentiate between these two categories of enemies?

Mr. SMITH. I do not.

Senator AKAKA. Is there potential that this tiered concept of different treatments for different categories of criminals to make its way into other parts of our judicial process?

Mr. SMITH. I certainly hope not, but you do raise a good question about that. I know that some persons in this country have been worried about the manner in which we reacted to September 11, including using things like the material witness statute to hold people as witnesses. Some of the civil rights community have been concerned about using immigration laws, for example, to detain persons for reasons unrelated to immigration. So, we need to be very careful when we begin to make these kinds of distinctions, and I think you're right to raise that question.

Senator AKAKA. Mr. Chairman, to follow up, Admiral Hutson, in your opinion, is it appropriate to have separate designations for lawful and unlawful enemy combatants? What is the basis for your answer?

Admiral HUTSON. That question has caused us a lot of confusion and set us off in some difficult waters, I think. The original distinction that people struggled with, I think, was between POWs and civilians. In the early stages of this war, that was the distinction that people were trying to make. That somehow has morphed into this other distinction, which I think has caused a lot of mischief for us. POWs is a very clear term—there are four criteria—you wear the uniform, you bear your arms openly, and so forth. That distinction is easy to make. When you start slicing it this other way, and particularly with definitions that are as broad and as vague as they are in section 948 of the MCA, where at one point, one section simply says, "You are an unlawful enemy combatant if you have been determined to be an unlawful enemy combatant." Does that make any sense?

So, I think that that has been one of the problems that we've had from the very beginning, is drawing these distinctions.

Let me say one other thing about the CSRTs, because I've been sitting on the edge of my seat about wanting to say this. The reason that the CSRTs are fatally and fundamentally flawed and can never be fixed, in spite of what my friend Dan Dell'Orto says, is that they are significantly different from the Article 5—Geneva Convention Article 5 and Army Regulation 190–8 tribunals, in the sense that they are on the other side of the face of the Earth, and they are months, if not years, removed from the proximity of the capture. There is nobody there—no witnesses, no evidence, no understanding of the nature of the capture.

The other reason that they cannot be fixed is because the President has said, "they're the worst of the worst," Secretary Rumsfeld

said, “they’re all terrorists, so different rules apply. They’re all killers.” The list goes on. So in the military, we have a very clear understanding of something called command influence. This is kind of the first cousin to that. It’s very difficult, impossible—impossible—for officers in Guantanamo, after everybody in their entire chain of command has said, “They’re the worst of the worst, that’s why they’re here,” to say, “no, Mr. President, no, Mr. Secretary of Defense, no, Mr. Everybody, you’re wrong. We’ve actually misapprehended them.” That is asking too much of those individuals, and that is why. It’s not the rights, it’s not the representatives, it’s not the access to evidence. That’s the reason you cannot fix the CSRTs.

Senator AKAKA. Thank you.

Mr. DELL’ORTO. Senator Akaka, if I might just respond. Again, my good friend Admiral Hutson, and I only retired as a colonel, so I have to be very deferential. [Laughter.]

Chairman LEVIN. That’s his point, chain of command. [Laughter.]

Mr. DELL’ORTO. In point of fact, it’s not impossible, because we have had 38 individuals go through the CSRT process who were determined to be no longer enemy combatants, and released to their countries without further conditions on their freedom once they got back.

Mr. RIVKIN. If I may weigh in, for 10 seconds, on the unlawful-versus-lawful-combatant point?

Senator AKAKA. Right.

Mr. RIVKIN. All due respect to my colleagues, they cannot be more wrong. This distinction is centuries old. That distinction is reflected in dozens of military manuals, in dozens of court decisions, including the Supreme Court decisions in this country. That distinction is fundamental to the laws and customs of war, because the whole purpose of laws and customs of war is to inculcate the respect for the law-compliant approaches to combat and to deter the noncompliant approaches. So, it doesn’t mean that unlawful combatants have no rights, but the notion that there’s no distinction between the two, this is made out by this administration, is absolutely factually untrue.

Senator AKAKA. I really appreciate your responses.

Chairman LEVIN. Thank you, Senator Akaka.

Senator SESSIONS.

Senator SESSIONS. Thank you.

First, I would just like to make a brief response, Mr. Chairman, to your opening statement, in which you referred to disapproval of Guantanamo, that people think that it’s not being handled well. You cite a DOD review about abusive treatment, but, as I recall that review, the reviewer, after intensive work, found that not a single technique—Mr. Dell’Orto, see if I’m correct about this—in itself, was invalid, but utilized all together, could amount to abusive conduct. Is that correct?

Mr. DELL’ORTO. That’s my recollection, Senator Sessions.

Senator SESSIONS. So, I just want to say, first of all, there’s no torture going on there, is it, Mr. Dell’Orto? Hasn’t the President explicitly stated that should not occur?

Mr. DELL’ORTO. Correct.

Senator SESSIONS. So, I want to just say that. Now, I think we have had over 30 hearings on these issues, and I think we’ve cre-

ated in the world an impression that we are torturing and abusing prisoners in Guantanamo, systematically, and that is just not so. I've been there several times, and personally seen Guantanamo.

Now, with regard to the rules of war, Senator Akaka, in the *Ex Parte Quirin* case in World War II, a number of Nazi saboteurs entered this country. They didn't wear a uniform, they violated the rules of war. If they had been wearing a uniform and had attacked our country and were captured, could they have been executed, Mr. Rivkin?

Mr. RIVKIN. No, Senator Sessions, they would not.

Senator SESSIONS. They would have been held as POWs.

Mr. RIVKIN. Over duration of hostilities, unless they committed an individual violation of the laws of war.

Senator SESSIONS. But in this case, they didn't. They came in, not wearing uniforms, and they were tried by military tribunals, and several were executed. Isn't that correct?

Mr. RIVKIN. That is correct. They were tried in the DOJ building, and the case went to the Supreme Court.

The only thing I wanted to add is, there is some, perhaps, possible confusion, because you have terms like "unlawful belligerent," "unprivileged belligerent," but they all mean the same thing. Everybody understood what it means.

Senator SESSIONS. As you indicated, this was a treaty nations signed to encourage people to conduct war at a legitimate level, not to murder innocent women and children, not to behead people you capture, and things of that nature. If you do that, and you signed that treaty, and your soldiers do behave in accordance with the treaty, you're guaranteed certain protections when captured. They're not guaranteed to those who don't participate in that fashion.

With regard to the question that's been made several times about shooting at our soldiers, I've never said that. I'm not sure anybody's said that this morning. But the point about the people that are apprehended is, Mr. Denbeaux, if they're apprehended and detained, and you want to make it an element of proof that they shot at somebody, then you have to have a bunch of witnesses and a whole trial. Mr. Dell'Orto, had they been seen shooting, couldn't the soldier have killed them on the spot, if they've been able to?

Mr. DELL'ORTO. Yes, Senator.

Senator SESSIONS. That's the law of war. Now, if he captures the person rather than killing him, surely it's not incumbent on us to give this person a trial and bring soldiers off the battlefield, out of the command, bring commanders back to provide witnesses to say he was the one that was shooting. Surely, we can't do that, as a practical matter.

Mr. DELL'ORTO. We can't. If the purpose is to determine his status and to have a basis for detaining him, correct.

Senator SESSIONS. Now, with regard to all these people that have gone through Guantanamo, would you tell us if you can remember the numbers—they slip my mind—how many have actually gone there and how many have actually been released, to date?

Mr. DELL'ORTO. I'll give you rough numbers, Senator. I think we've processed about 760 individuals to Guantanamo, and about half of that number remain. I think we're on the order of some-

thing under 400 still there, maybe 380–390. So, about half of those who arrived have departed.

Senator SESSIONS. So, something is happening where they're getting reviews, and people are being released. But, as Mr. Rivkin said, can you give us better numbers on how many have been re-apprehended fighting against our American soldiers?

Mr. DELL'ORTO. The general number is just short of 30, I think, Senator.

Senator SESSIONS. I think that's remarkable, because I'm sure that if 30 have been captured, many more have returned to the war against us that have not been captured.

Mr. DELL'ORTO. Let me correct what I said. It's a combination of 30 we believe have either been captured or killed on the battlefield, so some of them have actually died on the battlefield.

Senator SESSIONS. Now, I know, Admiral Hutson and Mr. Smith, you talk about that this is a different kind of war. It is different in many ways. We have to frankly admit that. But, as I understand, Mr. Dell'Orto, the Leahy legislation that's proposed would apply to the 425,000 German prisoners that were held in the United States.

Mr. DELL'ORTO. I believe if we were to apply it to that scenario, it would.

Senator SESSIONS. So, they would all have a right to file a *habeas* petition. Now, a *habeas* petition is not a little thing. It requires, immediately, the magistrate to order the production of the prisoner before the court, and to conduct a hearing as to whether or not that person ought to be or has been properly charged and is legitimately being held. Isn't that correct?

Mr. DELL'ORTO. That's my general understanding, Senator.

Senator SESSIONS. This Congress has found so many abuses in the prisoner petitions and *habeas* petitions filed, that we passed several bits of legislation, some quite significant, to try to curtail the multiplicity of *habeas* petitions that are being filed. This is a Great Writ, all right, but it obviously can be utilized by determined prisoners and determined enemy combatants, lawful or unlawful, to disorder our ability to fight—execute combat. Would you not agree?

Mr. DELL'ORTO. I would agree wholeheartedly, Senator.

Senator SESSIONS. I would also raise this point. Many said, "We need to be consistent with our heritage of law, even in a time of war." I couldn't agree more. Mr. Rivkin, isn't it true that we've never given *habeas* petitions to prisoners of war? So, it's not inconsistent with our heritage, and, in fact, what's inconsistent would be to give them this privilege they've never been given before?

Mr. RIVKIN. That is correct.

Senator SESSIONS. Let me ask this question. Mr. Smith, in your study and review of these situations, and in light of the legislation we just passed, would you state, specifically, if there's any law that we have in force today, or policy that violates the laws of the United States, or even our treaty obligations?

Mr. SMITH. I'm not aware, Senator, that any conduct of the United States is currently at odds with our laws, if that is your question. I don't believe we are.

Senator SESSIONS. But you have some ideas that we should do differently.

Mr. SMITH. That's correct.

Senator SESSIONS. I see my time is up, but——

Chairman LEVIN. Did you respond to something?

Mr. SMITH. I did, Senator. All of your points are good, about what we've done in the past. My concern is that this is a different war, and it's the unending nature of it, and the fact that we've locked these people up for what may be decades is what concerns me. I really would like to find a better way to give them a genuine opportunity to challenge that detention.

I also believe that what it has done to our international standing and our ability to accomplish broader diplomatic objectives concerns me a great deal, and I really think that has to be one of the focuses of this committee.

Senator SESSIONS. That is a political reality, I think, although I would repeat my concern that Members of this Congress have misrepresented the standards of our military, have sullied the reputations of soldiers, and suggested that we have a policy of abuse and torture that is not so. We have, in fact, disciplined people substantially, and sent them to jail, who violated the standards that we require.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Sessions.

Senator Reed.

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

Thank you, gentlemen, for your testimony.

Mr. Smith, I want to try to understand the full scope of the MCA. If an individual is here in the United States, legal alien, not a citizen, can he be seized by law enforcement authorities, accused of being an enemy combatant, and shipped to Guantanamo, or held someplace, and be without access to the courts for purpose of *habeas corpus*?

Mr. SMITH. The plain language of the MCA would permit that, yes, in my view.

Senator REED. That, to me, is a very disturbing point. I don't think it's anything that we seriously contemplated when we were considering the MCA. I would daresay that there are probably people sitting in this room who, at one time or other, either themselves or their parents, were legally here as aliens, and never thought in the world that they or their neighbors could be suddenly picked up, taken away incommunicado, and have absolutely no rights at all.

This might go to just the drafting problems with the legislation— if they were picked up, one would presume, they wouldn't be arrested by military or intelligence agents in the United States, because of *posse comitatus*, but if they're not in military custody, then they don't have any rights to this CRST procedure. Is that correct also? That might be a harder question.

Mr. SMITH. It is a harder question. It's one that's not come up, but you raise a good point about who is in and who is not within the system.

Senator REED. It suggests to me that this is just one example where we have to make some clarifying amendments, at a min-

imum, with respect to this statute. I think most Americans would be appalled if they thought that could happen.

Mr. SMITH. I agree, Senator. S. 576, the Dodd, Kennedy, and others bill, would do that by narrowing the definition of “unlawful enemy combatant” to somebody who’s actually engaged in hostilities against the United States.

Senator REED. Thank you.

Mr. Smith, also, you mention in your comments that you would suggest that there be clarification of rendition policy by the executive. Now, I noticed, in Mr. Dell’Orto’s comments, that one of the criteria we use to repatriate someone from Guantanamo is that they will not be treated inhumanely by their country. There’s a deep suspicion in the United States that one of the major reasons we render people is because we suspect they might be treated inhumanely. How do we clarify that? Or is there an inconsistency that defies logic there?

Mr. SMITH. As I said in my statement, Senator, I believe renditions can be very valuable. I’ve been involved in a number of them over the years. In my experience, they were all either to bring someone to this country to stand trial or to send somebody to another country. One that I think is a real demonstration of how valuable it is, is we, working together with the French, were able to get Carlos the Jackal from Sudan back to Paris, where he stood trial for murdering French intelligence officers. That was a classic rendition.

The difficulty is, after September 11, it has been occasionally used to get people off the street and/or to return them to some country for purposes of interrogation. That’s where the concern has arisen. In my judgment, Congress should provide direct statutory authority to the President to issue an Executive order that would have several criteria that I have in my statement. First, is very clear approval, at a senior level, Cabinet level or sub-Cabinet level, before rendition can be conducted. Second, that we would only send them to a state that has signed the convention against torture and human rights protection. Third, that we would get an assurance from the state in writing—to which they are sent—that they would not be tortured. Fourth, that we would have some kind of follow-up, perhaps consular visits or visits by a U.S. officer, that they’ve not been tortured. I think those kinds of proceedings would provide the kinds of protection that I believe is appropriate.

Senator REED. Thank you.

Mr. Dell’Orto, as I understand the Combat Status Review Tribunals rules, that the evidence against a detainee is supposed to be prepared by a recorder who—is that the case?

Mr. DELL’ORTO. It’s the recorder’s obligation to present the information to the tribunal, Senator.

Senator REED. But there is an officer of administrative review of the detention of any combatant, that actually does the record?

Mr. DELL’ORTO. My understanding is there is a group of people who have all the files, who are able to gather all the information and then present it in, probably, a summarized form, as I think the Chairman indicated, to the recorder, who then ensures that the personal representative of the detainee has a copy of the unclassified matters, does review the classified matters, himself, without

showing it to the detainee, and then presents the information at the tribunal in complete form.

Senator REED. Who prepares the record of the proceedings?

Mr. DELL'ORTO. There is a transcript that's done afterwards, I assume you mean as the proceeding occurs? There is a recording done, and then there's a transcript prepared after the proceeding is completed, and that's, then, reviewed as part of the review process.

Senator REED. Maybe I can ask Mr. Denbeaux, who's looked at all this. Can you help illuminate what the recorder does? Is anything done offsite by people who have no immediate access to the proceedings?

Mr. DENBEAUX. I believe the answer is, the recorder is simply a functionary who takes what somebody else has given him, usually in summary form, and says, "This is the classified evidence." The tribunal members all insist they never look at it before the hearing or before the detainee comes in.

The hearing that was just described as taking place, the transcript, it is entirely and exclusively a summary of what the detainee says. No more and no less. There's nothing presented at that hearing. The only thing we can tell by going through the records is that, for 109 of these hearings, the entire record has been produced, and we can then look at that and see what documents were reviewed, what was shown to the detainee, the answer—and what was classified and what was not. You can't tell from this record whether or not there has been any evidence shown to the tribunal. The one thing we do know is that at no time in any reported case has anything been produced by the recorder that would be exculpatory. In many cases, detainees have said, "Hey, there's X, there's Y," and the recorder will say, "I don't know anything about that." So, the recorder has had no access to that information whatsoever.

Senator REED. So, what is available for review by the reviewing authority?

Mr. DENBEAUX. Actually, that's a very good question, which, again, no one can answer, because it's been kept secret. Both kinds of things have been kept secret. First of all, there have been 556 CSRT proceedings, and they're the ones that are supposed to be appealable to the Circuit Court of Appeals. Eighty percent of those have not been made available, so no one even knows what happened at those, because the Government has refused to hand over the proceedings that are the only proceedings that could be taken to the DC Circuit. We have a Freedom of Information Act application from Seton Hall right now, asking for those. But, of the sample that's there, it's very clear that there's nothing to review that anybody could look at, except the classified evidence.

To be absolutely honest, when the tribunal finishes, the detainee leaves the room, and they make the decision the same day, and there's no recording and there's no deliberations reflected or established, and it's always against the detainee, there's no evidence that they've ever looked at it. It's presumed reliable and valid. In all due respect to the chain-of-command issue, it starts off saying to the tribunal, they've been found to be enemy combatants repeatedly before. We now have secret evidence. It's classified. It's presumed reliable and valid.

Now, after the detainee leaves, they now partake the presumed reliable and valid evidence, make their decision, and there's nothing to know what was reviewed in any way, and the only thing we do know is, when they are reviewed, if they win, they're reversed.

Senator REED. Final question, very quickly. Who can demand a review?

Mr. DENBEAUX. No one demands a review. There are no demands of anything. The detainee walks in. What happens, happens. We don't know what happens when it goes up, except when the detainee wins; then we know it was sent back down. There's no knowledge. It's a black hole. Most of the proceeding is a black hole, but it gets blacker and darker as it goes up the chain of command.

Senator REED. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Reed.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

I want to express my gratitude to the entire panel. Thank you for being here and offering your views.

I'm a little confused. Mr. Dell'Orto, the New York Times says in today's story there is no limit to access to lawyers by detainees at Guantanamo Bay. Am I misreading that?

Mr. DELL'ORTO. They have had access for the purposes, in the past, of the potential *habeas* petitions, and so there are a number of them who, well before the MCA, had taken advantage of that opportunity. To the extent that those petitions have not yet been dismissed, there has been considerable access by a number of the detainees to lawyers to assist them with those previously-filed *habeas* petitions.

Senator CORNYN. I've tried my best to try to figure this out for myself, and, Mr. Chairman, I know we all have struggled with this, because, frankly, most of us are more familiar with criminal proceedings than we are acts of war that are tried in military commissions. We have people like Admiral Hutson who's very familiar, an expert, no doubt, in court-martial proceedings and the Uniform Code of Military Justice. But it strikes me as that our goals at a time of war are a little bit different than our goals in prosecuting a crime against somebody who's committed an act. For example, Mr. Denbeaux, you mentioned the people are detained against whom there's no evidence that they've actually shot at our people, but the purpose of the criminal law, it seems to me, is to prosecute people who have shot someone and done harm, and then try that, based upon the evidence after the fact. One of the principles, it strikes me, of what we're trying to do is to prevent people from getting killed in the first place. So, there is a very distinctly different function of the process that we're providing here.

The other thing that strikes me is that no one has mentioned in this hearing the importance of actionable intelligence gained from interrogating these detainees. I realize there's controversy about the techniques used to gather that information, but, here again, big difference between a criminal-law context, where we would recognize the right of somebody who's charged with a crime to not incriminate themselves, but during a time of war, when getting intelligence from a detainee may save thousands of additional lives, the role is distinctly different.

I would just add, I know someone's characterized the last 5 years as a "period of disorder and tardiness." I think that, Professor Denbeaux, was your term. But, to me, that demonstrates the problems with the kind of unbridled litigation that some have proposed here, that if we were to create an opportunity for litigating things even before cases are tried—and I think, Professor, you mentioned the idea of a facial challenge, and you advocated that we ought to allow facial challenges, rather than review after people are tried and actually convicted, and there's a firm record, there's a requirement to demonstrate harm, and the like. In other words, we're not trying hypotheticals, we're actually trying a record of fact, that we can look at, rather than hypotheticals.

I want to give you all a chance to respond to this. I know you're eager to do that. But let me just quote to you a provision of a Supreme Court case, which I know you're familiar with. It's a 1950 Supreme Court case, *Eisentrager* versus *Johnson*. This is what concerns me the most, and this is why I believe that what we've done under the DTA and the MCA is important, and the distinction between criminal law and an act of war is an important one, and principle we need to observe.

In that opinion, these words appear: "Such trials would hamper the war effort and bring aid and comfort to the enemies. They would diminish the prestige of our commanders, not only with enemies, but with wavering neutrals. 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 to 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."

Mr. Dell'Orto, would you offer, briefly, your comments on that? Then, I'd like to go down the line as time permits.

Mr. DELL'ORTO. We believe that the *Eisentrager* precedent is good precedent that stands, and should stand, for the very proposition that we fight here, and that is that in armed hostilities, in combat, in war, to have our civil judicial process encroach upon what has been, traditionally, decisions made by the commander on the ground takes us down a road that we don't want to go, for those very reasons. In point of fact, the article today to which you refer, Senator, about difficulties with the access of detainees to counsel down at Guantanamo, is a difficult problem for the commander down there. To try to schedule lawyers in and out, watch what goes on down there, and ensure that it doesn't disrupt the discipline of that camp, is a day-to-day challenge for the Joint Task Force Guantanamo commander. So, we are seeing that in this conflict more and more, and it is increasingly problematic for the commander on the ground.

A natural extension of what we're talking about in Guantanamo, an area outside the United States, is that we will then move to other places on the battlefield, other theaters of our operation, and the logical extension of these sorts of civil judicial applications then

will clearly fetter our commanders in attempting to do what they try to do on a day-to-day basis.

Senator CORNYN. Admiral? Would you care to comment?

Admiral HUTSON. Oh, yes. Thank you, Senator.

I think of myself as taking the conservative point of view on all of this, as a registered Republican, sir. [Laughter.]

I want to go back, the Constitution was the Constitution in the early 1940s. What I'm suggesting we do is undo some of the things that have been done. I'm not talking about dramatic changes to anything that existed in World War II or when *Eisenhower* was decided.

As you know better than I, and certainly better than most, our system of justice presumes an innocence, and then, as hard as we try to do that as best we possibly can, even in the most difficult situations, and then move forward towards conviction, and, if conviction, sentencing, I believe, with respect, that what this process, the military commissions, the CSRTs, the whole ball of wax has done is essentially presume guilt that this is an enemy combatant, who, by status, or perhaps action, but, most generally, just status, and move back to how we're going to substantiate that. We've reverse-engineered the process. I think that is a mistake.

In the case of Guantanamo, the 385 people down there, that's not an insurmountable number of people. It's not going to clog the courts. We can deal with that in courts martial, we can deal with that with military commissions, the Federal courts can deal with it in terms of *habeas corpus*. It just goes back to the way the system once was without having tinkered with it in the ways that we have.

Thank you, sir.

Senator CORNYN. Mr. Chairman, I know my time is expired.

Chairman LEVIN. We are going to have a second round. So, we can come back then.

Senator CORNYN. Okay.

Chairman LEVIN. Senator McCaskill.

Senator MCCASKILL. Thank you.

Let me preface this by saying I spent 10 years of my life in a criminal courtroom, and I was always the prosecutor, and so I have had, as all prosecutors have, a love-hate relationship with the constraints of our Constitution as it relates to the job of determining guilt or innocence in our criminal justice system in this country. I think what I'm trying to get my arms around is the fact that we seem to want to have it both ways here. We want to talk about what we've traditionally done in military justice in a completely new environment that is nontraditional. Finding our way with moral certitude and a position of envy to the world, in terms of the way we administer justice, I think, is the challenge we face.

Let me start with the admiral. Am I wrong in saying that it's very difficult now, with this particular enemy, to define who the enemy is?

Admiral HUTSON. Absolutely.

Senator MCCASKILL. Is it difficult to even identify where the battlefield is?

Admiral HUTSON. Absolutely.

Senator MCCASKILL. Is it even more difficult to envision when this war will be over?

Admiral HUTSON. Absolutely.

Senator MCCASKILL. In other words, what we're now saying is, we are now fighting a philosophy, we are fighting a point of view, we are fighting a military tactic of terror, and it is ubiquitous, it is worldwide, it is located in every country, it is located even in our own country, potentially, with aliens that may be living legally in this country, or illegally. So, if we're going to change the rules with that kind of vista, don't we need to be terribly careful of the, probably, most ultimately slippery slope to the Constitution that we hold near and dear?

Admiral HUTSON. Absolutely.

Senator MCCASKILL. Okay. So, let me give a hypothetical. I know—with all due respect to Mr. Dell'Orto, the essence of legal education is a hypothetical, and I don't think anybody's gotten a law degree without having to endure what most of us thought were ridiculous hypotheticals. So, let me give you a hypothetical that scares me to death.

My daughter really wants to study abroad. I'm assuming, if these are the rules we're going to embrace, that we would recommend our allies embrace them. Mr. Dell'Orto, would you recommend to the U.K. that they adopt the same set of rules that we have adopted as it relates to these unlawful enemy combatants? Are you proud of these rules? Would you recommend to the United Kingdom that they adopt them?

Mr. DELL'ORTO. I think that if you sit down and look at these rules and compare them to most domestic legal systems and the rights that they provide their own citizens, I think you would find that this compares very, very favorably.

Senator MCCASKILL. Okay. So, you would recommend that they adopt the exact same framework of rules in the U.K.

Now, let's assume, hypothetically, that my daughter goes to study in the United Kingdom, and let's assume she's living in a dorm on a campus in Britain. Let's assume that two of her suite-mates, unbeknownst to her, have in fact, this view of America, and that they embrace this philosophy of jihadism, and that they are engaging, off campus, in meetings with other people that share this view. Intelligence indicates to the government in the United Kingdom that these two girls are actually going to these meetings, and my daughter has absolutely no idea that any of this is going on, but she happens to live in the dorm with them in a suite. Let's assume she is picked up by the government of the United Kingdom. Let's assume she's put someplace. Do you not understand the fear that would grip an American mother that all of a sudden she doesn't get a lawyer, there is no access to information, and it could be 5 years before we see or hear from her again?

Mr. DELL'ORTO. Oh, I think I can appreciate that fear that a mother would have.

Senator MCCASKILL. So, how do we deal with that? I understand that we can't have the same rules in military justice that we have in our criminal justice system. I can tell you, I have seen horrific things as a prosecutor, people who have preyed upon dozens of children, violently, and nothing more that I wanted in my heart than

to say, “We saw. We know he did it. We can screen this,” just like you say the military screens it, “We can take care of this. There’s no reason that we have to jump through all these hoops. Put this person away right now, immediately, so we don’t have any chance that they ever prey on another child.” But we don’t do that in this country. So, how do we reconcile this never-ending war with a non-specific enemy with the fact that we are basically saying we have changed, dramatically, the traditional military rules that have guided us in these kinds of circumstances?

Admiral, would you address that for me?

Admiral HUTSON. The Marines have a saying that, “When the going gets tough, the tough get going.” I think that it is incumbent upon us, in these difficult times, to hold ever closer to those things that made us what we are now. It may make some people uncomfortable, but we cannot act out of fear. We can’t make our rules change because we are afraid of a never-ending war and an unseen enemy around the world. That can be a fearsome prospect, but it means that we have to be very, very careful when we look at the prospect of changing rules that will bring in potentially every person from around the world. That’s what you’re talking about. That’s why I think that we can’t define an “enemy combatant” in paragraph 2 as being “somebody that we have determined to be an enemy combatant.” That’s your daughter.

Senator MCCASKILL. Okay. As I look at one of the definitions, it’s “supporting such a force.” Supporting is in the eye of the beholder. Like a landlord?

Admiral HUTSON. Materially supporting may not be knowing support. You donate money to the charity. There are a million examples that we can all come up with where there is some sort of—“material and purposeful” is the other word—material and purposeful support—completely, absolutely, abjectly unknowing support. That person can be an “enemy combatant.”

Senator MCCASKILL. So, my daughter loaning one of her suite-mates money could do it.

Admiral HUTSON. Right. Right.

Senator MCCASKILL. Even though she had no idea that they may be using that money for something that she didn’t believe in.

Admiral HUTSON. Absolutely. Absolutely.

Senator MCCASKILL. If it was unknowing. But purposeful—she loaned them the money.

Admiral HUTSON. She loaned them the money. She did it intentionally. But she did not know where it was going to go. Now, people of honor and good intentions can say, “that’s not what we meant.” That may not be what they meant. But, as the chairman has pointed out, we have said, subsequently—“we,” the Government of the United States, have said, “that’s not actually too far from what we mean.” We can pull people in to that status on the basis of that kind of evidence, and then, oh, by the way, not give them a real review of that process.

Senator MCCASKILL. Let me ask—if there’s anyone on the panel that disagrees with this, I would just like them to speak up. I know my time’s just about over, but is there anyone on the panel that believes that the war against terrorism in this world will ever come to an end?

Mr. RIVKIN. If I may comment briefly, despite all the rhetoric about the war against terror, what's legally significant is not that; it is a war against specific enemy combat entities, including al Qaeda and the Taliban. With all due respect, Senator McCaskill, there's nothing unprecedented about this war. Engagement by organized states against irregular combatants have been around for centuries. I can think about 15th- and 16th-century examples. There are clear standards as to who participates in this war. You have to be a member of these entities. There are clear standards on international law that when this war is over, you don't need to sign an armistice on a battleship—

Senator MCCASKILL. With all due respect, how do you become a member of one of these entities if you are living 5,000 miles away? Do you become a member of one of these entities by professing that you want to be a member of one of these entities? Isn't that correct?

Mr. RIVKIN. That is a fair question.

Senator MCCASKILL. Okay. So, if I live 5,000 miles away from Iraq, and I profess, in some way, in some kind of diatribe I've written in a dorm room or in some meeting I've attended, that I support what the Taliban is doing, or I agree and support what al Qaeda is doing, doesn't that make me one of them?

Mr. RIVKIN. No, it does not. If one looks, actually, at the definitions in the MCA, the very statute that you all passed, it talks about "purposefully and materially supported hostilities against the United States." I think any reviewing court parsing the word "purposefully" in this context would conclude that your purpose cannot be fulfilled—

Senator MCCASKILL. The point is, we're not going to get to court. That's the point.

Mr. RIVKIN. Forgive me, you are going to get to court, because if you'd—in your hypothetical, your daughter—and I understand it's only a hypothetical—is adjudicated to be an enemy combatant by a CSRT, that would be the very language that the great Court of Appeals, the DC Circuit, would be parsing, first as a panel, then *en banc*, and then it would go to the Supreme Court. There has to be a purpose. The fact that you are giving somebody money does not amount to purposefully and materially supporting hostilities against the United States.

Senator MCCASKILL. So, you would disagree with the answer that Mr. Dell'Orto gave the chairman when he was talking about the lady sending money to the charity. You say, absolutely, that woman is in no jeopardy if she did not know that charity was a front.

Mr. RIVKIN. That question was not posed to me. Let me be more adventuresome than Mr. Dell'Orto, since I'm not a part of this administration, I would tell you that that statement by a DOJ attorney was absolutely wrong. But just because you have a Government attorney that makes a wrong statement, that does not necessarily establish that the reverse is also true. People make—

Senator MCCASKILL. Should we be concerned that the DOJ is interpreting the law contrary to what you say it is?

Mr. RIVKIN. Senator McCaskill, I can tell you one thing, in litigation, particularly on the Court of Appeals level, and private-sector

litigation, we sought to hold the Government to its position, as articulated by some DOJ attorney, with a remarkable lack of success, because the standard doctrine would be that just because you say something in litigation somewhere does not mean that that is the binding position of the United States. So, yes, I personally don't think it was a very smart statement, but that's not what happened.

Look, despite all the parade of horrors, we've only had three U.S. citizens detained so far as enemy combatants. Mr. Hamdi and Mr. Padilla and one other gentleman, whose name escapes me. We do not have a Government promiscuously running up hundreds of people who are in this country lawfully. That is not a problem.

Senator MCCASKILL. The issue isn't how many we have, with all due respect, sir. The issue is whether law allows it.

Thank you, Mr. Chairman.

Chairman LEVIN. Since my name has been introduced here, let me add to something that Senator McCaskill has said on the purposeful/material test. That is not required for one to be detained as an enemy combatant. Support does not have to be purposeful or material. It's only in the criminal case. So, your daughter, who goes to England, who provides some money for what she thinks is a charitable cause, let's say, to her two roommates, if she were arrested and detained as an enemy combatant, which she could be, under our law, her support does not have to be purposeful or material at all under the enemy combatant statute. It's only when you get to the criminal side of it that that even becomes a factor.

So, I want to reinforce what you're saying, Senator McCaskill, because the question was, I think, could she be detained as an enemy combatant in England if they followed the same laws? The tragedy is, yes, she could be as an enemy combatant, and they would not even have to show purposeful or material support, only support.

Mr. RIVKIN. May I briefly respond to the Chairman?

Chairman LEVIN. Of course.

Mr. RIVKIN. You're absolutely right that this language goes to the military commission definition. But, best of my knowledge, a CSRT applying the laws and customs of war would not—repeat, not—adopt a material-support definition. That would be a travesty. In order to be considered an enemy combatant, you have to be a member of an organization with which the United States is engaged in active hostilities. That is a classical agency-type test.

My favorite hypothetical is, you can be a forger, but you have to be an in-house forger for al Qaeda. If you are a commercial forger, like in "The Day of a Jackal," and you forge documents for all comers, you are not going to be an unlawful enemy combatant.

Chairman LEVIN. The law does not say you have to be a member.

Mr. DENBEAUX. It absolutely does not, Mr. Chairman.

Chairman LEVIN. You're wrong on that. It says, and I'll read it to you, "An 'enemy combatant,' for purposes of this order, shall mean an individual who is part of, or supporting, Taliban or al Qaeda or associated forces that are engaged of"—this includes—it's not restricted—it includes—"any person who has committed a beligerent act or has directly supported hostilities." It is not restricted in that way. It includes those people, but is not limited to those people.

Mr. DENBEAUX. Could I respond?

Chairman LEVIN. That is why the daughter, who clearly is not a member, would—could be—

Mr. RIVKIN. I understand. Ten seconds, if I may. I'm familiar with this language. But, remember, this is statutory gloss being put on existing regulatory and administrative practice that is very, very old. I would submit to you that, unlike military commissions, you did not fully flesh out, statutorily, the CSRT-type procedures. I'm not aware of anybody suggesting—the DOD is not good-faith applying the pre-existent customary norms of war, which have to do with unlawful combatants. They are Geneva-based.

Mr. DENBEAUX. I'm suggesting that.

Chairman LEVIN. Wait, we'll get to you, Mr. Denbeaux, and then we're going to call on Senator Clinton, who's been awaiting, there. Go on, Mr. Denbeaux, if you want—or anyone else wants to comment on this.

But we don't call statutory language "gloss."

Mr. DENBEAUX. Not only that, Mr. Chairman, I think the executive branch, despite what he's said, has already admitted that they're holding 60 percent of the people in Guantanamo because they're associated with a group, not because they're numbers—only 8 percent are alleged to be fighters. The remainders are members, and 60 percent are only there because they're associated with groups.

Chairman LEVIN. Yes, I don't think the membership test is in the CSRT language. I think the "gloss" reference is not appropriate to law, to legislation. Maybe administrative practice might be "gloss" on legislation, but not vice versa.

In any event, I disagree with what you said, and it's a very vital point here. What Senator McCaskill is raising is a very critical issue, because, even though you say only three U.S. citizens have been detained, we have to treat other folks appropriately—not just our own citizens, but other people—because when we draw that distinction, the rest of the world looks at us and says, "It's just American citizens that they're concerned about. They're not concerned about the rest."

So, we have to have a common standard, whether or not we're treating people who are American citizens, whether they're green-card holders, or whether they are not, when it comes to detainee treatment and when it comes to criminal trials.

Let me—unless somebody else wants to jump in here—I'll do that on my time on the second round, in any event.

Senator Clinton.

Senator CLINTON. Thank you very much, Chairman Levin, for holding this important hearing.

Perhaps the exchange about the testimony might send a message to the administration and the DOJ, who I think would be surprised to hear a defender of their policies defend them for things that they, frankly, have not participated in. They have been quick to disregard precedent and rule of law. They have dismissed the Geneva Convention. So, I think that it perhaps would behoove them to get some advice from Mr. Rivkin.

It seems to me that any effort to resolve the legal status of the detainees at Guantanamo must, at this stage, include a discussion

of the logic of continuing to keep the facility open. Reports emerged in recent months that one of the first things Defense Secretary Gates did upon taking his post was to urge the administration to close the detention facility at Guantanamo and to move the detainees to the United States.

Earlier this month, Secretary Gates confirmed, in testimony to the House Armed Services Committee, that he had pressed for the closing of Guantanamo, and that, in his view, proceedings at Guantanamo would lack credibility internationally.

Reports also suggest that Secretary Gates was joined by Secretary of State Rice in calling for Guantanamo to close, earlier this year. They reportedly argue that the detention center should be moved to make the trials of detainees more credible, and because Guantanamo's continued existence hampered the broader war effort.

It is my further understanding that this proposal was reportedly blocked by Attorney General Gonzales and Vice President Cheney, for two reasons. First, because they were concerned it would make it harder for them to argue that the detainees have no rights. Second, that it would be a public admission that Guantanamo was a mistake.

So, here you have a facility that, according to reports, the Secretaries of Defense and State argue is harming the war on terror. State Department and Pentagon officials have elsewhere said, according to reports, that Guantanamo has harmed our relationship with our closest allies and made it more difficult to coordinate efforts in counterterrorism, intelligence, and law enforcement.

I think we need to own up to the problem that is Guantanamo, and it goes beyond the very serious questions that have already been considered in this hearing about our treatment of detainees.

William Taft IV, who was once the acting Secretary of Defense in the first Bush administration, and then served as current President Bush's chief legal advisor at the State Department during his first term, recently testified that 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. He also recommended closing the facility.

Guantanamo has become associated, in the eyes of the world, with a discredited administration policy of abuse, secrecy, and contempt for the rule of law. Rather than keeping us more secure, keeping Guantanamo open is harming our national interests. It compromises our long-term military and strategic interests, and it impairs our standing overseas.

I have certainly concluded that we should address any security issues on what to do with the remaining detainees, and then close it, once and for all.

In his House testimony last month, Secretary Gates called on Congress and the administration to work together on a plan to close Guantanamo. So, my first question is to each of you, to the extent you feel you can comment, briefly, what do you regard as, first, the security hurdles to closing Guantanamo; and, second, the legal hurdles?

Do you want to start, Mr. Dell'Orto?

Mr. DELL'ORTO. Senator, from a security standpoint, when, in the early days, the Department wrestled with a location for what we anticipated might be thousands of detainees—I'm talking about in the late fall of 2001, after we had begun combat operations in Afghanistan—we looked at various possibilities; and, principally, Afghanistan, at the outset, because that's where the conflict was underway. The nature of that combat, the relatively small footprint that we ultimately decided, as a matter of how we were going to fight on Afghan soil, led to the conclusion that Afghanistan was not going to work—you probably couldn't secure the facility—again, if you anticipated getting those sorts of numbers. As you looked around the world for other locations, there didn't appear to be a lot of other areas where, again, you could house large numbers of these sorts of detainees, and not fear that there might be an attack on that installation by the terrorist organization itself.

The United States was not a good option for these people, because, again, we anticipated large numbers, the level of violence that they have in the past undertaken, the fact that they didn't behave, even upon capture, as soldiers do—that is, a disciplined unit that, once out of the combat, would sit docilely in a confinement facility, a POW facility, and obey and understand that, under the law of war, they were out of the combat, they're no longer fighting—you couldn't get that out of this group of folks. So, you had to find someplace that was going to be truly secure. The United States was not going to be an option. Again, contemplating thousands. So, Guantanamo became a place that we believed we could literally secure from possible attack against the facility for the purpose of releasing them, creating havoc, or whatnot. So, from the security standpoint, Guantanamo made sense.

As it turns out, we have fewer than thousands, but, again, if you go to that facility and look around it, as perhaps you have, it is a very, very secure environment. So, that's why Guantanamo made sense, from a security standpoint.

If we talk about, now, moving to the United States, I think then you bump up against the legal aspect, and that is, are we going to have the full panoply of constitutional protections for those individuals, by virtue of their presence on U.S. soil? If we are going to try these people by military commissions, as we have traditionally done for violations of the Law of Armed Conflict, the 1,800 we did in post-World War II Germany, the 1,500-or-so we did in the Far East theater post-World War II to deal with law-of-war violations, then the military commissions, traditionally, historically, and practically, are the best way to deal with that. But they don't necessarily match up when you try to overlay them with the full range of constitutional protections.

So, you do face that legal hurdle, were you to bring them to the United States. You could very well wind up not being able to try them by military commission, and then, practically, rules of evidence and things like that would hamper your ability to get to the truth in trying to hold them accountable in the civilian legal system.

So, securitywise, it was a determination made early on. Legally, I think we face that same problem today, going forward. I don't know how to reconcile that at this point, given the litigation we've

been under, and would clearly wind up with even more litigation, were we to bring them to the United States.

Senator CLINTON. Thank you.

Admiral Hutson?

Admiral HUTSON. With respect to my good friend, Dan Dell'Orto, we have one, a red herring; and, two, a tired old argument. The red herring is the security. We don't have thousands, we have 385. The United States prison system is easily capable of dealing with those.

We have tried to try two people by military commissions from down there. One was a driver, and the other was a kangaroo-skinner. These are—some of them are terrible people, I'm sure. Khalid Sheikah Mohammed admitted to everything under the sun. But we don't have 385 people that the United States prison system can't, one way or another, deal with. We have John Walker Lindh in prison now for 20 years. We have Richard Reid in prison for life without parole. The U.S. prison system can deal with it.

With regard to the legality, we keep wanting to come up to the edge of Guantanamo Bay Naval Base being a legal black hole, and the reason they're there is because the laws can't touch them. If you bring them back to the United States, the laws suddenly cover them. The United States Supreme Court has decided that issue. The law reaches down to Guantanamo. It's not a legal black hole. So that it is not an insurmountable legal problem for the United States court system, which I testified earlier we should be trumpeting from the rooftops rather than hiding behind the concertina wire of Guantanamo. Let's bring them out, show them the light of day, prosecute them, convict those that need to be convicted, and sentence them, acquit those that need to be acquitted, and get on with it.

Senator CLINTON. But we also are housing, in addition to the people you mentioned, Omar Abdel Rahman, Ramzi Yousef, Wadih el Hage. We have other terrorists who have actually committed horrific crimes on American soil, in super-max prisons.

Admiral HUTSON. Yes, ma'am.

Senator CLINTON. Mr. Smith?

Mr. SMITH. I agree, first of all, with the imperative of trying to close Guantanamo, for all the reasons that you've said, and the reasons that Secretary Gates has articulated. It's an impediment to trying to win the broader war on terror and our standing in the world.

The security issues, we can clearly deal with, as Admiral Hutson said. The legal issues, I see no reason why we can't have military commission trials in the United States. I also see no reason we cannot use the procedures—we spoke of earlier, before your arrival, of beefing up the procedures for the CSRTs—I don't see why we couldn't do that in this country, as well. I'm in favor of, ultimately, restoring *habeas corpus* once someone has been through the process of the CSRTs. I don't see why any of that can't be done here. What do we have to fear from this kind of process?

Finally, as a political matter, at some point Castro is going to die and we're going to want better relations with the Cubans. My guess is, one of the first things a new Cuban Government is going

to do is ask us to leave Guantanamo in its entirety. We may want a naval base there.

So, I think, for all kinds of broader reasons, we need to be thinking, very quickly, about leaving Guantanamo. In my prepared statement, I suggested that Congress direct the President to prepare a plan to close Guantanamo and to proceed along the lines that the Admiral and I have been discussing. I think that's a worthy thing for this committee to consider.

Senator CLINTON. Professor?

Mr. KATYAL. Senator, I think you're asking exactly the right question, which is a bigger one than just simply closing Guantanamo, it's: what is the legal advice that the DOJ is giving the President of the United States? Here, you've just heard Mr. Dell'Orto testify to this new military commissions scheme as being legal, and that we can't have these trials in America, because, oh no!, the Constitution might apply. This is the kind of legal advice that says the Constitution's like a tax code, and we should look for a loophole here and a loophole there, instead of treating it as our most foundational document. As a student of history, I know it's hard for the Supreme Court, in a time of armed conflict, to rebuke the President. You have to really try, if you're the President, to lose a case in a time of armed conflict. It's like failing a class at Georgetown or something like that. [Laughter.]

Here, the administration's managed to do it several times, because of this DOJ advice. They said they won't have *habeas corpus* rights. The Supreme Court said no, in the *Rasul* case. The administration said that U.S. citizens can be held indefinitely and held incommunicado. Supreme Court said no, in *Hamdi*. The administration said you can have military commissions and try these people. Supreme Court said no, in *Hamdan*. The administration said Geneva Convention protections can't be given, even the most bare-bones ones of Common Article 3, that that treaty doesn't require it. Supreme Court said no. They repeatedly lose, and I haven't even gotten to stuff like the National Security Agency and torture. This is an administration and a DOJ that's just telling the administration what it wants to hear, instead of actually taking our legal obligations seriously.

So, when you hear Mr. Dell'Orto say "the MCA is going to be upheld by the courts," I think you should take it with a grain of salt.

Senator CLINTON. Mr. Denbeaux?

Mr. DENBEAUX. Yes. Senator, I was sitting here thinking about your question. I always go, when I have a troubled problem, to Occam's razor, which is, "The simplest explanation is the best explanation." The solution to this problem is to try them, determine who belongs, who should be appropriately prosecuted, treated as an enemy combatant, and let the rest go. I'm always troubled when we have a simple solution to a really hard problem, the response is often to make a complicated, difficult series of choices. I don't understand why, for 385 or 400 people, we don't end this sore, lance the boil, have these people have a trial, and then, whatever happens happens. None of the people in the *habeas* process want anything more than a trial. If we get a trial, we wouldn't be here. In fact, if there had been Article 5 proceedings on the battlefield 5

years ago, I don't think anyone in this room would be here. The administration keeps trying to avoid anything but a determination as to whether they're right or wrong, and especially don't want it done by anybody but the executive branch, whether you call it a CSRT or something else.

I think all anybody has a right to, whether they're enemy combatants, American citizens, Senators, or anyone else, is the fact that we try people, use our legal system. The idea that—somehow, that we can't handle 385 *habeas corpus* petitions—any District in the United States handles that many in a week without even blinking an eye. This is not a big problem. It's simply one we don't want to address.

Senator CLINTON. Mr. Rivkin?

Mr. RIVKIN. Senator Clinton, in addition to the legal and practical problems that Mr. Dell'Orto mentioned, I think some of our subsequent observations underscore what I think is a fundamental problem. Guantanamo is not just a piece of geography. I personally would have no problems closing Guantanamo and going somewhere else. But this is a symbol of a fundamental intellectual tension, and, frankly, confusion, on the part of many people, because to say, for example—in my discussions with Europeans, both in government and academe, and I asked them, “If we moved everybody to Leavenworth, and we deployed the same system of CSRTs and military commissions, and the same style of judicial review, would you be happy?” The answer is no. They're not interested in that. Unfortunately, most of our allies are not taking the traditional law-of-war paradigm seriously at all. They wouldn't be satisfied with anything, other than, in essence, a criminal justice paradigm, which, in my view, is utterly impractical, for most people. It's very difficult to convict somebody in the criminal system entirely on the evidence you collect overseas.

Famous DNA contamination, chain of custody, even if you have somebody with an AK-47, if I were the defense lawyer—and I'm not even a criminal law expert—I would make mincemeat out of a Government's argument, “how do you know it's that AK-47? How many hands did it go through?”

But there's a far more fundamental problem. We really are present at a class of fundamental philosophy. Is this a real war? Does the law-of-war paradigm apply or does the criminal justice system? In which case—by the way, all due respect to my colleague, Professor Denbeaux, you don't need to try people whom you capture as enemy combatant. You have the full right to hold them for the duration of hostilities—not a punishment, to make sure he doesn't go back to combat.

I don't understand one thing. Why is it more charitable to try somebody, as John Walker Lindh, and put him in prison, if I'm not mistaken, for 25 years? I don't think he will be pardoned by any President, and then, you have people who have done at least that much, or worse, who get released to go to Britain, they're sitting and drinking beer in a pub right now.

To me, if you go down the criminal justice paradigm, it is both underinclusive and overinclusive. It would let people go who shouldn't be let go, and it may be harsh for some people. The mili-

tary justice system actually is far more effective at weeding out people who need to be detained for a while.

Again, would it be really charitable if we tried every single one of those people—and let's pretend, for a second, they are really enemy combatants—and, what, are we going to put everybody in prison for 25 or 30 years? Is that going to make anybody happy?

Senator CLINTON. Obviously, Mr. Chairman, this is one of these issues on which there are strong feelings. I personally believe that, in the eyes of the world, Guantanamo is ammunition for our enemies, and it is time to close Guantanamo and to deal with both the security and the legal challenges. There's a lot of land in this country that the Federal Government owns. There is certainly no shortage of capacity to build a special detention center or prison, or to use one of the maximum-security facilities that already exists. But I think it would be worthwhile, following up with the comments that Mr. Smith made, about perhaps putting forth some position from Congress, so at least this debate would be engaged in, in a vigorous way, which it deserves to be.

Chairman LEVIN. Thank you, Senator Clinton.

Let's try a second round, to the extent we have time. There is going to be a vote coming up shortly.

It's been said here by a number of colleagues that the Leahy bill grants a privilege, relative to *habeas corpus*. Let me start with you, Mr. Smith, is that accurate?

Mr. SMITH. No, I don't think it states a privilege. As you said earlier, Mr. Chairman, the Leahy bill would revoke the previous language in last fall's MCA that takes away from the courts the jurisdiction to hear *habeas* petitions.

Chairman LEVIN. Does not grant a court jurisdiction?

Mr. SMITH. That's correct.

Chairman LEVIN. Let's talk about coerced statements, because the provision in the law creating the CSRTs, and their procedures, the way I read it, says that, where there is an issue of coerced testimony, the CSRT is required to "assess whether any statement derived from, or relating to, such detainee was obtained as a result of coercion, and the probative value, if any, of any such statement."

Now, does that not, then, very clearly say that, even though it is found by that panel that a statement was obtained as a result of coercion, that, nonetheless, it might be admitted by the panel, might be considered by the panel? Is that true, Mr. Dell'Orto?

Mr. DELL'ORTO. I believe it is, Mr. Chairman, and they'd have to factor that into their assessment of what weight they want to give that statement.

Chairman LEVIN. This is one of the major problems here. I think this would be the first time that we would put into law the power of a panel to admit into evidence, or to consider, a confession which was obtained as the result of coercion. I can't think of any other law which permits a panel to give probative value to such a confession.

Admiral Hutson, do you know of any?

Admiral HUTSON. No. In fact, the laws go the other way, that they have to be demonstrated to be voluntary, so that it's quite clear that this is a step in the opposite direction.

Chairman LEVIN. Mr. Smith, do you know of any law which has ever said that a confession obtained as a result of coercion can be given probative weight?

Mr. SMITH. Not in this country.

Chairman LEVIN. Professor Katyal?

Mr. KATYAL. Not in this country.

Mr. DENBEAUX. I know of no such laws, but I'm not aware of all the rest of the world. But not in the United States.

Chairman LEVIN. We're talking about in the United States.

Mr. DENBEAUX. Never.

Chairman LEVIN. Have we ever allowed a panel, which is making a judgment, to consider a confession which they determine was obtained as a result of coercion in this country?

Mr. DENBEAUX. Never. No.

Chairman LEVIN. Mr. Rivkin?

Mr. RIVKIN. Mr. Chairman, I don't believe that there is any law that says that specifically, but let me just point out—and this is, of course, a very difficult issue, and much has been debated before you and others—there are different degrees of coercion. You have treaties that ban torture, that ban cruel, inhumane, and degrading treatment. Common Article 3 of Geneva talks about “outrages against personal dignity.” To the best of my knowledge, I don't know of any international law or provision that refers to coercion as being a disqualifying thing. In fact, I would submit to you, any kind of custodial interrogation is inherently coercive. Anytime a government pressures you or threatens your family which happens all the time in criminal investigations, “If you don't cooperate with us, we're going to go after so and so”—this is coercive. So, if you have a broad injunction against any coercively-obtained information from being entered, I would say much of our criminal justice system would not be able to function.

Chairman LEVIN. So you believe that we have, in case law or in statutory law in this country, said that, where a confession was obtained as a result of coercion that that would be allowed into evidence.

Mr. RIVKIN. No, because, frankly, Mr. Chairman, it was never presented this way.

Chairman LEVIN. I see.

Mr. RIVKIN. There are circumstances where something is disqualified, but I don't believe anybody has ever tried to argue—and I could be wrong—in a criminal trial, that a defendant who confessed because the prosecutor, for example, threatened to charge—and let's stipulate that they could—his brother with another offense, but didn't, because the person cooperated—I don't know of any criminal defense lawyer who's sought to throw out this confession, even though it clearly would be coercive, because you don't want your brother to be charged.

Chairman LEVIN. All right. I didn't want to get into specific fact situations, although I was tempted, because of the District Court case which went into very specific facts and said that apparently, the tribunal allowed consideration of a confession, although the petitioner had contended—and apparently the District Court found some support for it—that he had been locked in a room that would gradually be filled with water to a level just below his chin as he

stood for hours on the tips of his toes, claimed that he was suspended from a wall with his feet resting on the side of a large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electric shocks to his feet, and so forth.

But let me just ask you, then, Mr. Rivkin, let's assume that a CSRT tribunal found that a confession was the result of a person being waterboarded, and that that represented coercion, and that was the finding. Would you allow that confession to be considered?

Mr. RIVKIN. No, I would not. In my view, waterboarding would be a practice that infringes the standards. I think it's a torture—if not torture, it's cruel, inhumane, and degrading treatment. My problem is with the very breadth and ill-defined nature of the word "coercion."

Chairman LEVIN. All right.

Mr. SMITH. Mr. Chairman, at some point I'd like to address the issue of interrogation techniques. I don't know whether it's appropriate here or not.

Chairman LEVIN. Do that right now.

Mr. SMITH. One of the concerns I have, Mr. Chairman, is the question of whether or not there ought to be two standards used by the United States Government to conduct interrogations. You may recall that, last fall, in the DTA—Congress said that the Armed Forces should follow the Army Field Manual with respect to the interrogation and treatment of detainees for anybody under the control of the DOD, but that other Government agencies were simply to follow a more general rule against torture. Then, the President is supposed to issue an Executive order defining interrogation techniques to be used by agencies other than the DOD, presumably the CIA—I'm troubled that there might be two standards for interrogation techniques out there. I understand that some people at the CIA and in the Intelligence Community believe that aggressive techniques are needed. I'm not persuaded of that. I note that the President has not yet issued his Executive order. But I believe that the burden should be on those who believe that techniques that go beyond the Army Field Manual are productive and, indeed, consistent with our values.

So, I'm hopeful that, either in this committee or in the Senate Intelligence Committee, Congress will look very closely at the question of whether techniques beyond those used or adopted for the Army Field Manual are appropriate, because, among other things, if they work, why should the military not be able to use them, as well?

Chairman LEVIN. Thank you.

Mr. Rivkin, I want to go back to your answer, because I'm very much troubled by it. You say that when I said that a confession which is obtained as a result of coercion, that I don't know of a court in this country that reached that conclusion that would then allow it into evidence. I don't know of a hearing. You said, "that depends on how one defines 'coercion.'"

My question to you was, "when the panel or the judge concludes that the confession was obtained as a result of coercion." It's not how I define it or you define it. I'm talking about a panel or a judge has reached a conclusion, "That confession was obtained as a result

of coercion.” Those are the words of our statute. I can’t imagine a court or a panel in this country saying, “But we’re still going to give probative value to it.” We put, in our law, that that panel can give probative value to it. It seems to me that you are really dodging the issue when you say, “it depends how I define,” or someone defines, or one defines “coercion,” and talks about somebody’s brother. I think you’re really diminishing the import of this question when you do it that way, because I’m saying that the very finder of fact—or law, whatever—reaches that conclusion, “There was coercion used. That statement was obtained as a result of coercion.” I think that would end it in any American court or panel. I have to tell you, I’m really troubled by the way you—

Mr. RIVKIN. May I clarify?

Chairman LEVIN. Of course.

Mr. RIVKIN. Mr. Chairman, reading all the statutory provisions together, if all you had is that language, it would lend itself to this interpretation. But, as a result of much debate and discussion in the DTA, you and Senator McCain and Senator Graham have developed a very extensive set of prohibitions that rules out certain extreme forms of coercion. So, I presume that torture—and torture has always been off the table—but cruel, inhumane, and degrading treatment and various other things are off the table. So, when I read this language about coercion, I believe it refers to coercive techniques that do not rise to that level. So then, if you are a military panel, if you are a judge, you are saying, “I don’t have to worry about those other prohibited degrees of coercion, because they’ve already been banned. This is talking about lesser forms of coercion.” With all due respect, do you not agree that there is some element of coercion present in every impact, if you will, by a State on an individual, even in the criminal justice system? The whole plea-bargaining, the whole, “If you cooperate with us, we’ll do this, we’ll do that,” that always entails coercion.

So, my concern is failure to define the boundaries of permissible coercion, as versus impermissible coercion, in a situation where you banned out most of the impermissible forms of coercion. Not in that section, but elsewhere in the statutory law.

Mr. KATYAL. Senator, may I respond to that?

Chairman LEVIN. Sure.

Admiral HUTSON. One quick note with regard to the MCA, in section 948, forgive me for reading part of it, “statements obtained before December 30, 2005, may be admissible if the degree of coercion is disputed, if the judge finds that the circumstances rendered the statement reliable and possessing sufficient probative value and the interests of justice may be served.” I would submit that the interests of justice are never served by admitting coerced statements, haven’t been for 225 years.

Chairman LEVIN. On that point, the act that you refer to prohibits, as you say, the use of statements obtained through cruel and inhuman treatment only if they were obtained after December 30, 2005.

Admiral HUTSON. That’s right

Chairman LEVIN. It permits the use of testimony obtained through cruel and inhuman treatment before December 30, 2005. I can’t imagine that we would ever allow any other country to

apply that kind of a standard to our troops. I find that distinction—if you’ll pardon the expression, it’s a little bit like saying you can use the—and I’m probably getting into an area I shouldn’t—stem cell lines, providing the embryo was destroyed before a certain date, but not if it’s destroyed after a certain date. This is an absurd distinction. Would you, Mr. Rivkin, say, “it’s okay if another country permits the use of testimony obtained through cruel and inhuman treatment, providing the cruel and inhuman treatment was perpetrated on our soldier prior to a particular date”—would you accept that kind of a line applied to our people?

Mr. RIVKIN. I would not, and I’ve always been troubled by “cruel, inhumane, and degrading treatment,” and never supported its utilization. But, to me, the term “coercion” is much broader than—

Chairman LEVIN. No, I’m not going back to “coercion.” I’m going to this question.

Mr. Dell’Orto, we at least have Mr. Rivkin on this question. [Laughter.]

Mr. Dell’Orto, can you join Mr. Rivkin? Can you continue to be with him on this question, too?

Mr. DELL’ORTO. Again, I think the difference that we have in the act, with respect to pre-DTA and post-DTA, was designed to—

Chairman LEVIN. This is MCA.

Mr. DELL’ORTO. Right, but the distinction that we have in the MCA that makes that distinction between pre-DTA and post-DTA is designed to account for the fact that we didn’t have, necessarily, clear standards, pre-DTA, on “cruel, inhuman, and degrading treatment.” So, it is an accommodation of that.

When we go to the notion of coercion, again, it is not a well-defined term, and it can be things as simple as an inducement—the lore down at Guantanamo was that a fish sandwich from McDonald’s down there oftentimes gets these guys to talk.

Chairman LEVIN. Can you imagine a court in the United States, or a panel in the United States, saying, “That was a coerced confession, but, nonetheless, we’re going to give probative value to it”? Can you imagine that? I’ll tell you what, you have great resources in the DOD, the legal folks there—see if you can find me any case—any case—where a finding was made that was supported and affirmed that a confession was coerced, which, nonetheless, was given probative value. Just do that, and that’ll solve a problem that I have with that language, because I think it’s totally unacceptable that we say that you can reach a conclusion as a panel that the confession is coerced, but still allow it, anyway.

[The information referred to follows:]

Mr. Dell’Orto did not respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Senator Levin, may I just say one comment on this? Chairman LEVIN. Please do.

Mr. KATYAL. I think this is just a preposterous argument, that “coercion” means fish sandwiches, or that courts will read it to mean things like flipping witnesses or the like. I can’t imagine that such an argument would succeed in any court in this country. What you have here is, again, this Mr. Dell’Orto-and-Mr. Rivkin game of saying—whenever the MCA is criticized—“Oh, no, trust us, we’ll do it fairly, and so on.” But then, when we’re talking about

habeas corpus and things like that, they say, “Oh, no, there’ll be a flood of litigation, there’ll be damages actions that’ll ensue. If we have coercion bans, then the defense lawyers’ll ban all kinds of relevant testimony.” I think the American answer here is to trust our judges, trust our system. These preposterous arguments are never, ever going to be accepted in a court.

Chairman LEVIN. Just two last questions, and then we’re going to have to run and vote.

Mr. Smith, you said that you want a lawyer to be able to review classified evidence at these CSRTs. What Mr. Dell’Orto has said is that the representative that is provided for can review the classified evidence. Do you see that as an answer to your point?

Mr. SMITH. No, because the representatives are not counsel, and it’s not an adversarial proceeding.

Chairman LEVIN. Are they an advocate?

Mr. SMITH. They’re a representative. I’ve never attended one of these. So I can’t—

Chairman LEVIN. Is it intended that they be an advocate for the detainee?

Mr. SMITH. They’re personal representatives, and that’s something less than an advocate.

Chairman LEVIN. Can the personal representative, as a matter of fact, be questioned by the Government as to what a detainee told them?

Mr. SMITH. I believe the answer is yes.

Chairman LEVIN. I think that’s not a fair equation to say that, because a personal representative, who does not represent, as a lawyer, and advocate a detainee’s position can see something that’s classified—is the same as someone who has a fiduciary duty to that detainee and is an advocate for that detainee.

Mr. DELL’ORTO. Mr. Chairman, I wasn’t raising that point for that articulation. I was just making a statement of fact that at least, right now, presumably, if counsel were provided, he would have no less of a right to see classified material than the personal representative now has. So, the issue there is whether you get counsel, not whether he will have access to classified information.

Chairman LEVIN. The context that you used that access to the classified testimony—it seemed to me the context to kind of give some reassurance, “well, heck, there’s that access now.” It’s very different for someone who has no fiduciary duty, who can be quizzed by the Government, and who is not an advocate for a detainee, to have access to something—it’s very different for that to be the case than for someone who is an advocate, a lawyer, and has a fiduciary duty. I think you would agree.

Mr. DELL’ORTO. Yes. Clearly, I’m not trying to distinguish between those two roles.

Chairman LEVIN. One final question. I want to give you each an opportunity to answer this—no, I’m not going to be able to give you an opportunity to answer this, because we have a vote on the floor, which is going to be a very close vote.

I think I’d better adjourn this hearing, with thanks to you all. It’s been a long hearing, a very important hearing, and we’re very grateful for your attendance and for your advice.

Senator Dodd has presented testimony for the record, and so, we will accept his testimony and make it part of the record. I should have made reference to that before. The Dodd testimony will be made part of the record.

[The prepared statement of Senator Dodd follows:]

PREPARED STATEMENT BY SENATOR CHRISTOPHER J. DODD

Chairman Levin, Ranking Member McCain, and distinguished members of the committee: I thank you for holding this very important hearing. I believe that passage of the Military Commissions Act last year was a setback to our Nation's efforts to meet the international challenges we are confronted with in an uncertain world. This morning's hearing is an important step toward righting the wrongs embodied in the Military Commissions Act so that America can reclaim its moral authority.

Our Nation's security is the priority that overwhelms all others, especially in this time of war. Our soldiers, sailors, airmen, and marines are our first line of defense against terrorism, and they deserve all the resources we have in our power to give.

But last fall, the Senate passed a bill that endangers our troops and threatens the outcome of our struggle. The Military Commissions Act of 2006 was passed under the mantle of security—but nothing, in my view, could be further from the truth. I am asking you today to help me reverse that error.

Let me be clear: I absolutely believe that military commissions, appropriately constituted, can be an effective instrument for bringing our enemies to justice under clearly defined circumstances. Those who plan, support, or participate in terrorist attacks against the United States must be punished to the fullest extent of the law. But the Military Commissions Act as currently written does far more. As you know, it grants the President sole and unchecked authority to designate "unlawful enemy combatants." It then denies those individuals the right to counsel, the right to invoke the Geneva Conventions, and the right of *habeas corpus*. Worst of all, it would allow, under certain circumstances, evidence obtained through torture to be admitted into evidence.

These are not only departures from long-settled, long-honored precedent; they harm our Nation and its cause in two very concrete ways.

First, they put our troops in harm's way. If we countenance torture, foreign militaries may mistreat future American prisoners of war and use our actions as an excuse. I will grant that our enemies will hardly be swayed from torture by moral argument or the force of example. Still, if we should ever have to advocate for the fair treatment of our troops, the Military Commissions Act would deprive us of a valuable weapon. Consider the 15 British sailors recently kidnapped and held in Iran: We know that they suffered "mock executions," and that they were paraded on television, in violation of the Geneva Conventions. With the Military Commissions Act on our books, our authority to speak for them was severely weakened. That arguably might still be the case if the next troops captured were ours.

Second, the abuses of the Military Commissions Act dramatically harm our status as the world's leading proponent of international law and human rights. In this ideological struggle, the harm is not simply to our vanity—but to our ability to wage and win the war on terror. Convictions of alleged terrorists have already been called into question—most recently, that of David Hicks, who for several years raised allegations of American abuse. He then pled guilty after two of his lawyers were barred from appearing at his review. Khalid Sheikh Mohammed, the mastermind of the September 11 attacks, confessed to a litany of crimes, as well. But his allegations of torture at our hands found wide credibility. When our word is so tarnished that it seemingly ranks below that of one of the world's worst criminals, we have truly reached a sad pass. No one has put it with more authority than Senator McCain himself: "Prisoner abuses exact on us a terrible toll in the war of ideas, because inevitably these abuses become public. When they do, the cruel actions of a few darken the reputation of our country in the eyes of millions." Undoubtedly, those millions will include allies whose cooperation is essential to our success.

I believe it is time to start winning back our credibility. To that end, this February I introduced S. 576, the Restoring the Constitution Act. Senators Patrick Leahy, Russ Feingold, and Bob Menendez joined me as cosponsors. This valuable legislation, which seeks to remedy the excesses of the Military Commissions Act, now has 11 cosponsors and has been referred to your committee. It deserves your careful consideration and hopefully your support as well.

My legislation would overturn key provisions of the Military Commissions Act; specifically, it would do the following:

- Restore the writ of *habeas corpus* for individuals held in U.S. custody;

- Narrow the definition of unlawful enemy combatant to individuals who directly participate in hostilities against the United States in a zone of active combat, who are not lawful combatants;
- Require that the United States live up to its Geneva Convention obligations by deleting a prohibition in the law that bars detainees from invoking the Geneva Conventions as a source of rights at trial;
- Permit the accused to retain qualified civilian attorneys to represent them at trial;
- Prevent the use of evidence in court gained through the unreliable and immoral practices of torture and coercion;
- Charge the military judge with the responsibility for ensuring that the jury is appropriately informed as to the sources, methods, and activities associated with developing out of court statements proposed to be introduced at trial, or alternatively that the statement is not introduced;
- Empower military judges to exclude hearsay evidence they deem to be unreliable;
- Authorize the U.S. Court of Appeals for the Armed Forces to review decisions by the military commissions;
- Limit the authority of the President to interpret the meaning and application of the Geneva Conventions and make that authority subject to congressional and judicial oversight;
- Clarify the definition of war crimes in statute to include certain violations of the Geneva Conventions; and
- Provide for expedited judicial review of the Military Commissions Act of 2006 to determine the constitutionality of its provisions.

All of these measures are important. But perhaps none is more urgent than the final one, requiring expedited judicial review of the Military Commissions Act. The need is particularly pressing, given that the Supreme Court rejected an appeal in February by Guantanamo Bay prisoners seeking to exercise their *habeas corpus* rights. The appeal was rejected on the grounds that the appellants had not yet been tried under the new military commissions system. But a new appeal could take years to work its way through the courts. Given the high stakes—both for the individual detainees and for the credibility of our Nation—that is simply too long. I believe that upon a full judicial review of the Military Commissions Act, the members of our esteemed judiciary will see to it that its most egregious provisions are overturned.

Senators, I have fought on this issue long and hard. I've done so because the calling into question of our Nation's moral authority, manifest in how we treat our enemies, has a deep personal meaning for me. You might be aware that the Military Commissions Act was approved by the Senate on the 60th anniversary of the Nuremberg verdicts. My father, Thomas Dodd, served in this body; but before that, he was the number two prosecutor at Nuremberg. I remember well how he described the challenges of those days.

Sixty years ago, we had under our power the men of a brutal regime that had taken the lives of more than 20 million men, women, and children. The world considered their atrocities and asked: Why not just give in to vengeance?

Justice Robert Jackson, the lead American prosecutor, answered eloquently: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."

We are tested at such moments. At Nuremberg, when we affirmed our humanity and commitment to high principles, America confirmed its exceptional role in the world. Six decades later, the test has come again.

It is true that our enemies will never be influenced by appeals to what is right. They mock our laws, as Goering once mocked our treaties as "just so much toilet paper." But this is not about them. It's about us: our values, our principles, the just and honorable Nation we aspire to be.

All 100 members of this body—and the members of this committee most especially—have been given the gravest of responsibilities. The American people have entrusted us with this Nation's security; and they have entrusted us with this Nation's principles. But those who argue that our principles stand in the way of our security are sadly, sorely mistaken: They are the source of our strength.

Last year, we departed from that source. But it is not too late to turn back. I implore you to join me.

Thank you, Chairman Levin and Ranking Member McCain, for the opportunity to express my heartfelt views before your distinguished committee.

Chairman LEVIN. Now we really will stand adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR ROBERT C. BYRD

HABEAS CORPUS RIGHTS

1. Senator BYRD. Mr. Katyal, you argue that the Framers never intended to deny the right of *habeas corpus* to detainees based on either citizenship or alienage. Thus, what authority do you believe exists to deny detainees the right of *habeas corpus*, if, as some believe, the Equal Protection Clause of the Constitution were written specifically to extend that right to aliens, as well as to U.S. citizens?

Mr. KATYAL. As I testified before the committee, I do believe that the Equal Protection clause extends the right of *habeas corpus* to aliens, in addition to U.S. citizens at Guantanamo.¹ Therefore, because Congress has not invoked its Suspension Clause power, it may not eliminate the core *habeas* rights enshrined into our Constitution. 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. Even if Congress were to invoke its Suspension Clause power, it lacks *carte blanche* authority to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension of *habeas* only when in “Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, §9, cl. 2. In enacting the Military Commissions Act (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. Second, 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*. Third, 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. Fourth, such restrictive *habeas* review jeopardizes the finality and confidence surrounding verdicts of the military commissions. My prepared testimony addresses these issues at some length, see pp. 12–15.

2. Senator BYRD. Mr. Dell’Orto, in your testimony, you state that “the United States is entitled to hold these enemy combatant detainees until the end of hostilities.” Since it is generally acknowledged that the war against terrorism may continue indefinitely, meaning, for at least several generations, would you acknowledge that an innocent person mistakenly detained as an enemy combatant could potentially face detainment for his entire lifetime, without the possibility of redress?

Mr. DELL’ORTO. Although the war against terrorism may continue for some years, we have taken extensive measures at Guantanamo Bay to ensure that persons are not mistakenly detained. Specifically, the procedures include the initial assessment at the point of capture, the Combatant Status Review Tribunal (CSRT) to determine whether a detainee is an enemy combatant, followed by Federal court review of the lawfulness of that determination, the Administrative Review Board (ARB) to assess whether an enemy combatant should continue to be detained, and a process by which new information that may be relevant to a detainee’s enemy combatant status can be reviewed; all contribute to procedural safeguards that serve to preclude the possibility that the hypothetical situation would occur. These protections are unprecedented in the history of armed conflict.

3. Senator BYRD. Mr. Dell’Orto, wouldn’t restoration of the right of *habeas corpus* provide a clear and simple mechanism whereby the United States would avoid making such a mistake and, at the same time, enhance its credibility in the eyes of national authorities worldwide?

Mr. DELL’ORTO. The Department of Defense (DOD) relies on commanders in the field to make the initial determination of whether persons detained by U.S. forces qualify as enemy combatants. In addition to the screening procedures used initially to screen detainees at the point of capture, the DOD created two administrative review processes at Guantanamo in the wake of the *Hamdi* and *Rasul* cases: CSRTs and ARBs.

The CSRT is a formal review process, created by DOD and incorporated into the Detainee Treatment Act (DTA) of 2005, that provides the detainee with the oppor-

¹As I explain in my answer to question 49, a majority of the Supreme Court of the United States has suggested that Guantanamo is, for all practical purposes, United States territory.

tunity to have his status considered by a neutral decisionmaking panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections, building upon procedures found in Army Regulation 190–8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. Although unlawful enemy combatants are not entitled to the special protections afforded to prisoners of war under international law, the CSRT provides the detainee rights that notably extend beyond those provided in tribunals set up in accordance with Article 5 of the Geneva Convention Relative to the Protection of Prisoners of War.

In addition to the opportunity to be heard in person and to present additional information, a detainee can receive assistance from a military officer to prepare for the hearing and to ensure that he understands the process. Furthermore, although the CSRT recorder has a duty to present to the CSRT such matters in the Government information as may be sufficient to support the detainee's classification as an enemy combatant, the recorder is also obligated to provide to the tribunal any matters in the Government information suggesting the detainee is not an enemy combatant to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the information supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority within DOD, empowered to return the record to the tribunal for further proceedings, in addition to Federal court review by the D.C. Circuit. Notably, access by enemy detainees to a nation's domestic courts is a remarkable protection, unprecedented in the history of armed conflict. Finally, if new factual information comes to light relating to a detainee's enemy combatant status, a CSRT can be convened to re-evaluate that status determination in the light of the new information.

In addition to the CSRT, an ARB conducts an annual review to determine the need to continue the detention of the enemy combatant. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention. Based on this assessment, the ARB can recommend to the designated civilian official that the individual continue to be detained, be released, or be transferred. The ARB process also is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

These multiple processes serve to ensure we are continuing to detain at Guantanamo Bay only those persons whose detention there is necessary in the security interests of the United States.

4. Senator BYRD. Mr. Dell'Orto, if the tribunal is truly impartial and fair, what would be lost by protecting innocent detainees from being held indefinitely, yet determining legitimately, openly, and for the record, which detainees justifiably should be held as enemy combatants?

Mr. DELL'ORTO. Please refer to the answer to question 3 in regard to CSRTs.

Additionally, the unclassified portions of these tribunals are open to the detainee so he can participate and, in fact, members of the media have been permitted to observe those open portions. The classified portions of the proceedings are not open for security reasons.

RIGHT TO COUNSEL

5. Senator BYRD. Mr. Denbeaux, where in the United States Constitution did the Framers state that detainees should not be entitled to counsel, and that powers entrusted to the American judiciary should be transferred to tribunals created, administered, controlled, and judged purely by the executive branch?

Mr. DENBEAUX. The assistance of counsel, perhaps more than any other dimension of due process, evokes the traditional American value of fair play. The United States Constitution never once restricts, limits, or denies anyone to be entitled to the right to counsel or that the powers of the judiciary should be transferred to tribunals created by the executive branch. Quite to the contrary, the language of the Constitution explicitly guarantees the assistance of counsel. Clearly, the United States Constitution does not deny detainees the right to counsel and doing so goes against both the letter and the spirit of our foundational document. The right to counsel is entrenched in the laws of all civilized nations. The right to an independent judiciary, rather than an ad hoc administrative procedure created by or for the executive branch is an even greater violation of the Constitution's language and structure.

6. Senator BYRD. Mr. Dell’Orto, do you believe that the military officer, which is currently provided by the government to “assist” a detainee in preparing for his hearing before the CSRTs is, in every respect, the same as an attorney who, if hired by the detainee, would act in his behalf as his exclusive advocate?

Mr. DELL’ORTO. The personal representative is not an attorney and does not function in the role of an attorney, nor is it intended or required that the personal representative function in such a role. The personal representative is a military officer who assists the detainee in preparing for his administrative CSRT hearing and ensures that he understands the process. The personal representative can also assist the detainee in questioning witnesses at the CSRT.

7. Senator BYRD. Mr. Dell’Orto, if you do not see military officers currently provided as the same as an attorney or exclusive advocate, why do you believe the detainee is entitled to even minimal assistance?

Mr. DELL’ORTO. The CSRT procedures were put in place to allow the detainee the opportunity to contest his designation as an enemy combatant. The personal representative and the assistance of the personal representative help the detainee in this regard. They are modeled after, but exceed, the non-adversarial processes that the DOD has employed in past armed conflicts, consistent with Article 5 of the Geneva Convention Relative to the Protection of Prisoners of War. These procedures exceed the requirements of status tribunals under the law of war.

8. Senator BYRD. Mr. Dell’Orto, what is the rationale for providing a detainee with some legal advice, but not an attorney in whom the detainee may confide?

Mr. DELL’ORTO. There is no “legal advice” provided to detainees during the CSRT process. The personal representative informs the detainee of the nature of the CSRT process and of his opportunity to participate in that process. The CSRT is an administrative proceeding to review a detainee’s status; it is not a judicial proceeding.

UNITED STATES CREDIBILITY ABROAD

9. Senator BYRD. Mr. Denbeaux, in your testimony, you state that the eyes of the world will be on any detainee trials held in the United States. How do you believe our Nation’s actions in this regard, including the standards it applies to these proceedings, will affect U.S. credibility abroad?

Mr. DENBEAUX. Our credibility abroad has already been damaged by these “secret show trials.” The United States has long embodied the dream of freedom for the world. We have objected to secret trials, with secret evidence and without impartial tribunals when such procedures are used in other countries. The eyes of all people are upon us. The reputation of the United States is on the line—and hearings conducted in the legal abyss of Guantanamo, hearings that do not possess even a veneer of credibility—sully our image abroad and erode the foundations of our freedom at home. Our ability to object to such procedures when used by dictatorships around the world is diminished by our hypocrisy.

CLASSIFIED EVIDENCE

10. Senator BYRD. Mr. Denbeaux, can you identify any other examples in American jurisprudence where a government prosecutor is entitled to rely on classified evidence presumed to be valid, though withheld from the defendant/detainee, who is also unable to retain counsel to defend himself?

Mr. DENBEAUX. No.

SOLID LEGAL FOOTING AND CLEAR CRITERIA

11. Senator BYRD. Mr. Smith, in your testimony, you state that Congress should require the President to issue an Executive order “establishing solid legal footing and clear criteria for the conduct of extraordinary renditions.” What remedy exists if the President refuses to issue such an Executive order?

Mr. SMITH. I hope, and expect, that the President would respect congressional direction. If he refuses, Congress has a number of actions it may take, ranging from oversight hearings to withholding of funds. But again, I hope no such action is necessary.

12. Senator BYRD. Mr. Smith, why shouldn’t Congress simply specify such “solid legalities” and “clear criteria” by statute, rather than direct the President to issue such an Executive order?

Mr. SMITH. My hope is that the President would incorporate these criteria in his Executive order. In my experience, renditions are often unique; they may be conducted for different reasons and present different questions. Some are conducted for law enforcement purposes, for example, one State “rendering” a suspect to stand trial in another State where extradition is not practicable. Another example is one State entering the territory of another State, but over which the State is not able to exercise effective control, for the purpose of bringing a terrorist to justice. It is difficult to anticipate all of the possible issues that might be presented by these and other examples and my concern is that if we enacted a statute with rigid criteria, we might unnecessarily restrict the ability of the United States to conduct necessary renditions in the future.

That said, I am not in favor of conducting renditions solely for the purpose of “taking someone off the streets” or sending someone to a country where we have reason to believe they will be tortured or face trial in a country that does not afford minimal international standards for a fair trial.

If the President does not incorporate strong criteria in his Executive order or if, after conducting oversight, Congress finds that renditions have been conducted that are unacceptable or that don’t adhere to the criteria in the Executive order, then Congress should enact a statute that prohibits renditions unless clear criteria and legal protections are met.

13. Senator BYRD. Mr. Smith, would you suggest that such congressional legislation contain the same elements that you proposed for inclusion in the Executive order?

Mr. SMITH. As I have discussed in the previous question, I do not foresee the need for congressional legislation, but if legislation were necessary it should be written in broad terms and principles in order to preserve the necessary flexibility for the President. I say this because it is much more difficult to amend a statute than an Executive order, especially in a short period of time.

RESTITUTION

14. Senator BYRD. Mr. Smith, at page 15 of your testimony, you note that, “United States law requires a showing of specific intent to commit torture, and it is therefore doubtful that merely sending someone to a state where torture might occur violates the statute absent a more specific showing of intent.” Do you believe the statute should be modified to reflect a different standard necessary to prove intent to commit torture? If so, how?

Mr. SMITH. I do not believe that United States law should change its current requirement of showing specific intent to commit torture. We ask the men and women of our intelligence services to take extraordinary risks and make decisions under enormous pressure. My concern is that if we lowered the requirement of specific intent, it could expose individuals who made tough choices in very trying circumstances to later second guessing and possible prosecution. They should be given, in an Executive order or statute if necessary, clear criteria and guidance so that no one is knowingly sent to a state where we have reasonable knowledge that torture might occur.

RIGHT TO DUE PROCESS

15. Senator BYRD. Mr. Dell’Orto, you state that “[m]uch of the evidence against these accused war criminals was collected on foreign battlefields, where reading Miranda-style rights, warnings, and obtaining court-issued search warrants would be impossible and would, in any case, cripple intelligence-gathering efforts.” However, we know from innocent detainees wrongly imprisoned at Guantanamo, who, years later, have now been released, that many of them were not captured on any foreign “battlefield.” Instead, they were turned over to the U.S. Government based on hearsay evidence, contrived by bounty hunters, who sought payment in exchange for persons they delivered to the U.S. Government as alleged “terrorists.” Wouldn’t adherence to fundamental principles of due process, including the right to counsel, cross-examination, and access by the detainee to the evidence that is being used against him, actually improve U.S. intelligence-gathering efforts by enhancing the truth, rather than contributing to the wrongful detention of innocents?

Mr. DELL’ORTO. First, both the Supreme Court and the D.C. Circuit Court of Appeals have held that aliens detained outside of the United States do not have constitutional due process rights. Also, as explained in the answer to question 1, we have extensive procedures in place to ensure that persons are not mistakenly de-

tained. The CSRT is an administrative proceeding to review a detainee's status; it is not a judicial proceeding. Nevertheless, the CSRT provides the detainee rights that notably extend beyond those provided in a tribunal conducted pursuant to Article 5 of the Geneva Convention Relative to the Protection of Prisoners of War, as explained in the answer to question 3.

ALIENAGE AND THE EQUAL PROTECTION CLAUSE

16. Senator BYRD. Mr. Rivkin, what is your response to the assertion that the MCA is unconstitutional because it discriminates on the basis of alienage, a distinction not contemplated by the Equal Protection Clause?

Mr. RIVKIN. The Equal Protection Clause is part of the Constitution's 14th Amendment and does not apply to actions taken by the Federal Government. In that regard, and among other things, the Equal Protection Clause forbids any State to "deny to any person within its jurisdiction the equal protection of the laws."

With regard to the Federal Government, the courts have recognized an equal protection component in the Fifth Amendment's Due Process Clause. The Fifth Amendment's Due Process Clause, part of the original Bill of Rights, does apply to Federal actions. However, the courts have not interpreted this provision as an absolute. Although distinctions drawn on the basis of alienage are reviewed based on a heightened level of scrutiny, they can be justified based upon a sufficiently important governmental interest. I believe that the war on terror provides that interest and that the MCA would, and should, be upheld against an equal protection challenge.

17. Senator BYRD. Mr. Rivkin, do you share the view that the Equal Protection Clause was intentionally written specifically to extend certain rights, including the right of *habeas corpus*, to aliens, as well as U.S. citizens?

Mr. RIVKIN. As noted above, the Equal Protection Clause is part of the 14th Amendment. That Amendment—along with the 13th and 15th Amendments—was adopted after the Civil War to ensure that the freed slaves were guaranteed the full rights of citizenship throughout the Union, but especially in the Southern States. I do not believe that it was drafted specifically to extend certain rights to aliens as well as U.S. citizens.

However, as suggested above with regard to the equal protection component of the Fifth Amendment's Due Process Clause, in construing the Equal Protection Clause, the courts have generally applied a heightened level of scrutiny to legal distinctions drawn on the basis of alienage. I believe that the governmental interest in effectively fighting and winning the war on terror is a sufficient interest to support the distinctions made by the MCA.

QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

COMBATANT STATUS REVIEW TRIBUNALS

18. Senator AKAKA. Mr. Dell'Orto, after the Supreme Court's decision in the *Hamdi* case in 2004, the DOD established CSRTs with a stated objective of providing Guantanamo detainees "the opportunity to contest designation as an enemy combatant." However, it is clear from the CSRT procedures enacted by the military, that the detainee really does not have an opportunity to seriously contest his designation as an "unlawful combatant," since the detainee:

1. has already been determined to be an enemy combatant;
2. is not represented by a lawyer or advocate;
3. faces tribunal procedures that specifically minimize the potential to access exculpatory evidence;
4. is only allowed to respond to the unclassified evidence;
5. is not allowed to confront his accusers;
6. is not allowed to see or respond to classified evidence; and
7. has already been referred to in the press by high level government officials up to and including the President of the United States as "the worst of the worst."

What exactly are we accomplishing with the CSRTs?

Mr. DELL'ORTO. Please see the answer to question 3 in regard to CSRTs. The CSRT process, in conjunction with the ARB process, ensures that we are detaining the right individuals and are keeping them off the battlefield.

19. Senator AKAKA. Mr. Dell'Orto, it seems like we are expending a lot of resources on CSRTs, but are not really allowing the tribunals to accomplish their stat-

ed function. Instead it appears to be merely an administrative review conducted by the military with virtually no opportunity for the detainee to challenge the “enemy combatant” designation. Please explain how the CSRTs are specifically addressing DOD’s stated objective of providing Guantanamo detainees “the opportunity to contest designation as an enemy combatant.”

Mr. DELL’ORTO. Please see the answer to question 3 in regard to CSRTs.

20. Senator AKAKA. Mr. Dell’Orto, during the hearing, I asked you why a detainee is not allowed to have any advocate or lawyer to represent him during a CSRT. I noted that he is assigned a “personal representative,” who specifically does not represent him in the proceedings, which makes the title of “personal representative” a misnomer, to say the least. It seems to me that your response is inconsistent with the stated purpose of the CSRT, and with American values for fair criminal justice. Specifically, you stated that we already give more rights to a detainee than they would have under a Geneva Convention Article 5 hearing. But an Article 5 hearing takes place on or near the battlefield, around the time of capture. Obviously, there are limitations as to what kind of proceedings can be conducted under those circumstances. A CSRT has no such excuse. I would also note that providing more rights than the Geneva Convention is not necessarily the bar against which we should measure success. Next, you stated the detainee has a personal representative who sees all of the evidence, including the classified evidence. But what good is a representative who has no responsibility or obligation to represent your interests in a proceeding?

Mr. DELL’ORTO. The purpose of a CSRT is to ensure we are detaining the right individuals and to keep those individuals from returning to the battlefield. The purpose of a criminal trial is to punish an individual for violating a law. The MCA enables us to punish alien unlawful enemy combatants who have violated the laws of war, but that system is separate and apart from the basis for detaining enemy combatants, which is determined by a CSRT. Both of these systems have an appropriate place within our detainee policy.

The personal representative is a military officer who assists the detainee in preparing for his hearing and ensures that he understands the process. The CSRT Implementing Procedures (available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>) (see Annex B) clearly describe the significant roles and responsibilities of the personal representative. The personal representative explains the nature of the CSRT process to the detainee, explains his opportunity to present information and assists the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the tribunal. The personal representative explains the detainee’s opportunity to make a personal appearance before the tribunal. The personal representative requests an interpreter, if needed, to aid the detainee in making such an appearance and in preparing his presentation. The personal representative explains to the detainee that he may be subject to questioning by the tribunal members, but he cannot be compelled to make any statement or answer any questions. The personal representative can also assist the detainee in questioning witnesses at the CSRT. The personal representative shall present information to the tribunal if the detainee requests that the personal representative do so, and, outside the presence of the detainee, may comment upon classified information submitted by the recorder that bears upon the presentation made on the detainee’s behalf. Once the record is complete, the personal representative shall be provided the opportunity to review it and may submit observations or information that he or she believes was presented to the tribunal and is not included or accurately reflected in the record.

Also, nothing in Article 5 suggests that such “competent tribunals” were designed only for proceedings “on or near the battlefield.” Indeed, state parties have a responsibility to evacuate detainees out of an area of active hostilities. The Article 5 tribunal is designed to be used during an ongoing armed conflict; however, there is no question that the armed conflict against al Qaeda continues.

21. Senator AKAKA. Mr. Dell’Orto, the person who sees all of the evidence, including the classified evidence, but has no responsibility or obligation to represent your interests in a proceeding should not even be called a “representative” because they do not represent the detainee. In fact, “personal representatives” have often advocated for the Government. Finally, you asked how far do we want to take this, “do we take this to the point where it’s a full-blown criminal trial?” You stated that you think we would be headed that way if we allow counsel for the detainees “and things of that nature.” In other words, you seem to believe that it is just too hard to give the detainee a truly fair opportunity to challenge his designation; therefore, we should not give them the opportunity. Can you comment?

Mr. DELL'ORTO. Please see the answer to question 20.

22. Senator AKAKA. Mr. Dell'Orto, to follow-up on my question to you during the hearing regarding an advocate for the detainee, why not allow an advocate to represent the detainee in a CSRT?

Mr. DELL'ORTO. The CSRT is an administrative proceeding to review a detainee's status; it is not a judicial proceeding. The personal representative serves the role that is appropriate for such a process. The CSRT Implementing Procedures (available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>) (see Annex B) clearly describe the significant roles and responsibilities of the personal representative. See also the answer to question 20 in regard to the personal representative's role.

23. Senator AKAKA. Mr. Dell'Orto, I do not think you have to have a full blown criminal trial simply to allow someone to advocate for the detainee, and to challenge the basis for detention. There are forms of legal proceedings that do not involve a full trial. I note that since military personnel are probably predisposed to the belief that the detainees are enemy combatants due to well-publicized statements about the detainees being the "worst of the worst," it seems that a lawyer cleared to hear the evidence would be the fairest form of representation. Can you comment?

Mr. DELL'ORTO. The CSRT is an administrative proceeding in which the detainee has the opportunity to have his status considered by a neutral decisionmaking panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. Thirty-eight detainees were determined to be No Longer Enemy Combatants by CSRTs held in 2004 and 2005. That fact corroborates our assessment that military personnel per se are not predisposed to the belief that the detainees are enemy combatants. There is no reason to believe that personal representatives would be any different in the execution of their duties.

REVIEW OF GUANTANAMO DETAINEES

24. Senator AKAKA. Mr. Dell'Orto, Professor Denbeaux and his students have performed a very thorough evaluation of the publicly available information on the Guantanamo detainees. Since you stated that the Department was in the process of reviewing the reports, upon completion of your review, would you please provide the assessment and data where you believe his findings were inaccurate.

Mr. DELL'ORTO. At the Department's request, the Combating Terrorism Center (CTC), a privately funded academic institution affiliated with the United States Military Academy at West Point, conducted its own independent review of the data underlying the Seton Hall report, which consisted of 516 (the information initially posted by the Department contained a single duplicative record) unclassified summaries used in CSRT. The CTC study was published on July 25, 2007. The CTC's analysis, which can be found at <http://www.ctc.usma.edu/csrt/default.asp>, (see Annex A) [information retained in committee files] reached conclusions dramatically different from those contained in the Seton Hall report.

Among the most significant of the CTC's findings are that the unclassified summaries indicate that 73 percent of the detainees in question could be classified as demonstrated threats to the United States, and that 95 percent could be classified as potential threats. Conversely, the CTC's analysis revealed that only 1.16 percent of the CSRT unclassified summaries failed to allege any evidence of a threat posed by the detainees to whom they applied. Additionally, in conjunction with its report, the CTC published a response to the Seton Hall report, identifying significant flaws in the Seton Hall group's statistical methodology (see Annex C). [Information retained in committee files.]

I would note that the CTC's findings were a result of a review of only the unclassified summaries. As you are aware, there is also classified information within each of the detainee's files that was reviewed by the CSRT when making a status determination.

25. Senator AKAKA. Mr. Dell'Orto, please provide statistics on the Guantanamo program regarding the numbers of detainees processed, the number released, and the number recaptured or killed on the battlefield.

Mr. DELL'ORTO. As of September 29, 2007, 778 detainees have been processed at Guantanamo.

As of September 29, 2007, there are approximately 330 detainees currently at Guantanamo.

As of September 29, 2007, approximately 445 detainees have departed Guantanamo for other countries.

Number of former Guantanamo detainees either confirmed or suspected to have returned to the fight: Approximately 30.

26. Senator AKAKA. Mr. Dell'Orto, of the Guantanamo detainees released, how many were determined to have been wrongfully detained?

Mr. DELL'ORTO. No released detainees were determined to have been wrongfully detained.

27. Senator AKAKA. Mr. Dell'Orto, how many were simply determined to be "no longer an enemy combatant"?

Mr. DELL'ORTO. Thirty-eight detainees have been determined by the CSRT process to be no longer enemy combatants, and all have been released.

28. Senator AKAKA. Mr. Dell'Orto, what basis does the military use to determine that someone is no longer an enemy combatant?

Mr. DELL'ORTO. The CSRTs determined that 38 detainees were no longer enemy combatants. The CSRT determines whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

29. Senator AKAKA. Mr. Dell'Orto, of those that have departed from Guantanamo, are there any that were not released from the custody of either the United States or another nation?

Mr. DELL'ORTO. Yes, some detainees have departed Guantanamo and have not been released from the custody of other nations. Those detainees are not held on behalf of the United States, but rather are held under the authority of the laws of their home nations in which they are detained.

30. Senator AKAKA. Mr. Dell'Orto, of those who were released after having departed from Guantanamo, where were they released (e.g., in their home nation, third party nation, et cetera)?

Mr. DELL'ORTO. Detainees have been released after having departed from Guantanamo both to their home countries and, in some cases, to third-party nations. Releases to third-party nations have been necessary when the U.S. Government determined that the individuals could not be released to their home countries due to a lack of sufficient assurances regarding humane treatment or security from those countries or when the home countries did not agree to accept their nationals.

RIGHT TO DUE PROCESS AND MILITARY COMMISSIONS

31. Senator AKAKA. Mr. Rivkin, the 6th Amendment states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." It further states that the accused has a right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." The 5th Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law." I am having difficulty understanding your assertion in your prepared statement that the MCA comports with the Constitution. In fact, the law specifically has provisions denying these very rights. I note that further down in your statement, you say that in your view, the "scope of judicial review is not only sufficient for noncitizens held abroad, but is constitutionally sufficient for United States citizens themselves." Please explain how you reach the conclusion that the MCA comports with the Constitution, specifically addressing the 5th and 6th Amendments for both citizens and noncitizens.

Mr. RIVKIN. I believe that the MCA comports with the requirements of both the Fifth and Sixth Amendments because the individuals subject to trial in military commissions are not civilians entitled to be tried in the civilian courts. Both in the case of military commissions and military courts martial, the courts have long accepted that the full rights guaranteed by the Constitution in ordinary criminal trials are not required in military tribunals. This was the Supreme Court's holding in *Ex parte Quirin* (1942), which remains good law today. (In this regard, a number of lower courts and the Supreme Court have referred to *Quirin* with approval in several post-September 11 national security cases.) Further, the critical distinction here is not one of citizenship, but one of being a combatant or civilian. United States citi-

zens who are combatants, whether lawful or unlawful, can be subject to military courts as can noncitizens. That, also, is part of *Quirin's* teaching.

32. Senator AKAKA. Mr. Rivkin, in your statement, you say that “the current U.S. practice has been not to prosecute at all, at least so far, the vast majority of individuals determined to be unlawful enemy combatants. The fact that this procedural and substantive generosity has not been widely hailed and appears not to even be noticed by most of the critics is unfortunate.” Given that the 5th Amendment guarantees that no person shall “be deprived of life, liberty, or property, without due process of law,” why is it that you feel that we are being generous by not prosecuting detainees?

Mr. RIVKIN. As noted in my answer to the above question, individuals who qualify as enemy combatants in time of war, whether they are lawful enemy combatants or unlawful enemy combatants, are not constitutionally entitled to be tried in civilian courts with all of the guarantees of the Bill of Rights. Moreover, individuals who are combatants—as the Supreme Court explained in *Ex parte Quirin*—can be detained until hostilities end and can also be tried and punished for war crimes. Becoming and operating as an unlawful enemy combatant—like the saboteurs at issue in *Quirin* or al Qaeda and Taliban operatives today—violates the laws of war, for which such individuals can be harshly punished, up to and including death penalty. The major reason why this is the case is because unlawful combatancy is a very dangerous phenomenon and unlawful combatants, both of the yesteryear and today, are responsible for a disproportionate number of atrocities against civilians and other grave breaches of the laws and customs of war. The fact that the United States has chosen not to try and punish all al Qaeda and Taliban operatives for having violated the laws of war is, in my view, generous.

33. Senator AKAKA. Mr. Rivkin and Mr. Dell’Orto, during the hearing, Admiral Hutson stated that our criminal justice system assumes innocence until proven guilty, and that he believes that the MCA has reversed this presumption. Do you agree with the Admiral’s statement? If not, why not? If so, do you believe this is an acceptable consequence of the act and why?

Mr. RIVKIN. I disagree with Admiral Hutson. Under MCA section 9491 “Voting and Rulings,” a military commission can only make its findings once commission members have been instructed that “the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt” and that “the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.” I also believe that this is the correct standard to be applied in military commission proceedings.

Mr. DELL’ORTO. I disagree with Admiral Hutson. Both the MCA and Rules for Military Commissions expressly provide that an accused tried before a military commission is presumed innocent, that this presumption can only be overcome when guilt is proven beyond a reasonable doubt, and that the burden of proof rests with the prosecution. See MCA § 9491(c) and Rule for Military Commissions 920(e)(5).

DISTINCTION BETWEEN “LAWFUL” AND “UNLAWFUL” ENEMY COMBATANTS

34. Senator AKAKA. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, during the hearing, I asked Mr. Smith why we need two different categories of enemy combatants (i.e., lawful and unlawful), which sparked some discussion between several members of the panel. A couple of you indicated that, in your opinion, the distinction is unnecessary, creating some difficult complexities. To this, Mr. Rivkin responded that this distinction is centuries old, and is reflected in dozens of military manuals, in dozens of court decisions, including the Supreme Court decisions in this country. He further stated that this “distinction is fundamental to the laws and customs of war, because the whole purpose of laws and customs of war is to inculcate the respect for the law-complying approaches to combat and to deter the noncompliant approaches.” If the purpose of this distinction is truly to instill “respect for the law-complying approaches to combat and to deter the noncompliant approaches,” as Mr. Rivkin argues, then I submit to you that the unlawful enemy combatant designation has done little to convince terrorists to abide by “law-complying” approaches to combat. As such, I ask each of you to provide your expert opinion on the need to have the two categories of enemy combatants. If we treated all enemy combatants in the war on terror the same, what would be the problems and the benefits, in your opinion?

Mr. DELL’ORTO. The distinction between lawful and unlawful enemy combatants is an important principle in efforts to seek compliance with the law of armed conflict

because it reflects the incentive for both current and future belligerents to abide by those laws. Belligerents' adherence to international legal rules governing armed conflict is fostered by each party's expectation that it will receive reciprocal treatment from the adversary. Although it is true that terrorists' lawless activities, including deliberately targeting civilians, means that they have no regard for the law of war and no record of abiding by the law of war in the current conflict, we are confident that consistent and sustained application of the law of war makes it more likely that belligerents will abide by the law of war in the future. Conversely, to treat all belligerents the same, without regard to their lawful or unlawful actions, would remove any practical incentive to abide by the law of war.

Moreover, treaties to which the United States is a party afford greater protections to certain categories of lawful enemy combatants. Thus, international law contemplates that state parties will make such a distinction.

Mr. SMITH. Although I understand the argument that having different categories of detainees increases our operational flexibility, I do not believe that we should make those distinctions. For purposes of clarity for our military personnel, for purposes of diplomacy, and as a sign to the world that we are acting in good faith, I think we should treat all detainees consistent with the standards set forth in the Geneva Conventions.

I should add that while I agree with Senator Dodd's efforts to narrow the definition of an unlawful enemy combatant, my preference is to eliminate the status differentials.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. I believe in the distinction. If we choose to ignore the age-old, internationally-recognized distinction between lawful and unlawful enemy combatants and treat all enemy combatants in the war on terror the same, we are lowering our Nation to the level of terrorists in order to prosecute them. While convincing terrorists to abide by "law-complying" approaches to combat is certainly a lofty goal, it is an unrealistic one at best. The importance of maintaining the distinction between lawful and unlawful combatants that terrorist regimes blatantly disregard is to distinguish ourselves from our enemies. If the United States is viewed as little different from terrorist regimes, then other nations, enemies, and allies alike will believe we lack respect for those with different beliefs.

Offering detainees certain limited rights is not legitimatizing al Qaeda's methods, considering that many detainees are completely unfamiliar with our court system and the novel process of military commissions. As former Secretary of State Colin Powell recently stated:

The concern was, "Well, then [the detainees will] have access to lawyers, then they'll have access to writs of *habeas corpus*." So what? Let them. Isn't that what our system's all about? By the way, America, unfortunately, has 2 million people in jail all of whom had lawyers and access to writs of *habeas corpus*. So we can handle bad people in our system. So I would get rid of Guantanamo and I'd get rid of the military commission system and use established procedures in Federal law or in the manual for courts-martial . . . because I think it's a more equitable way to do it and it's more understandable in constitutional terms . . . and because every morning I pick up a paper and some authoritarian figure, some person somewhere is using Guantanamo to hide their own misdeeds. So, essentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission.

MSNBC Meet the Press Transcript for June 10, 2007, available at <http://www.msnbc.msn.com/id/19092206> (see Annex D). [Information retained in committee files.]

It is not the classification of al Qaeda fighters as unlawful enemy combatants that criticism is directed at; rather, it is the treatment that has resulted from that categorization. After all, the administration attempted for several years to argue that these individuals were exempt even from the rudimentary protections of Common Article 3 of the Geneva Convention. Fortunately, the Supreme Court reversed that interpretation in *Hamdan*.

The onslaught of international criticism—prior to the detainees' trials beginning—should prompt us to re-evaluate whether we are handling the situation correctly. The trials are likely to be highly publicized, and we need the support of the international community if we are ever going to "win" the war on terror.

Mr. DENBEAUX. Mr. Rivkin misrepresents the laws and customs of war. In contemplating a comparable situation under the laws of war, a situation where indefi-

nite detention is not merely foreseeable but likely inevitable, perhaps Mr. Rivkin is thinking of the Hundred Years War. This war is potentially endless. Our history has frequently required that wars end with an unconditional surrender. Whose surrender would end this war? Who decides when this war is over?

He ignores the views of the Supreme Court, expressed in *Hamdan*, that all combatants—regardless of their purported status as “lawful” or “unlawful”—are entitled by Common Article 3 of the Geneva Conventions to judgment “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The determination of a combatant as lawful or unlawful—within the context of the war on terror—defies logic. The weapons of terror are themselves unlawful. The perpetrators are not combatants in a war; they are criminals who should be prosecuted as such. The application of the term unlawful is inconsistent with the normal dichotomy of law and of war.

It also defies logic, reason, and the customs of civilized nations to capture individuals far from any real battlefield, and label them combatants. The consequences of this twisted definition of combatant leads to people being found to be enemy combatants, as our report has demonstrated, if they are believed to have supported hostilities by, for example, supporting a charity that somehow is thought to support terrorists. It defies reason that they may be apprehended, and then imprisoned—yet have no right to test their incarceration via *habeas corpus*, have no counsel, and no hope of release.

Now we seek to apply the distinction of lawful combatants to non-combat enemy combatants. Our system permits us to hold indefinitely individuals who we do not claim violated any laws and who we do not claim engaged in combat. We permit the incarceration of civilians who have neither broken any law nor engaged in any combat.

When Congress passed the MCA, Congress distinguished unlawful enemy combatants from lawful enemy combatants. It is remarkable that the MCA would specifically apply only to unlawful enemy combatants and then to discover that there truly is no difference in unlawful and lawful enemy combatants.

Even more remarkable is the fact that at the same time that Congress made the distinction between unlawful and lawful enemy combatants for military commissions it permitted indefinite detention in Guantanamo for detainees in Guantanamo who are being held indefinitely as lawful enemy combatants.

Nothing could present in a clearer light the irrational and harmful effects of the distinction between lawful and unlawful enemy combatants than the case of David Hicks. David Hicks had two choices. Admit to being an unlawful enemy combatant who committed war crimes and remaining a lawful enemy combatant. David Hicks was better off confessing to being a war criminal before the Military Commission than he was winning before the Military Commission and being returned to Guantanamo as a lawful enemy combatant. If David Hicks had proven that he was not a war criminal he would have been returned to Guantanamo as a lawful enemy combatant for the indefinite future. He pled to the crime and has been sent home to serve 9 months in an Australian jail and then he will be released.

David Hicks, an admitted unlawful enemy combatant, will be home for the New Year. The lawful enemy combatants in Guantanamo will stay far longer.

Mr. RIVKIN. Treating all enemy combatants in the war on terror as lawful combatants would undercut the fundamental distinction between lawful and unlawful behavior in armed conflict, and would inevitably legitimize conduct that the laws of war have always sought to delegitimize and punish. In my view, given the grave threat posed by unlawful combatants who fight out of uniform, deliberately operate out of civilian areas, and whose entire *modus operandi* is to attack civilians and cause maximum casualties, taking any steps that would have the effect of legitimating this kind of behavior would be nothing short of disastrous. Far from being a humanitarian gesture, erasing the venerable and well-established distinction between lawful and unlawful combatants would be inconsistent with the entire architecture of the laws of war paradigm.

In addition, granting unlawful combatants lawful status would also require their recognition as POWs, with all of the very substantial rights to self-government, communication, and honorable status that this classification entails. This would make fighting and winning the war on terror far more difficult. It is, of course, true that the laws of war have not deterred all unlawful combatants any more than our civilian law codes deter all criminals. Indeed, given their fanaticism and zealotry, it is quite likely that many members of al Qaeda, Taliban, and other jihadist groups are well-beyond deterrence with regard to this matter and other aspects of their behavior. However, as in the case of the civilian system, it is likely that many individuals and groups that may wish to take arms against the United States and our allies can be deterred and—at a minimum—it is incumbent upon lawful sovereign states

to make clear, by the legal rules they recognize and apply in wartime, that certain behaviors are unacceptable. I believe that this reassurance function of the relevant legal rules is just as important as the deterrence function.

MILITARY COMMISSIONS ACT AND THE DETAINEE TREATMENT ACT

35. Senator AKAKA. Mr. Katyal, Mr. Denbeaux, Admiral Hutson, and Mr. Smith, your fellow panelist, Mr. Rivkin, asserted in his statement that the MCA and the DTA comport with the U.S. Constitution and more than meet the applicable international Law of Armed Conflict standards. He further states that the actual procedures currently used by the DOD to determine the status of detainees and to try them for war crimes are constitutionally sufficient and give to the detainees far more due process than they have had under any other “competent tribunals” convened, for example, under Article 5 of Geneva Convention III or any military commission in history. Finally, he asserted that the scope of judicial review under the MCA and DTA “is not only sufficient for noncitizens held abroad, but is constitutionally sufficient for United States citizens themselves.” Please provide your views on the validity of these statements.

Mr. KATYAL. Like the DTA of 2005, the MCA of 2006 implements an impoverished two-tier justice system. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles that are deeply ingrained in both our legal culture and our American narrative. It eliminates the right of *habeas corpus* for a group defined not by objective principle, but by arbitrary judgment of the executive. Citizen detainees remain free to challenge their detention in civilian courts, while alien detainees are now excluded from independent judicial review based on a mere 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 Federal courts. As I explained in my earlier testimony to this committee, the Equal Protection components of the Fifth and Fourteenth Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply 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 those who do and do not receive full *habeas* review under the MCA is based on an unconstitutional distinction-alienage. The onus is on this Congress and this committee to recognize that we can no longer tolerate this unconstitutional deviation from longstanding American law in the current war on terror.

In addition, the commissions sanctioned by the MCA flout international law and dispense with many of the procedures fundamental to the fair administration of justice. 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.

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. What the MCA does retain of the Geneva Conventions is, under the administration’s view, thin gruel. For instance, while grave breaches of Common Article 3 are subject to criminal sanction, a court may not consider international or foreign law (which might be the only applicable authority) to determine what would constitute such a grave breach. American personnel accused of violating Common Article 3 have a ready defense: as long as they believed in good faith that their actions were lawful (which might include reliance on administration memos expounding on the legality of 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.

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 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.

Mr. DENBEAUX. He is wrong on the law and on the facts. In blatant defiance of the Constitution and constitutional jurisprudence, the enactment of the MCA was not the result of the requisite circumstances for the suspension of the writ of *habeas corpus*. Absent invocation of the Suspension Clause by the legislative branch, the writ of *habeas corpus* protects individuals detained by the government—as the Founders intended. Also, the Constitution grants the authority to suspend *habeas* rights only if in “Cases of Rebellion or Invasion the public Safety may require it.” The MCA lacks the geographical and temporal restrictions required by the Supreme Court. In suspending *habeas*, it scoffs at jurisprudence that stretches back to *Ex parte Milligan*, which required that suspension of *habeas corpus* must be tailored geographically to the area of rebellion or invasion. It suspends a right that the Supreme Court has called “the fundamental instrument for safeguarding individual freedom” and a “centerpiece of our liberties.” It suspends that right indefinitely.

Mr. Rivkin forgets that *habeas* rights have been extended to all within U.S. jurisdiction—including enemy combatants. Mr. Rivkin cannot seriously contend that these procedures would be proper for American citizens.

His claim that the judicial review provisions within the MCA and DTA would be sufficient for U.S. citizens is ludicrous. If Mr. Rivkin is imagining the United States without the Bill of Rights, then perhaps his claim is plausible. These laws only provide for judicial review of whether the procedures that the government created were adhered to—whether the government conformed to the standards and procedure it created. The courts may not review whether those standards and procedures bear even a remote resemblance to the due process standards of civilized nations. Imagine U.S. citizens submitting themselves to double and triple hearsay evidence, or allowing themselves to be held based on evidence neither they nor their counsel has seen. Imagine U.S. citizens being denied counsel, and being tried repeatedly until a tribunal finally finds their detention valid—all circumstances which the Seton Hall Reports (see Annex F) [information retained in committee files] have found to occur under the DTA. Imagine that the courts are prohibited from addressing such gross violations of due process. Perhaps, that is the United States of which Mr. Rivkin speaks.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. SMITH. I respectfully disagree with Mr. Rivkin and continue to believe that, at least in instances where detainees are held in locations over which the United States has full or effective sovereignty (including Guantanamo Bay), the administrative and judicial review proceedings are clearly inadequate as a matter of policy and strike me as inadequate as a matter of constitutional law.

36. Senator AKAKA. Mr. Katyal, Mr. Denbeaux, Admiral Hutson, and Mr. Smith, in addition, are there potential implications that the MCA and the DTA may have on U.S. citizens? If so, what are they?

Mr. KATYAL. As I testified before the committee, the line that divides those who do and do not receive full *habeas* review under the MCA is based on an unconstitutional distinction-alienage. I believe that such distinctions based on alienage will eventually be struck down by the Federal courts. As the MCA currently stands, we will put the country through the 10 (or more) commission trials, at a huge taxpayer expense, and then they will come to the Supreme Court 4 or 5 years from now, at the earliest. I believe that they will then be thrown out as unconstitutional. We will then have to face the terrifying prospect of these individuals going free or additional burdensome litigation at additional taxpayer expense. Congress should break this counterproductive cycle and enact a bill that makes sense, one that revises the current system to ensure fair trials that our Nation can be proud of.

Mr. DENBEAUX. The MCA and DTA do not merely chip away at the standards of justice which U.S. citizens hold dear; the effect is more akin to a sandblaster. In addition to the debasement of our values, the detention policy has had substantial deleterious effects on our international reputation. That damage has resulted in weaker international support for our fight against terrorism, and consequently threatens our safety. It cannot be that September 11 changed everything. Our civic values and our principles of freedom and liberty must not be allowed to change. The potential implications of the DTA and the MCA include the possibility that our most central values are being lost in the name of fighting to preserve them. That would be a tragedy of monumental proportions, and a victory for the perpetrators of terror.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. SMITH. Although I do not immediately see it happening, I do not believe that a U.S. citizen should be subject to the detention procedures prescribed by the DTA or MCA. It is my conviction that American citizens detained in the course of our

military and counterterrorism operations should be charged with a crime or released. While I reserve judgment on the rarest of situations where a preventative detention is called for, I doubt that DTA or MCA would cover the terms of their detention.

HABEAS CORPUS RIGHTS

37. Senator AKAKA. Mr. Katyal, in your statement, you point out that the MCA “denies *habeas* rights based on citizenship, not on the locus of their detention.” Are there legal precedents supporting this basis for denying a constitutional right?

Mr. KATYAL. No. The commissions set up by the MCA, like President Bush’s first attempt to set up a system 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, where a majority of the persons tried were American citizens. The tribunals in the Civil War naturally applied to citizens as well. In *Ex parte Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen as well as for 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.” *Ex Parte Quirin*, 317 U.S. 1, 37 (1942). Please see my testimony.

Those who drafted the Equal Protection Clause knew all too well that discrimination against noncitizens 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 all “persons.” 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.” 60 U.S. (19 How.) 393, 449 (1857). Please see my testimony.

38. Senator AKAKA. Mr. Katyal, in your opinion, does the denial of *habeas corpus* rights based on citizenship have legal implications in the area of immigration?

Mr. KATYAL. As I testified before the committee, the denial of *habeas corpus* based on citizenship, targeting both a protected right and a protected class, will not withstand Federal court scrutiny. 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 all aliens of those rights, even lawful resident aliens living within the United States, who are currently determined, or will be determined, by the executive’s makeshift procedures to be “enemy combatants.” Citizen detainees remain free to challenge their detention in civilian courts, while alien detainees are now excluded from independent judicial review based on a mere 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 Federal courts under the Equal Protection components of the 5th and 14th Amendments. For further elaboration on this point, please see my testimony.

Moreover, the MCA’s denial of *habeas corpus* rights based on citizenship will have a long-term effect on the way in which the international community (both governments and individuals seeking refuge) perceives the United States and its values. When I first met Mr. Hamdan at Guantanamo in 2004, he asked me a simple question: “Why are you doing this? Why are you defending me? Your last client was Al Gore. What are you doing here?” 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’s no nation on Earth, I told him, that would treat me, the son of immigrants, equally, and give me the opportunities that I had. Now, however, rather than being viewed as a “melting pot” and “land of immigrants,” the United States will be remembered for having established a two-tiered system of justice, one for “us” and another for “them.”

39. Senator AKAKA. Mr. Katyal, are there precedents for taking away a person’s rights before the person has been found guilty of a crime?

Mr. KATYAL. Yes, pretrial detention is one such area. Quarantine is another.

40. Senator AKAKA. Mr. Katyal, in your opinion, would the Supreme Court uphold this concept, if it were challenged?

Mr. KATYAL. I believe that the Supreme Court will ultimately hold that the Constitution's fundamental guarantees govern these trials. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles for the *habeas* procedures that I believe the Supreme Court is likely to require when it considers the MCA. Ultimately, the trials must be applied symmetrically to aliens and citizens, as they have in past conflicts. Moreover, the trials must provide the guarantees Americans have been known to cherish even in times of war. A departure, particularly an *ex post departure*, from those guarantees will lead to this scheme's invalidation. Please see my answers to questions 35 and 39, above, and question 75, below.

QUESTIONS SUBMITTED BY SENATOR MARK L. PRYOR

COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES

41. Senator PRYOR. Mr. Smith, after a Supreme Court ruling in 2004, the DOD established CSRTs closely paralleling the structure and procedures of Army Regulation 190-8. Are these procedures adequate, particularly those attempting to provide due process?

Mr. SMITH. I do not believe the CSRT procedures are adequate for the unique circumstances we face with respect to the detainees in Guantanamo or others whom we believe should be detained for an indefinite period. As I understand Army Regulation 190-8, it is intended as a review, often in battlefield or theater operations, to determine the legal status of an individual who has been captured. In my judgment, those procedures are entirely appropriate for individuals who have been captured and will be held in facilities in Iraq or Afghanistan, whether administered by the United States or by the local government. However, when the United States Government determines that the individual should, for whatever reason, not be detained in theater but brought to Guantanamo or some other place where the United States exercises powers tantamount to sovereignty and held indefinitely, I believe the Government assumes a greater burden to establish that there are adequate legal and factual grounds to detain the individual. I do not believe the current CSRT procedures meet that requirement.

42. Senator PRYOR. Mr. Katyal, the challenge of today's hearing is to determine the CSRT's ability to adequately adjudicate the combatant status of detainees. Of particular significance is whether the procedure for the determination of a detainee's combatant status at the point he was captured on the battlefield is sufficient for a determination of status made today, while confined, and not engaged in any combat operations. Inquiries have shown that these CSRTs do not provide due process requirements nor adhere to the laws of armed conflict. What suggestions do you have to address this problem?

Mr. KATYAL. As I testified before the committee, the MCA inexplicably attempts to cement into law the enemy combatant determinations of the CSRTs, which were hastily conceived and are notoriously skewed to provide the detainee with little opportunity to disprove the "enemy combatant" allegations against him. During CSRTs, detainees are afforded few basic protections. CSRTs only informed detainees of the general charges against them, while the details are kept classified. Detainees have no right to present witnesses or to cross-examine Government witnesses. All detainees lacked counsel in the CSRTs, even if the detainees had counsel who were handling their cases in other fora. For example, Mr. Hamdan requested that my colleague, Lieutenant Commander Charles D. Swift of the United States Navy, represent him at the CSRT, as Swift had been working on the case in preparation for military commission trial. However, the Government would not permit this. Suddenly, Mr. Hamdan was on trial in the CSRT, at the same time, but without legal counsel. Though the Government argued that CSRT findings did not relate to Mr. Hamdan's military commission trial, they could use any findings obtained at the CSRT against Mr. Hamdan in his trial.

To address these numerous problems, I would recommend using the military's already battle-tested system for dealing with the problem of trying our enemies: courts-martial. Courts-martial are tooled up, under existing authority, for handling terrorism cases. They offer a thorough, respected, and established justice system that is accustomed to handling the inherent security risks and logistical problems of trials for crimes against the laws of war. We've had courts-martial on the battlefields of Afghanistan and Iraq. The "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civil-

ians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. The Uniform Code of Military Justice (UCMJ), in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today. As we have already seen, tinkering with the precise procedures of military commissions leads to litigation that may continue for years.

In addition, our civilian courts have handled a variety of challenges and complicated cases from the trial of the Oklahoma City bombers to spies such as Aldrich Ames. They have tried the 1993 World Trade Center bombers, Manuel Noriega, and dozens of other sensitive cases. They have prosecuted cases where the crimes were committed abroad. They have prosecuted hundreds of terrorism cases since September 11.

I am well aware that some organizations, including the CATO Institute, filed briefs in *Hamdan* arguing that, only the Federal civilian justice system was appropriate. I do not take that position, because I can imagine that there are reasons why we may want to have an alternative to the civilian justice system. I take it that this was the point of Congress' 1916 statute, still on the books, that gives courts-martial the ability to try violations of the laws of war. See 10 U.S.C. 818. That statute, as the Supreme Court emphasized in *Hamdan v. Rumsfeld*, provides the President with the power to try terrorism cases in courts-martial.

43. Senator PRYOR. Mr. Dell'Orto, under the CSRT, a detainee has no representation through legal counsel, has no access to the evidence against him, yet has the burden of proof to disprove his enemy combatant status. Can you explain why the DOD feels these restrictions are sufficient?

Mr. DELL'ORTO. Please see the answer to question 3 in regard to CSRTs.

44. Senator PRYOR. Mr. Dell'Orto, a CSRT makes a determination of a detainee's combatant status by a "preponderance of the evidence." If a detainee has limited access to witnesses, documents, and potentially exculpatory evidence, how can the DOD believe the CSRT process is fair?

Mr. DELL'ORTO. Please see the answer to question 3 in regard to CSRTs.

45. Senator PRYOR. Mr. Denbeaux, CSRTs are required to "access, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement." What has your study toward the admissibility of coerced evidence revealed for detainees under the CSRT process?

Mr. DENBEAUX. Our studies prove that the CSRT process never once investigates allegations of coercion; the CSRT never reveals any evaluation of the reliability of any evidence and it reveals that at least 56 detainees alleged that their statements were obtained as a result of coercion. Of the 356 detainees who appeared at their CSRT proceedings 56 alleged that they had been tortured and that their statements were obtained as a result. In each case, the tribunal completed its process without awaiting any investigation. Hence at no time did the CSRT consider the role of coercion in obtaining any evidence, even when explicitly told that it had occurred.

Our studies further show that when these allegations were referred to in the CSRT record the DOD did not investigate or inquire into the validity of the allegations.

From the records available it is not possible to tell the extent that the other allegations against detainees were obtained through torture.

For a number of detainees the only allegations presented against them during their CSRT hearings were from their own statements which they alleged were made as a result of torture.

46. Senator PRYOR. Mr. Dell'Orto, detainees are not permitted to view the disclosure of the government's classified evidence against them, yet the U.S. District Court for the District of Columbia has concluded that "all of the CSRT's decisions substantially relied upon classified evidence." Given this finding, how is a detainee expected to challenge his designation as an enemy combatant?

Mr. DELL'ORTO. It would be unheard of and extremely unwise to permit detained enemy combatants access to classified information while hostilities are ongoing. However, given that there is a good deal of classified information utilized in the CSRT proceedings, the CSRT procedures allow for the personal representative, outside the presence of the detainee, to comment upon classified information submitted by the recorder that bears upon the presentation made on the detainee's behalf. This allows for the protection of classified information while allowing the personal

representative to share with the tribunal information provided by the detainee that is relevant to the classified information.

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

COMBATANT STATUS REVIEW TRIBUNALS, ADMINISTRATIVE REVIEW BOARD PROCEDURES,
AND DUE PROCESS

47. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, critics have argued that CSRT procedures are flawed in a number of ways. For example, they do not allow for representation by attorneys, the detainee is not allowed access to classified evidence that is considered by the tribunal, hearsay evidence may be considered, and the detainee's access to evidence and witnesses may be limited if it is classified or unavailable. Do you believe the CSRT and ARB processes are adequate? If not, what shortcomings in your opinion must be fixed?

Mr. DELL'ORTO. Please see the answer to question 3.

Mr. SMITH. I have shared with the committee my principal concerns with the administrative processes and will take this opportunity only to underscore that, assuming they should not be wholly reconstituted or complemented by *habeas* proceedings, the CSRT process should, at the very least, provide detainees with fuller rights to counsel, access to evidence against them (along the lines of the Classified Information Procedures Act (CIPA)), and opportunities to pursue exculpatory materials. Moreover, meaningful judicial review, within which a tribunal can review the administrative adjudicator's factual findings, legal conclusions, and procedural rulings is a must.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No, the current CSRT processes are not adequate. Indeed, two military judges just invalidated the CSRTs as places where "unlawful enemy combatant" determinations were made in two written decisions just last week. Please also see my answer to question 42, above.

Mr. DENBEAUX. The CSRTs and ARBs are demonstrably inadequate. Consider the following:

The Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96 percent of the cases.

The detainee's only knowledge of the reasons the Government considered him to be an enemy combatant came from the summary of the evidence. The tribunal characterized this summary before it as "conclusory" and not persuasive. Yet that is all the detainee ever knew of the evidence gathered against him, a reading of conclusory charges against him.

The Government's classified evidence was always presumed to be reliable and valid. The Government's classified evidence was incomplete and did not include the exculpatory evidence that each detainee was entitled to have considered. In 48 percent of the cases, the Government also relied on unclassified evidence, but, like the classified evidence, this unclassified evidence was almost always withheld from the detainee.

At least 55 percent of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses and/or documents.

a. All requests by detainees to inspect the classified evidence were denied.

b. All requests by detainees for witnesses not already detained in Guantanamo were denied.

c. Requests by detainees for witnesses detained in Guantanamo were denied in 74 percent of the cases. In the remaining 26 percent of the cases, half the detainees were permitted to call some detainee-witnesses and half were permitted to call all of the detainee-witnesses that they requested.

d. Among detainees that participated in their tribunals, requests by detainees to produce documentary evidence were denied in 60 percent of the cases. In 25 percent of the hearings, the detainees were permitted to produce all of their requested documentary evidence; and in 15 percent of the hearings, the detainees were permitted to produce some of their documentary evidence.

The only documentary evidence that the detainees were allowed to produce was from family and friends.

Detainees did not always participate in their hearings. When considering all the hearings, 89 percent of the time no evidence was presented on behalf of the detainee.

The tribunal's decision was made on the same day as the hearing in 81 percent of the cases.

The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer. Instead of a lawyer, the detainee was assigned a "personal representative," whose role, both in theory and practice, was minimal. With respect to preparation for the hearing, in most cases, the personal representative met with the detainee only once (82 percent) for no more than 90 minutes (88 percent) only a week before the hearing (90 percent).

At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98 percent of the cases,

a. During the hearing; the personal representative said nothing 12 percent of the time.

b. During the hearing; the personal representative did not make any substantive statements in 48 percent of the cases; and

c. In the 52 percent of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.

In 3 of the 102 CSRT returns reviewed, the tribunal found the detainee to be not/no-longer an enemy combatant. In each case, the Defense Department ordered a new tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two tribunals, before a third tribunal was convened which then found the detainee to be an enemy combatant.

When a detainee was initially found not/no-longer to be an enemy combatant:

a. The detainee was not told of his favorable decision;

b. There is no indication that the detainee was informed of or participated in the second (or third) hearings;

c. The record of the decision finding the detainee not/no-longer to be an enemy combatant is incomplete.

All of the flaws you listed have been demonstrated in our objective analysis of the CSRT proceedings that have been made available by the DOD. You ask how these problems can be fixed. The breadth and depth of the defects prevents any simple solution. One cannot put a bandaid on cancer. The first solution would be to allow legal representation and to allow for a full evidentiary hearing. The second would be an impartial tribunal and the third would be a reasonable definition of enemy combatant. I do not believe that there is any solution other than a hearing before an Article III court, or before the established courts-martial of the military, using the role of lawyers and the rules of evidence that have served us so well since before the beginning of this Republic.

Mr. RIVKIN. I believe that the CSRT and ARB procedures are adequate. Neither involve criminal sanctions where greater due process would be appropriate—as in the case of military commissions.

48. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, deciding who is an enemy combatant has historically been a uniquely military function. Decisions on the appropriate and lawful use of force on the battlefield are based on military personnel making judgments based on the best available evidence about who is an enemy combatant. Those are life and death decisions. While CSRTs and ARBs take place at a location far removed from the battlefield in terms of distance and time, the essential determinations are the same: is the individual an enemy combatant, and are they a continuing threat to the United States? What are the advantages and disadvantages of making these determinations through a process that is more like a criminal trial involving the courts and less like an administrative determination made by military personnel?

Mr. DELL'ORTO. The process is not like a criminal trial, nor should it be. Article 5 tribunals under the Geneva Convention Relative to the Protection of Prisoners of War certainly are not criminal trial proceedings. The CSRT is an administrative proceeding to review a detainee's status and is a process that includes extensive protections for the detainee to ensure sound determinations are made. The purpose of a CSRT is to ensure we are detaining the right individuals and to keep those individuals from returning to the battlefield. The purpose of a criminal trial is to punish an individual for violating a law. The MCA enables us to punish unlawful enemy combatants who have violated the laws of war, but that system is separate and

apart from the basis for detaining enemy combatants, which is determined by a CSRT. Both of these systems have an appropriate place within our detainee policy.

Mr. SMITH. I favor importing elements of criminal trials into the administrative adjudication process. By no means do I intend to imply, however, that the detainees ought to be given full trials or that the Government necessarily bear the burdens of proof that ordinarily attach to criminal proceedings.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. I do not take the position that only the Federal civilian justice system is appropriate for determining whether an individual is an enemy combatant. Rather, I believe that this decision can remain a military function. However, more important than what body makes the decision is the process by which the determination is made. Detainees should be granted the basic rights Americans would want if our troops were captured and detained.

Our civilian court system is certainly capable of handling complicated cases, as evidenced by the trials of the Oklahoma City bombers, the 1993 World Trade Center bombers, and spies such as Aldrich Ames. They have prosecuted hundreds of terrorism cases since September 11. However, I can imagine that there are reasons why we may want to have an alternative to the civilian justice system, including national security concerns and a desire for more flexible evidentiary and chain of custody rules. Therefore, I am advocating the use of the military's tried-and-true courts-martial system, a thorough, respected, and established justice system that is accustomed to handling the inherent security risks and logistical problems of trials for crimes against the laws of war. For further explanation, please see my answers to questions 42, above, and questions 53 and 59, below.

Mr. DENBEAUX. Preliminary determinations of who is and who is not an enemy combatant may indeed be a uniquely military function. May I point out—Army Regulation 190–8 requires that this determination be made near the time of capture when witnesses and evidence are readily available. Under a fair system, those determinations and subsequent may continue to be a military function. But the CSRT/ARB process does not reflect the best traditions of American military justice. As any judge advocate general can attest, the military justice system is far more equipped to fairly deal with enemy combatants than the current process suggests.

Further, behind the barbed wire of Guantanamo Bay, the justification for deference to decisions made in the heat of battle no longer exists. The CSRTs and ARBs reflect the desires of civilians in the current administration, and do not necessarily reflect the views of military commanders or of the JAG Corps. The result is a shamefully inadequate and unconstitutional administrative process which indefinitely detains individuals without regard to either their culpability or the potential threat they may pose to our country.

As Professor Katyal has pointed out, our court-martial system is tried-and-true. Complemented by the Federal criminal justice apparatus, it is fully equipped to make determinations of detainee status. No one has ever demonstrated otherwise. Let me repeat that. No one has demonstrated a need to abandon our military justice system for the sham processes of Guantanamo.

The advantages of making these determinations through a process, like courts-martial, that is more like a criminal trial are both immediate and long-term. The immediate benefit is based on hundreds of years of experience that the adversarial trial process is the best way to reach the truth. No one wants to wrongly declare an innocent swept up in the fog of war to be an enemy combatant. Trial like procedures are designed to allow evidence to be brought forward to let us know that a mistake has been made—that an innocent person has been locked up. We have rejected measures that in the name of war have resulted in horrific injustice. We all agree that we must never see another locking up whole domestic populations, such as the Japanese internment camps during World War II. But we must also agree that random rounding up of anyone seized on the battlefield can also lead to injustice. The experience of the Soviet Union in Eastern Europe is a good example. If there were fair hearings, might someone have determined that Poles who had fought alongside the allies were accidentally rounded up? Would Raul Wallenberg have been mistakenly shipped to Siberia? I'm not suggesting, of course, that there is a Raul Wallenberg in Guantanamo. But a hearing is the best way for truth to come out. That's what we want: the truth.

Then there is also the advantage of due process for the sake of due process. This country and our military—belong to a tradition, a creed, a commandment—thou shalt provide due process. An inadequate administrative process which indefinitely detains individuals without regard to their culpability or threat looks like a royal star chamber, or a Soviet show trial behind a curtain.

The most distinct disadvantage for following the CSRT and ARB procedures is that those procedures are unconstitutional. Respectfully, sir, each member of the American military takes an oath to defend the Constitution against all enemies, foreign and domestic. That oath represents the devotion of our military to the ideals of liberty enshrined in that document. It is for those liberties that countless Americans have given the last full measure of devotion. Ideals familiar to aspiring democracies all around the world: that everyone deserves to make a defense; that government makes mistakes; and that off the battlefield we respect due process, civil rights, and human rights. Off the battlefield, we liberate ourselves of the notion that quick injustice is better than deliberate justice. Let's put an end to this charade now, while "Guantanamo" is a mistaken aberration of justice and not a new regime of injustice. We disrespect our military by diluting the force of that document—by abandoning *habeas corpus* and sacrificing even the most rudimentary principles of due process in the name of security.

Mr. RIVKIN. I believe that there would be a number of disadvantages in making enemy combatant determinations more like a criminal trial. First and foremost, treating individuals detained as enemy combatants like criminal defendants would serve to blur the very critical distinction between combatants and civilians that permeates the laws of war. In addition, it would impose further and unnecessary administrative burdens on the Defense Department. Most important of all, however, granting the criminal justice-level of the judicial process (or its practical equivalent) through which captured enemy combatants can challenge their detention, would make fighting and winning wars—both conventional and unconventional—all the more difficult. As Justice Robert Jackson explained in *Johnson v. Eisentrager* (1950), denying enemies held overseas the right to seek *habeas* relief from Federal courts:

The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own 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 enemies of the United States.

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. Except in England, whose law appears to be in harmony with the views we have expressed, and other English-speaking peoples in whose practice nothing has been cited to the contrary, the writ of *habeas corpus* is generally unknown.

339 U.S. 763, 779.

MILITARY COMMISSIONS ACT AND *HABEAS CORPUS*

49. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, should aliens detained outside the United States who have been determined to be unlawful enemy combatants by a competent tribunal have the right to *habeas corpus*?

Mr. DELL'ORTO. No, the DTA of 2005 and the MCA of 2006 strike the appropriate balance by allowing detainees at Guantanamo Bay to challenge the CSRT proceedings against them in the D.C. Circuit.

Mr. SMITH. To the extent they are fully under the authority of the United States, are not in a zone of current conflict, and are not subject to any other more immediate legal regime that could redress their grievances, detainees should have a right to *habeas* or to an appellate review process that is substantially identical insofar as it would permit them to have a meaningful opportunity to challenge the factual basis on which they are detained.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. In *Eisentrager*, the Supreme 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. 339 U.S. 763 (1950). While *Eisentrager* suggested that pres-

ence on U.S. soil might change the analysis, the Court later held in *United States v. Verdugo-Urquidez* that lawful but involuntary presence in this country does not necessarily entitle an individual to constitutional protection, either. 494 U.S. 259,271 (1991). However, the Court has already determined that the Guantanamo Bay military base is effectively U.S. soil for the purpose of reviewing detainee claims. *Rasul v. Bush*, 542 U.S. 466,480 (2004). The Supreme Court majority opinion in *Rasul* included a pointed footnote, footnote 15, that strongly suggested that the detainees were protected by the Constitution. 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. 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.

Therefore, although any detainees held outside U.S. jurisdiction do not possess the right to *habeas corpus*, any detainees being held at Guantanamo Bay determined to be unlawful enemy combatants by a competent tribunal possess a right to *habeas corpus*. Please see my testimony and my answers to questions 1 and 35–40, above.

Mr. DENBEAUX. Your question assumes that there has been a competent tribunal, there's the rub. These tribunals are not competent as designed and they are administered incompetently. Our reports have consistently demonstrated the incompetence of the current tribunal system. A competent tribunal has nothing to fear from the writ of *habeas corpus*. Only the incompetent tribunal shrinks from that light. *Habeas corpus* must be a right even if a competent tribunal had existed and had been provided if the detention is to last for an indefinite period of time. Endless detention, even for unlawful enemy combatants must be subject to examination. This is especially true once the interrogation has been completed, where an individual is held indefinitely, for no reasons of national security.

Habeas must be available, even if a competent tribunal was constituted, there needs to be a means to evaluate whether someone is properly being held indefinitely. As each year passes the constitutional reasoning for *habeas* becomes more and more compelling.

Mr. RIVKIN. I believe that *Johnson v. Eisentrager* was correctly decided and that alien unlawful enemy combatants held outside the United States have neither constitutional nor statutory right to *habeas corpus*. I recognize, of course, that Supreme Court's *Rasul v. Bush* (2004) decision has held to the contrary, albeit only on the issue of statutory *habeas*. In this regard, despite some ambiguous language in the *Rasul* opinion, I take comfort from the fact that the Court did not seek to overturn the constitutional *habeas*-related elements of the *Eisentrager* decision. To the extent that the sole basis for according *habeas*-type judicial review to unlawful enemy combatants is statutory in nature, it is entirely up to Congress and the executive to revise the relevant judicial review procedures. This is precisely what both political branches did in the MCA.

50. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, in your opinion, do such aliens held outside the United States have a statutory or a constitutional right to *habeas corpus*?

Mr. DELL'ORTO. No.

Mr. SMITH. The Supreme Court is scheduled to consider this matter during the upcoming term in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*. Although I will not speculate on the outcome of this pending litigation, I believe that a strong case can be made that detainees in U.S. custody outside of a theatre of war, such as detainees in Guantanamo, have the constitutionally protected right to *habeas corpus*.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Please see my answer to question 49, above.

Mr. DENBEAUX. I think that this may be the most important question raised by these issues. However, I think that the categories run the risk of ossifying any discussion. It is wrong to claim that September 11 changed everything and then to insist that the categories and classifications that were satisfactory to protect us before September 11 cannot also reflect the new reality.

I do not believe that statutory *habeas corpus*, as the law presently stands would provide any protection. However, that issue is one before this body and within your control.

The answer as to the constitutional questions is less clear. Obviously one source of the answer will be the Supreme Court. But there are other components of the

answer. The President has promised that all such detainees would be given a fair trial. That includes fundamental due process. Fundamental due process or the search for truth cannot rely upon or permit to be considered the use of statements obtained by torture. The idea that *habeas corpus* and due process cannot be available for those detained by the United States forces outside of the United States for a time without end is unfathomable. Our Constitution never envisioned such a use of power. Our Founders never envisioned a world in which our power allows us to hold outside of the United States any number of individuals who are not charged with any unlawful act and to hold them in isolation forever. In a world of treaties, in a world of universal jurisdiction, and in a world in which we have such vast and far-reaching power, the law must provide a remedy. The only question is when and under which doctrine. The most conservative way to develop that doctrine would be through far reaching legislation.

Mr. RIVKIN. No. Again, I believe that the Court was correct in *Johnson v. Eisentrager*, and that its later decision in *Rasul v. Bush* (2004) failed properly to account for and apply that precedent, at least as far as statutory *habeas* is concerned.

51. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, if alien enemy combatants held outside the United States have a constitutional right to *habeas corpus*, what other constitutional rights do they have?

Mr. DELL'ORTO. I do not agree that alien enemy combatants held outside the United States have a constitutional right to *habeas corpus*, just as the Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

Mr. SMITH. Just to be clear, I do not believe that detainees held in foreign theaters of war have *habeas* rights. But, when we hold detainees either in the United States or in locations such as Guantanamo over which we have exclusive territorial control that is tantamount to sovereignty, I believe basic rights attach including *habeas* or *habeas*-like rights attach. I am, frankly, less sure what other constitutional rights would attach, but I should think the Eighth Amendment prohibition on cruel and unusual punishment would be one such right.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. In *Eisentrager*, the Supreme 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. 339 U.S. 763 (1950). *Habeas* rights appear to only extend to an individual 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.” *Johnson v. Eisentrager*, 339 U.S. 763, 775,771 (1950). Guantanamo Bay is not immune from these dictates of the Constitution. In *Rasul v. Bush*, the Court rejected the Government’s assertion that Guantanamo is a land outside U.S. jurisdiction. 542 U.S. at 480–84. Indeed, considering that “[t]he United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base,” the Court observed that alien detainees held at Guantanamo are not categorically barred from seeking review of their claims. *Id.* at 480. Therefore, although enemy combatants held at Guantanamo possess a constitutional right to *habeas corpus*, there are presumably alien enemy combatants, held outside U.S. jurisdiction in other locales, that do not have a constitutional right to *habeas corpus*. Please also see my answer to question 49, above.

Mr. DENBEAUX. As I said in my previous answer, alleged enemy combatants deserve a reasonable and fair factfinding process. It makes no sense to hold anyone, especially those who are not even accused of doing anything unlawful, without a search for truth—reasonably soon after their detention begins. They must have the basic due process rights that the President promised all of those so detained. At a minimum such a proceeding must meet our expectations whenever we engage in the search for truth. That is a lawyer, access to evidence, an opportunity to present evidence, and an impartial tribunal. In short, the process created by the common law and required by the Constitution whenever anyone is in jeopardy.

Mr. RIVKIN. I do not believe that alien enemy combatants held outside the United States have a constitutional right to *habeas*. However, if this right is to be extended to such individuals, it is difficult to articulate any particular stopping point in requiring the Constitution’s full application overseas—even and especially to individuals who are not part of our unique, self-governing polity and whose fondest dream is to destroy it.

52. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, would these rights apply worldwide?

Mr. DELL'ORTO. I do not agree that alien enemy combatants held outside the United States have a constitutional right to *habeas corpus*, just as the Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). I would also direct you to the Supreme Court briefs submitted by the Government in the *Boumediene* case, which explain that aliens outside the United States do not have constitutional rights.

Mr. SMITH. I am not sure that these non-*habeas* constitutional rights would extend over people who are noncitizens and who do not have points of contact with the United States or with places over which the United States exercises effective territorial control. I am mindful, however, that some rights, such as those guaranteed under the Eighth Amendment, may bind government actors regardless of where they may be acting, or against whom. The United States should be mindful that some rights, such as the prohibition against cruel and unusual punishment, are substantially coextensive with our other legal obligations.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. Please see my answer to question 51, above.

Mr. DENBEAUX. Yes. Indefinite detention, without access to evidence held in secret and in isolation requires that these rights be applied worldwide to everyone, including our own citizens and Armed Forces.

Mr. RIVKIN. As noted above, I do not believe that there would be any clear stopping point, so that these rights would apply wherever the United States Government and its agents may be engaged.

53. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, how would courts have jurisdiction to hear complaints from enemies fighting against us? How is this workable?

Mr. DELL'ORTO. Under the DTA of 2005 and the MCA of 2006, detainees at Guantanamo Bay can challenge the CSRT determination in Federal court (Court of Appeals for the D.C. Circuit) and also may challenge their final convictions by military commissions in the D.C. Circuit.

Mr. SMITH. I do not believe that U.S. courts should have jurisdiction to hear *habeas* petitions from enemy combatants detained in the theatre of war. Rather, *habeas* should only be available when the United States makes the decision to hold detainees for an indefinite period of time away from the battlefield in areas such as Guantanamo where we exercise rights that are tantamount to sovereign rights.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Congress' 1916 statute, still on the books, gives courts-martial the ability to try violations of the laws of war. See 10 U.S.C. 81 8. That statute, as the Supreme Court suggested in *Hamdan v. Rumsfeld*, provides the President with the power to try terrorism cases in courts-martial. In addition, courts-martial are tooled up, under existing authority, for handling terrorism cases. They offer a thorough, respected, and established justice system that is accustomed to handling the inherent security risks and logistical problems of trials for crimes against the laws of war. Please see my answer to question 42, above.

Mr. DENBEAUX. With all due respect, I do not understand the question. Does it assume that they are still fighting as opposed to captured? Does it assume that they have been found to be enemies by a reasonable process or merely alleged to be so by someone on some basis? Finally, do you mean complaints about treatment or do you mean complaints seeking a proceeding to determine if they are properly held? If they have been proven to be enemies there would be no problem and I am going to assume that the enemies are no longer fighting but have been held in detention for some period of time. Under those circumstances such proceedings would be workable.

Mr. RIVKIN. As noted in my answers above, I do not believe that such a system would be workable, especially for the reasons articulated so well by Justice Jackson in *Eisentrager*.

54. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, is review of CSRT determinations of enemy combatant status by the Court of Appeals for the D.C. Circuit under the DTA an adequate substitute for *habeas corpus*? If not, what should be changed?

Mr. DELL'ORTO. Yes, it is.

Mr. SMITH. No. While the CSRTs with judicial review serve an important function and should not be abandoned, they are too limited because the procedures under

the DTA do not allow for a meaningful challenge to the underlying basis for the detention. Comprehensive judicial review including review of the CSRT's factual findings, legal conclusions, and procedural rulings is necessary. Therefore, while I believe that the procedures for the CSRTs should be substantially strengthened, I also support the restoration of *habeas corpus* or a substantially similar right for enemy combatants detained by the United States outside of the theatre of war.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. As I testified before the committee, the DTA's (and subsequently, the MCA's) attempt to strip Federal courts of *habeas* jurisdiction over alien detainees is unconstitutional. Congress may not eliminate the core *habeas* rights enshrined into our Constitution because it has not invoked its Suspension Clause power. 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). 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. As one of this Nation's greatest legal scholars, Paul Bator, once wrote: “The classical function of the writ of *habeas corpus* was to assure the liberty of subjects against detention by the executive or the military. . . .”

Though the DTA does authorize a direct appeal to the United States Court of Appeals for the District of Columbia Circuit, this is an inadequate substitute for *habeas corpus* because it only applies after a final decision has been rendered and attempts to limit the claims that could be brought at that point.

Mr. DENBEAUX. No, it must be pointed out that under the MCA of 2006, the Federal courts give a mere cursory review of determinations of enemy combatant status, a review which does not take into account due process standards, and ignores violations of Common Article 3 of the Geneva Conventions. Our studies have shown that the design of the CSRT process failed to meet any threshold standard for any fact-finding. Even assuming that the process was valid; our studies show that they were violated in many ways that cannot be discerned from the record. Any process that has withheld from detainees the right to know the evidence against them; that denied the detainees the opportunity to produce their own evidence and which withheld exculpatory evidence makes it impossible not to start the process over. Detainees must have access to counsel and determinations of status must conform to basic due process standards.

Mr. RIVKIN. I believe that the procedures for Federal court review established in the DTA and MCA are an adequate substitute for *habeas* review. Detainees are clearly entitled to raise constitutional questions in the course of that review, and the procedures represent a careful and considered balancing by Congress of the needs of the United States' war effort and the interests of detainees.

55. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, if *habeas corpus* jurisdiction was restored for alien unlawful enemy combatants, should *habeas* review be limited to the fundamental question of the determination of enemy combatant status, or should it extend to all conditions of capture and confinement?

Mr. DELL'ORTO. Alien enemy combatants should not be allowed to challenge their conditions of capture and confinement in our Federal courts. Even under *habeas* review, I do not believe that a court had jurisdiction to review a conditions-of-confinement claim, but, in any event, the MCA has made clear that any review does not extend to claims regarding conditions of confinement.

Mr. SMITH. With the exception of allegations of torture or other forms of inhuman treatment, I do not believe that challenges to the conditions of confinement ought to be entertained by a *habeas* court.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. As I explained above, any limitations imposed on *habeas* review must be in accordance with the Constitution. Restricting *habeas* lawsuits so as to bar some “conditions of confinement” claims can be appropriate and constitutionally proper. But the fundamental point of *habeas*—to make sure that a newfangled trial scheme is lawful before putting someone through it—is essential. Without it, the current restrictive MCA 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. But to truly bring the military commission system into accord with American values and traditions, detainees must be allowed full *habeas* review to test the validity of their trials before judicial authorities independent of the executive.

Mr. DENBEAUX. It is true that the fundamental question is the proper determination of the detainees' status i.e. an enemy combatant or not. However, that question cannot be separated from the conditions of capture and confinement. For example, the conditions of capture would have to include whether they were bought for bounties or captured fighting against our troops. The conditions of confinement are essential to evaluate whether any statements are the result of torture or other factors making statements unreliable. Equally, if the detainee's confinement were for 10 years rather than 90 days, the duration would have to be considered as well.

Mr. RIVKIN. If *habeas* jurisdiction were restored, it should be limited solely to the question whether the individual was properly detained as an enemy combatant—based upon the credible evidence standard articulated by the plurality in *Hamdan v. Rumsfeld* (2004).

56. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, if *habeas corpus* jurisdiction was restored, should detainees have the right to have the court make a new factual determination on enemy combatant status?

Mr. DELL'ORTO. I believe the MCA of 2006 and the DTA, which vest with the U.S. Court of Appeals of the D.C. Circuit exclusive jurisdiction to address challenges by a Guantanamo detainee to the status determination of a CSRT, appropriately protect the rights of detainees held at Guantanamo Bay, and, indeed, do so in a manner that goes well beyond what the United States has provided to alien enemy combatants in past conflicts.

Mr. SMITH. Yes. A court considering a *habeas* petition from a detainee should be allowed to determine that there is no factual basis for holding the person as an enemy combatant.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Yes, if for no other reason than the fact that the current CSRT procedures often appear to be little more than a mere formality. Granting substantive protections, such as access to an attorney, would make a significant difference in the outcome of the proceedings, particularly since many detainees are completely unfamiliar with our court system and the novel processes of CSRTs. Please also see my answer to question 42, above.

Mr. DENBEAUX. Yes. The CSRTs as drafted and as implemented are so grossly inadequate that a new factual determination must be made by a court.

Mr. RIVKIN. No. The court's sole inquiry should be whether the executive branch acted on credible evidence in designating the individual as an enemy combatant.

57. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, would a new factual determination by the court involve bringing soldiers and evidence from the battlefield to testify?

Mr. DELL'ORTO. It is possible that if the court decided to conduct a *de novo* review of the CSRT decision, it might require bringing service personnel and evidence from the battlefield and thereby disrupt important military operations.

Mr. SMITH. When possible, witnesses and evidence should be brought from the battlefield to the courtroom, but never at the expense of disrupting operations in the field. The typical procedures for presenting evidence may need to be adapted to overcome this challenge and strike an appropriate balance by relying on technologies, such as live telephone or video conference testimony.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. If a courts-martial were used, this scenario would be highly unlikely. Mil. R. Evid. 901–903 deal with the admission of documents and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient in-

dicia of reliability to permit a finding that it is authentic.” *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), cert. denied, 514 U.S. 1084 (1995). Additionally, “mere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility.” Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9–8 (5th ed. 2003); see also *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the “exhibit has not been changed in any important aspect.”). Military courts also dispense with any requirement for a chain of custody for items that are unique in appearance.

Mr. DENBEAUX. I cannot answer that hypothetical except to say that the possibility cannot be entirely ruled out. The evidence problem, or rather the lack of evidence problem, is especially compelling when no battlefield determination was made at the time of capture. That problem is caused, in part, because there was no “battlefield capture” and because they were not captured by American soldiers. The least of our problems is if the witnesses are members of our Armed Forces. They are available and can be produced if necessary. The real problem is when the evidence is from non-military sources, such as Pakistanis or Afghans.

Mr. RIVKIN. This is possible, if the court determined to revisit the question de novo and refused to rely on the administrative record.

58. Senator MCCAIN. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, could detainees introduce new evidence, or seek to obtain new evidence, not considered by the CSRT?

Mr. DELL’ORTO. Yes, the procedures for review of new evidence relating to enemy combatant status are posted at <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf> (see Annex E). As the procedures state, a detainee or a person lawfully acting on the detainee’s behalf can submit evidence that is new and relates to the detainee’s status by mailing it to:

Director, OARDEC
1010 Defense Pentagon
Room 3A730
Washington, DC 20301–1010.

Mr. SMITH. Yes. The very restricted access by detainees to evidence against them and limited opportunity to pursue exculpatory evidence are significant inadequacies in the current system.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Yes. Assuming CSRT rules are maintained as they stand currently—where detainees are afforded few basic protections, all lack counsel, and they have no right to present or cross-examine witnesses—the introduction of additional evidence would be essential to conducting a true, fair *habeas* proceeding. Please see my answers to questions 42 and 56, above. Of course, a proper CSRT, with defense lawyers and prosecutors presenting cases to an Article III judge, could obviate the need for additional evidence. If proceedings are done right the first time, it will likely be the most efficient way to proceed.

Mr. DENBEAUX. Yes, the CSRTs deny virtually every request for evidence that a detainee makes. Examples include evidence which the detainee claims will prove he could not have committed the offenses for which he is being held. Detainees have been denied evidence such as medical records which prove that the detainee was in another country at the time the alleged offenses were to have occurred.

Mr. RIVKIN. It is my understanding that, whenever material new evidence bearing upon the issue of whether the detainee involved is or is not an enemy combatant comes to light and is brought to the attention of the relevant Guantanamo authorities, a new CSRT will be convened. Such evidence can either be introduced by the detainee himself, his legal representative, or can arise through third-party channels.

59. Senator MCCAIN. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, how would classified evidence be dealt with?

Mr. DELL’ORTO. Classified new evidence relating to enemy combatant status would be handled in accordance with the procedures posted at <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf> (see Annex E).

Mr. SMITH. As discussed in my testimony before this committee, I believe that the issue of classified evidence can be addressed by allowing a detainee’s appointed counsel to obtain the necessary security clearances and providing defense counsel full access to all evidence against the detainee, including that which is classified

(along the lines of a modified CIPA). In order to balance fair judicial process against protecting the security interests of our Nation, a detainee's counsel would not be permitted to share classified evidence with the detainee.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Under the existing courts-martial system, the "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. If the accused at any stage of a trial seeks classified information, the Government may ask for an in camera (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and necessary" classified information to the prosecution's or accused's case can be made available. Mil. R. Evid. 505(i). In one court-martial espionage case tried under Mil. R. Evid. 505's procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused's request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), cert. denied, 507 U.S. 1017 (1993).

In addition, the military rules of evidence already provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d). Courts-martial also grant broad privileges for withholding information when it is "detrimental to the public interest." Mil. R. Evid. 506(a). Therefore, the UCMJ has flexible rules in place that permit trials under unique circumstances. There is no need to break from these rules without strong empirical evidence demonstrating such a necessity.

Mr. DENBEAUX. The question assumes that trials involving classified evidence are novel. That is not true. Military courts-martial use judges and juries with security clearance who can view classified evidence and we can be assured that these individuals would not endanger national security. Defense attorneys who visit their clients in Guantanamo possess security clearance and can acquire any clearance level which the military feels is necessary for the preservation of classified evidence. Courts-martial may close the courtroom when such sensitive evidence is presented. The same is true for *habeas corpus* proceedings in Federal court. Federal Court judges already close courtrooms and seal proceedings when national security interests are at stake.

Mr. RIVKIN. It is my understanding that the detainee himself is not entitled to see any classified evidence being presented to the CSRT. His appointed representative would have access to the entire record, but cannot share this information with him.

60. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, given that the D.C. Circuit has scheduled a hearing less than a month from now on May 15 to hear argument on how it will proceed with its review under the DTA, should Congress act now, or wait for the courts to clarify what they believe due process requires?

Mr. DELL'ORTO. On July 20, 2007, the D.C. Circuit issued its decision in *Bismullah v. Gates*, which provides courts and counsel with unprecedented access to Government records bearing on war-time status determinations. The Government has filed a Motion for *En Banc* Consideration in the *Bismullah* case, which is pending before the D.C. Circuit. We will continue to dialogue with Congress as we follow through on the pending court cases at all levels, including the *Boumediene v. Bush* and *Al Odah v. United States* cases, which will go before the Supreme Court this fall.

Mr. SMITH. In my view, the current situation is unacceptable because the CSRT and related appeals process under the DTA are inadequate. A strong case can be made that there ought to be a legislative solution, which includes a clear standard under which enemy combatants are detained and a meaningful judicial review process. While I cannot speculate on how the Court will resolve the particular issues before it, I believe that we need a comprehensive solution that only Congress can

provide to address the situation, rather than the piecemeal solution offered by litigation.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Congress should act now, rather than later, to restore rights and establish a framework for the *habeas* procedures that the Supreme Court is likely to require. 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 or seventh year. We must break this counterproductive cycle and avoid 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. A politics of responsibility, and not reaction, is required now.

Mr. DENBEAUX. Congress's duty as one of the three separate and equal branches of government does not prevent it from acting just because a court might also address an issue. It would be ironic if that were the case because the issue before the court now is whether the MCA passed by Congress stripping the Federal courts of jurisdiction is constitutional.

Why wait for an adverse ruling from the Supreme Court? Is Congress truly incapable of designing a *habeas* procedure that is both constitutionally consistent and mindful of national security? Has the relationship between Congress and the Constitution become so strained that Congress cannot interpret our founding document without repeated guidance and constant admonition from the judicial branch? Meanwhile, for the imprisoned souls of Guantanamo held for over half a decade without hope of reprieve, the clock keeps ticking. Tick-tock.

Mr. RIVKIN. In enacting the DTA and MCA, Congress sought to strike an appropriate balance between the interests of the United States people and detained enemy combatants. I do not believe that it should revisit this question until the courts have addressed the review process Congress adopted. To the extent that the MCA procedures end up being upheld by courts—as I believe is likely—it should not be possible for the MCA critics to argue that they are constitutionally deficient. To be sure, this does not mean that Congress may not seek to amend the MCA on policy grounds. It would be useful, indeed imperative, in such a case for the proponents of the MCA revisions to ascribe clearly their reasons as the ones animated by policy, and not constitutional, imperatives.

ADMINISTRATIVE REVIEW BOARDS AND LONG-TERM DETENTION

61. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, should Congress create a procedure that involves more procedural protections than the current ARB rules to evaluate the continuing threat of enemy combatants who are not expected to face trial by a military commission?

Mr. DELL'ORTO. No. The ARB process provides more procedural protections than are required by applicable international law, and we are confident that those procedural protections have served the United States very well in the effort to determine which enemy combatants we should continue to detain, as well as those who should be considered for transfer or release to other countries.

Mr. SMITH. Yes.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Yes. The ARB rules do not provide counsel, nor do they provide the types of procedures suitable to an open-ended and potentially perpetual conflict against "terror." Such changes may not be constitutionally compelled, but they are wise and pragmatic ones to make.

Mr. DENBEAUX. Yes.

Mr. RIVKIN. As suggested above, I believe that the current system strikes an appropriate balance and that it need not be revisited at this time.

62. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, if you think Congress should create a procedure that involves more procedural protections, what changes to the current ARB rules should be made?

Mr. DELL'ORTO. Please see the answer to question 61 above.

Mr. SMITH. Meaningful judicial review of the sort I described in question 47 and a right to seek *habeas* or a substantially similar review would be where I would start.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Please see my answers to questions 42, 56, 58, and 61, above.

Mr. DENBEAUX. The ARB proceedings are very important factfinding. The CSRTs rubber stamped the prejudgment of the DOD officials. The ARB proceedings are the only way detainees can ever be released. The factors are especially complex. Advocacy and assistance from lawyers is crucial. The ARB's are less an evidentiary hearing and more akin to parole hearings, only far more complicated.

Mr. RIVKIN. N/A.

63. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, should this continue to be an administrative process under the control of the executive branch, or be a determination made by the Federal courts, or should Federal courts review executive branch determinations as is currently the case with review of CSRTs as provided by the DTA?

Mr. DELL'ORTO. The purpose of the ARB process, unlike the CSRT process, is to determine which detainees are of a sufficiently low threat and intelligence value that the DOD can conclude that they may be returned to their home country or another appropriate third country without undue risk to the United States or its allies. This determination takes into account the individual's threat and intelligence value, and ultimately, if the individual is determined to be eligible for transfer or release, the process takes into account the potential actions that the detainee's home country, or an appropriate third country, is able to take to mitigate risks. The nature of such a war-time policy decision falls squarely within the authority and expertise of the executive branch and does not reflect legal standards or definitions appropriate for judicial review. On the contrary, the CSRT administrative process is distinguishable from the ARB process, in that the purpose of the CSRT is to determine based upon all available relevant facts whether or not a detained individual fits the definition of an "enemy combatant" who may be lawfully held until the end of hostilities.

Mr. SMITH. I am aware that some people have proposed a special court similar to the FISA court and I find much merit in this approach. However, on balance, I think it is preferable to leave this as an administrative procedure within the DOD. If the administrative process proves, over time, to be inadequate, Congress can consider creating a special Federal court.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. CSRTs should continue to be under the control of the executive branch, and subject to review by Federal courts under traditional *habeas corpus* jurisdiction.

Mr. DENBEAUX. First, the Federal courts are not currently reviewing executive branch determinations in any meaningful way. However, if there were a finding of enemy combatant status, followed by *habeas corpus* the fair assumption would be that those still detained had been enemy combatants. On that assumption the ARB would serve the same role as a parole board. It would determine whether or not the detainee should be released. If all else were operating properly, then the ARB could be administered by the executive branch.

Mr. RIVKIN. Traditionally, the question whether an individual is subject to armed attack, capture, and detention as an enemy combatant has been for the President, as Commander in Chief, alone. I believe that this system is both constitutionally and practically appropriate. At the same time, individuals held within the United States can seek a writ of *habeas corpus* in the Federal courts. Individuals who are not American citizens and who are held outside of the United States do not and ought not to have that right.

However, the question whether *habeas* relief is available to individuals held as enemy combatants, including individuals held as honorable prisoners of war, has not been settled by the Supreme Court. The only case directly in point remains *In re Territo* (1942), in which the United States Court of Appeals for the Ninth Circuit affirmed a District Court's denial of an American citizens *habeas* petition during World War II. The citizen had been captured while serving in the Italian Army and, the court ruled, was properly held as a POW.

In any case, a court reviewing such a *habeas* petition should limit its inquiry to whether the executive branch detained the individual as an enemy combatant based on credible evidence. If that standard is met, then the inquiry should end and the detention be upheld.

MILITARY COMMISSIONS ACT AND USE OF COERCED STATEMENTS

64. Senator MCCAIN. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, should the MCA provisions on admissibility of statements allegedly obtained by coercion be changed?

Mr. DELL’ORTO. First, it should be noted that statements obtained through torture are never admissible. There is a distinction between statements obtained through torture and those obtained through coercion. With regard to statements obtained through coercion, I do not believe the provisions of the MCA should be changed. At a minimum, there is a requirement that two findings be made before such a statement can be admitted into evidence—the statement must be reliable and of sufficient probative value, and the interests of justice must be best served by the admission of the statement. If the statement was obtained on or after December 30, 2005, an additional requirement must be met—the interrogation methods used must not have amounted to cruel, inhuman, or degrading treatment. See MCA §948r and Military Commission Rule of Evidence 304. These findings must be made by the military judge presiding over the commission; the military judge is in the best position to make that determination. Given these safeguards, the current provisions provide adequate protection for the accused and ensure due process.

Mr. SMITH. Yes. As I discussed in my testimony before this committee, the proposed language in §948r(c) of S. 576, which prohibits evidence obtained through coercion, will lead to more accurate, just, and responsible results.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Yes. Coerced confessions should be excluded. The Supreme Court has repeatedly recognized “the probable unreliability of confessions that are obtained in a manner deemed coercive.” *Jackson v. Denno*, 378 U.S. 368,386 (1964). The Supreme Court recognized this concept most recently in an opinion written by Chief Justice Roberts. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (“We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable”).

Article 31(d) of the UCMJ categorically excludes from courts-martial statements obtained by coercion. Article 31(a) of UCMJ extends this rule to compelling someone to answer questions. The commission version of Article 31(a), meanwhile, only speaks to testifying. When combined with the commission version of 31(b), which allows the admission of coerced statements, the result is that U.S. military members have an incentive to use coercion to gather information.

While it might be appropriate to include a definition of coerced statements in a statute applicable to commissions—a definition that does not appear in the UCMJ—coerced statements should be per se inadmissible.

Mr. DENBEAUX. Evidence obtained by coercion or torture should be banned. The ban should be for all statements and not merely those made after December 2005.

Mr. RIVKIN. As is the case with many of the MCA’s provisions, the sections on allegedly coerced statements represent a careful balance struck by Congress. Unless those provisions are invalidated by the courts, or their implementation reveals practical or other unforeseen problems, they should not be revisited.

65. Senator MCCAIN. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, how do other international tribunals deal with the issue of allegedly coerced testimony?

Mr. DELL’ORTO. The rules of evidence applied by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, indicate that those tribunals may admit any relevant evidence that is deemed to have probative value. However, those tribunals exclude evidence if it was obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. That exclusionary rule is similar to the rule under the MCA, which would permit the judge to exclude evidence obtained by coercion if it were in the interests of justice to do so.

Mr. SMITH. It is my understanding that defendants appearing before international criminal tribunals have the right not to be compelled to confess guilt. I am not familiar with the rules regarding coerced third-party testimony but imagine that given the growing consensus that coercion educes unreliable information its probative value may be deemed too insignificant to admit. (Please see #66 as well).

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. For information regarding how the recent international tribunals in the former Yugoslavia and Rwanda handle this matter, please see question 66, below.

Mr. DENBEAUX. International law clearly prohibits coerced testimony. We certainly do not want it used against our soldiers or our citizens.

Mr. RIVKIN. I do not recall there being a hard and fast rule either at the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC) or any other international tribunal I am familiar with that bans the introduction of any particular type of testimony. Generally, such tribunals follow the civil law-type approach to the introduction of evidence, whereby all evidence, including hearsay evidence, is introduced, but the trier of fact has to discount such evidence, taking into account its reliability and other relevant factors.

66. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, don't international judges make decisions on admissibility of evidence based on reliability and probative value?

Mr. DELL'ORTO. Yes. Please see answer to question 65.

Mr. SMITH. It is my understanding that international tribunals—at least the ones with which I am familiar—consider reliability and probative value in making evidentiary decisions.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Although international tribunals, such as those established for the former Yugoslavia and for Rwanda (ICTY/International Criminal Tribunal for Rwanda (ICTR)) allow the factfinder to admit any relevant evidence that he or she deems to have probative value, other rules protect against the use of unreliable evidence and the introduction of statements obtained through torture or coercion. This is an important and major restriction to the rules allowing evidence obtained through hearsay or coercion—to the point of making a comparison difficult for the current military commissions debate. Under one other rule, a previous Rule 92 bis of both ICTY and ICTR, the trial chamber may choose to admit “a written statement in lieu of oral testimony” unless such a statement would prove “acts and conduct of the accused as charged in the indictment.” The trial chamber trying Slobodan Milosevic emphasized that “regardless of how repetitive [written statement] evidence is, it cannot be admitted if it goes directly to the acts or conduct of the accused.” *Prosecutor v. Milosevic*, ICTY Case No. IT-02-54, P 8 (Mar. 21, 2002). While that rule has changed today, those who would rely on evidence rules from ICTY/ICTR would do well to consider that the factfinders in those tribunals are all legally-trained individuals and judges who are used to certain standards of evidence, and who know how to discount evidence that does not meet traditional indicia of reliability. The military commission, by contrast, consists of untrained, lay factfinders, all of whom may have differing assumptions about such matters. Rules of evidence are drafted, in part, to guide lay “jurors” and avoid evidence that might be inflammatory or probative in the minds of the untrained. In short, the standard adopted by the international criminal tribunals is acceptable for that court system, but not for military commissions to try detainees. As I understand it, the ICTY/ICTR can't adjudge death, whereas a military commission can, so there is even more reason to be cautious with respect to evidentiary rules for commissions than for international tribunals.

Mr. DENBEAUX. I believe the Rome Statute establishing the International Criminal Court establishes evidentiary procedures, and there are precedents in the ICTY and the ICTR where judges have made determinations on the admissibility of evidence.

Mr. RIVKIN. Yes, this is generally the case.

67. Senator MCCAIN. Mr. Dell'Orto, what was the position of the Judge Advocates General on this issue?

Mr. DELL'ORTO. I cannot speak for the Judge Advocates General.

MILITARY COMMISSIONS ACT AND ACCESS TO AND USE OF CLASSIFIED EVIDENCE

68. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, does the MCA strike the right balance on access to classified evidence?

Mr. DELL'ORTO. The MCA and the Manual for Military Commissions strike the right balance between protection of intelligence sources and methods, on the one hand, and the ability of the accused to be informed of and confront the evidence to be used to prove his guilt, on the other hand.

Mr. SMITH. In my opinion the right balance will exist when defense counsel is allowed access to classified information. In general, defense counsel should be barred

from sharing such information with his or her client. In extreme circumstances, when the information is so sensitive that sharing it with defense counsel would be dangerous, the judge should be given the information to decide how the case ought to proceed. I believe that responsible counsel and effective leadership from the bench can fashion a system that will strike an effective and workable balance.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. The MCA should be repealed and replaced with the procedures for courts-martial as set forth in the UCMJ. The rules governing courts-martial provide for trials on secure military bases and for courtroom closures when sensitive evidence is presented, measures that would further help guarantee information security. Please see my answers to questions 59 and 64, as well as my testimony.

Mr. DENBEAUX. No. Secret evidence cannot be considered evidence because it is not known. It must be available for evaluation, examination, and refutation. This seems to be a false problem. Classified evidence in judicial proceedings is not a new problem. It should be handled in these proceedings in the same way that our judiciary has been handling it for decades.

Mr. RIVKIN. Yes, I believe that it does.

MILITARY COMMISSIONS ACT AND DEFINITION OF UNLAWFUL COMBATANT

69. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, is the definition of unlawful combatant in the MCA too broad? If so, how should it be narrowed?

Mr. DELL'ORTO. No, I do not believe the definition of unlawful enemy combatant provided by the MCA is too broad. The definition provides basic criteria for those who can be tried before the military commissions. The definition does not directly implicate the President's authority to capture enemy combatants and detain them until the end of hostilities.

Mr. SMITH. As I have said, while I think narrowing the MCA's definition is a step in the right direction, ultimately I would not want to place weight on these status differentials.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. The MCA appears to expand the definition of "combatant" to include those who have "purposefully and materially" supported hostilities against the United States, even if they have not taken part in the hostilities themselves, and even if they are arrested far from the battlefield. This turns ordinary civilians—including a mother giving food to her combatant son or an individual who makes a charitable donation to a banned group for the digging of water wells in Afghanistan—into "combatants" who can be placed in military custody. An additional provision specifies that anyone who has been determined to be an unlawful enemy combatant by a CSRT is presumed to be an enemy combatant for the purposes of military commissions, even though the provision does not include any substantive criteria to guide the deliberations of such tribunals. Importantly, the definition of enemy combatant that has been used by the CSRTs at Guantanamo is broader than the definition in the MCA itself, encompassing even the unknowing financier of a charitable arm of a terrorist organization. This expansion of the definition of "unlawful enemy combatant" has no basis in international law and undermines one of the most fundamental pillars of the Geneva Conventions—the distinction between combatants, who engage in hostilities and are subject to attack, and noncombatants. That is why two military judges recently threw out the criminal charges against Mr. Hamdan and Mr. Khadr.

Please also see my answer to question 34, above.

Mr. DENBEAUX. First, the definition of enemy combatant is far too broad. As it now stands one can be an enemy combatant without ever engaging in any hostilities. Enemy combatants need not be combatants; nor do they need to be enemies. According to the Government's own records:

1. Fifty-five percent of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.
2. Only 8 percent of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40 percent have no definitive connection with al Qaeda at all and 18 percent have no definitive affiliation with either al Qaeda or the Taliban.
3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watch list. Moreover, the nexus be-

tween such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed “fighters for”; 30 percent considered “members of”; large majorities—60 percent—are detained merely because they are “associated with” a group or groups the Government asserts are terrorist organizations. For 2 percent of the prisoners their nexus to any terrorist group is unidentified.

4. Only 5 percent of the detainees were captured by United States forces. 86 percent of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. This 86 percent of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies. <http://law.shu.edu/news/guantanamo-report-final-2-08-06.pdf> (see Annex F). [Information retained in committee files.]

In short, more than 55 percent of the detainees in Guantanamo have never been accused of committing any acts of hostility. According to the same records more than 60 percent of those detained in Guantanamo are neither members of nor fighters for any of our enemies. They are held because they have been found to have had an association with our enemies. The added characterization of “unlawful” only makes the problem worse. Where does being a civilian who does not engage in any hostile act become unlawful? How can someone be an unlawful enemy combatant without being either an enemy or a combatant? The definition should be narrowed to those who commit hostile acts against us, in an unlawful way, or who are actually members of our enemies.

Mr. RIVKIN. I do not believe that the MCA’s definition of unlawful enemy combatant is too broad. Under the laws of war, the terms “combatant,” “enemy combatant,” “unlawful enemy combatant,” and “lawful enemy combatant,” have been variously used, and much confusion has resulted because these terms—along with the term “belligerent,” and its various formations, are both descriptive and have legal consequences. In many earlier sources, the simple term “combatant” or “belligerent” was used to denote an individual who qualified as the lawful soldier of a sovereign state meeting the four critical criteria of lawful belligerency: (1) a regular command structure; (2) uniforms; (3) openly carried arms; and (4) operations in conformity with the laws and customs of war. Such individuals were privileged in that they were not subject to prosecution for the acts of war they committed (so long as those acts were otherwise consistent with the laws and usages of war) and were entitled to all of the rights and privileges of “prisoners of war” upon defeat or capture. An unlawful enemy combatant is one who does not have the backing of a sovereign state and who fails to one or more of these criteria. I believe that the MCA’s definition of “unlawful enemy combatant” appropriately incorporates and applies these distinctions.

70. Senator MCCAIN. Mr. Dell’Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, S. 576 narrows the definition of “unlawful enemy combatant” so that it only applies to an individual who has directly participated in hostilities against the United States in an “active zone of combat,” or who aided in the terrorist attacks of September 11 or intentionally harbored anyone who aided in those attacks. As a result, it would not include individuals who provide material support for terrorists such as training, equipping, transporting, financing, providing false documents, facilitating communications, and so forth. The definition under S. 576 would also not recognize determinations of unlawful enemy combatant status made by a competent tribunal, so that the issue of enemy combatant status would be open to a jurisdictional challenge at the start of a trial by military commission. What are your views on the definition of enemy combatant proposed by S. 576?

Mr. DELL’ORTO. The definition provided by S. 576 is too narrow. Amending the MCA’s definition of unlawful enemy combatant in this manner would give anyone providing material support for terrorists a substantial loophole. The purpose of the definition is to ensure that we are in a position to try by military commission those persons involved in hostilities against the United States who we believe have committed war crimes or other crimes triable by military commission. If we are to build on our successes and ultimately win this war, then we have to detain not just those involved in direct hostilities, but also those who support individuals directly involved. Doing this prevents them from continuing in their efforts against us, and helps us to avoid losing any gains that we make.

Mr. SMITH. I believe S. 576 heads in the right direction by narrowing the definition of an unlawful enemy combatant. However, I would ultimately like to see these status differentials removed entirely. I believe that any person detained by the United States who is not a U.S. citizen should, regardless of their status, be af-

forded the full protection of the Geneva Conventions and other applicable international law.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. This legislation introduced by Senator Dodd would remedy the constitutional problems with the MCA that I have pointed out (see my testimony). It eliminates the problems associated with the MCA's expanded definition of "combatant." Please also see my answer to question 69, above.

Mr. DENBEAUX. Training, equipping, transporting, financing, providing false documents, and facilitating communications—providing material support for terrorists—these are all crimes. As the crimes of terrorism are universal in nature, they are subject to universal jurisdiction. Therefore, I believe that any omission of such individuals would leave them properly within in the purview of the criminal system. As the CSRTs are not truly competent tribunals, their decisions, decisions made based on flawed procedure, should be rejected. Those determinations are properly rejected. No such "competent tribunal" has been instituted, thus the issue of combatant status is properly challenged.

Mr. RIVKIN. I believe that the definition is too narrow. Combatant status, whether lawful or unlawful, applies to individuals who are fighters, and to individuals who are involved in combat support positions, as well as individuals trained as saboteurs and similar irregular operatives. Whether individuals who have provided support such as training, equipping, transporting, financing, providing false documents, or facilitating communications could properly be classified as unlawful enemy combatants would depend both on the nature of their actual activities—how closely related are they to making the enemy's military operations possible—as well as their overall relationship to the relevant enemy organization.

MILITARY COMMISSIONS ACT, COMMON ARTICLE 3, AND THE WAR CRIMES ACT

71. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, did the MCA adequately clarify those grave breaches of Common Article 3 that amount to war crimes under U.S. law? Is further clarification or expansion needed?

Mr. DELL'ORTO. The MCA of 2006 provides very useful clarification regarding those criminal acts that constitute serious violations of Common Article 3 of the Geneva Conventions and are war crimes under U.S. law. Specifically, the MCA identifies the following acts as war crimes: Torture, Cruel or Inhuman Treatment, Performing Biological Experiments, Murder, Mutilation or Maiming, Intentionally Causing Great Suffering or Serious Injury, Rape, Sexual Assault or Abuse, and Taking Hostages. We are confident that these war crimes are adequately defined in the MCA and that no further clarification or expansion of such crimes is needed.

Mr. SMITH. No. The MCA currently lacks a prohibition against willfully depriving a prisoner of war a fair and regular trial, despite the fact that such deprivation is deemed a grave breach under the Geneva Conventions. Fair trials are at the heart of all civilized societies and therefore the addition of this provision by S. 576 is, in my opinion, critical.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. The MCA disposes of Common Article 3 of the Geneva Conventions as a possible source of law under which a defendant may assert rights. What the MCA does retain of the Geneva Conventions is, under the administration's view, thin gruel. For instance, while grave breaches of Common Article 3 are subject to criminal sanction, a court may not consider international or foreign law (which might be the only applicable authority) to determine what would constitute such a grave breach. American personnel accused of violating Common Article 3 have a ready defense: as long as they believed in good faith that their actions were lawful (which might include reliance on administration memos expounding on the legality of torture), they may not be held liable.

The military has developed its own system of guidelines and procedures evincing a comprehension and acceptance of the Geneva Conventions. In fact, each Judge Advocate General has testified before this committee that our troops train to these standards and that the *Hamdan* decision imposes no new requirements upon them. There is no reason to think that, now aware that the Article applies, other government actors could not do the same.

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.

Mr. DENBEAUX. The MCA does not permit Common Article 3 to be a source of law under which a detainee-defendant may assert rights. The MCA does not permit a court to consider international or foreign law when determining whether a grave breach of Common Article 3 has occurred, in spite of the fact that such law might be the only authority on such a determination. As it is currently written, the MCA would permit American personnel to rely on legally flawed administration memoranda which opine on the legality of torture to formulate a defense that they possessed a good faith belief that their actions were lawful. Thus, simply because the administration's position on what constitutes a grave breach on occasion differs wildly from international standards and jus cogens, the MCA would allow personnel who torture or abuse detainees to escape liability.

Mr. RIVKIN. I believe that the MCA is adequate on this point.

MILITARY COMMISSIONS ACT AND HEARSAY

72. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, does the MCA strike the right balance on use of hearsay evidence? If not, what should be changed?

Mr. DELL'ORTO. Yes, the MCA strikes the right balance on the use of hearsay evidence. Military commissions may need to consider events that occurred on battlefields all over the globe. Congress recognized that there may be a number of foreign witnesses who cannot be found or who cannot be brought before the commission. Accordingly, the MCA provides for the consideration of hearsay evidence. In accordance with the statute, the Manual for Military Commissions provides first that hearsay evidence that would be admissible in general courts-martial will likewise be admissible in military commissions. More broadly, the Manual provides that other forms of hearsay may be admitted, but the party seeking to introduce the hearsay statement should provide advance notice of the intent to do so. This gives the opposing party a fair opportunity to contest the evidence. Ultimately, a hearsay statement will only be admitted into evidence if the military judge determines it is reliable.

Mr. SMITH. With troops overseas and access to related evidence often difficult to obtain there will be particularly challenging questions on the admissibility of hearsay. Therefore, I would prefer to have the judge decide whether the evidence is reliable and valuable.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. As I testified before the committee, 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. The MCA should be repealed and replaced with legislation that would remedy the constitutional problems I have pointed out, such as Senator Dodd's Restoring the Constitution Act. The Act would ban the use of evidence obtained by torture and coercion, and apply the procedures and evidentiary rules of our court-martial system to the military trials, subject to exceptions only when the Secretary of Defense and the Attorney General have both considered the case. It would also help level the playing field between the prosecution and the defense by making it easier to challenge hearsay evidence. For further elaboration, please see my testimony and my answers to questions 73 and 74, below.

Mr. DENBEAUX. Hearsay is always dangerous. In the context of the MCA and the CSRT its dangerousness is compounded. The normal concern for hearsay is that the out of court declarant could be speaking falsely or merely mistaken. In the case of the MCA and the CSRTs there is another even greater danger. It is impossible to tell if the declarant is actually talking about the detainee who is alleged to be the subject of the out of court declaration. There are relatively few different names for many Muslim men. In addition there are serious problems with translation.

If, after more than 4 years of interrogation, the Government does not know the names of its own detainees, confusion about the identity of detainees clouds any analysis of the evidence at the CSRT hearings. In short, there should be considerable concern when a tribunal relies upon hearsay declarants who may be talking about someone other than the detainee to whom the declaration is supposedly directed. For example, one detainee responded to the claim that his name was found "on a document." The detainee states:

There are several tribes in Saudi Arabia and one of these tribes is Al Harbi. This is part of my name and there are literally millions that share Al Harbi as part of their name. Further, my first names Mohammad and Atiq are names that are favored in that region. Just knowing someone has the name

Al Harbi tells you where they came from in Saudi Arabia. Where I live, it is not uncommon to be in a group of 8–10 people and 1 or 2 of them will be named Mohammed Al Harbi. In fact, I know of two Mohammed Al Harbis here in Guantanamo Bay and one of them is in Camp 4. The fact that this name is recovered on a document is literally meaningless.¹

Our own Government records have made numerous mistakes about the names of those who they have been holding in Guantanamo. The problem of reliability in the case of the detainees is apparent because the Government's records of its detainees themselves misidentified the detainees more than 150 times. On April 19, 2006, the Government published the names of the 558 detainees who have had CSRT proceedings at Guantanamo.² On May 15, 2006 the Government also published a list of 759 names which represents all those ever detained at Guantanamo.³ The Government has also released transcripts and other documents related to ARB hearings that also contain detainee names.⁴ These three records contain more than 900 different versions of detainee names. Adding other Government documents, such as the full CSRT returns and other legal documents, the number rises to more than 1,000 different names. Yet, according to the Government there only 759 detainees have passed through Guantanamo "between January 2002 and May 15, 2006."⁵ The more than 1,000 different names do not mean that there were more than 1,000 detainees at Guantanamo; but it does establish the difficulty of identifying individuals in these circumstances.

Mr. RIVKIN. I believe that the MCA does indeed strike the right balance, in the context of a military trial, on the use of hearsay evidence.

S. 576 AND EXPANDED DISCOVERY AND ACCESS TO INTELLIGENCE SOURCES, METHODS, OR ACTIVITIES

73. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, S. 576 would provide an unlawful enemy combatant expanded discovery rights at a trial by military commission. S. 576 would authorize a military judge, upon motion from defense counsel, to disclose the intelligence sources, methods, or activities by which the United States obtained an out-of-court statement intended to be introduced at trial if the military judge determines that the intelligence sources, methods, or activities might affect the weight to be given an out-of-court statement. The requirement to disclose is revoked if the United States decides not to introduce the statement. The MCA provides robust protection of intelligence sources, methods, or activities. The U.S. Government is required to provide unclassified versions or unclassified summaries of classified evidence, including exculpatory evidence. Under the discovery rules that now apply to military commissions, if access to classified evidence itself is required for a fair trial and unclassified substitutes are inadequate, the military judge can strike the testimony, declare a mistrial, find against the U.S. Government on any issue to which the evidence is probative and material, or dismiss the charges and specifications to which the evidence relates. What are your views on the expanded discovery authority that S. 576 would provide?

Mr. DELL'ORTO. Both the MCA and the Manual strike the proper balance between protection of intelligence sources and methods, and the ability of the accused to be informed of and confront the evidence to be used to prove his guilt. The accused has a right to see all evidence that will be admitted against him and shown to the members of the military commission, or that will be admitted against him at sentencing. The members of the military commission will not be able to consider evidence that the accused does not also see. Subject to the need to protect classified information,

¹Mohammad Atiq Al Harbi, ISN #333, goes on to state that there are documents available to the United States that will prove that his classification as an enemy combatant is wrong. He also objects to anonymous secret evidence, "It is important you find the notes on my visa and passport because they show I was there for 8 days and could not have been expected to go to Afghanistan and engage in hostilities against anyone. . . . I understand you cannot tell me who said this, but I ask that you look at this individual very closely because his story is false. If you ask this person the right question, you will see that very quickly. I am trusting you to do this for me."

²Available at: <http://www.defenselink.mil/pubs/foi/detainees/detainee—list.pdf>

³Available at: <http://www.defenselink.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>

⁴The procedures provide that each prisoner found an enemy combatant must go through an ARB process every year following the CSRT conclusion that the detainee is an enemy combatant.

⁵This is the language used to describe the list of 759 detainee produced by the Government on May 15, 2006.

the accused will also receive access to all exculpatory evidence, or an unclassified substitute, as well as any statements made by the accused that are material to his defense or that trial counsel intends to use as evidence in the Government's case-in-chief. Where evidence is classified and cannot be shared with the accused, the accused will, if practicable, receive an unclassified summary of the evidence, including the means by which the evidence was gathered. However, any evidence admitted against the accused, either for purposes of ascertaining guilt or at sentencing, will be shared with the accused and his attorney. Thus, I do not believe the discovery rights already afforded to an accused at a military commission need to be expanded in any way.

Mr. SMITH. I support Senator Dodd's efforts to expand discovery authority in S. 576. I think defense counsel should have access to classified information and the judge should determine whether hearsay evidence is admissible.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. As I testified before the committee, the evidentiary rules of the court-martial system are preferable to the current rules for military commissions set forth in the MCA. Please see my testimony, as well as my answers to questions 42 and 59, above.

Mr. DENBEAUX. I fully support this expanded discovery.

Mr. RIVKIN. I do not believe that, in the context of military commissions trials, expanded discovery opportunities would be appropriate.

MILITARY COMMISSIONS ACT AND SUPREME COURT SCRUTINY

74. Senator MCCAIN. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, will the MCA stand up under Supreme Court scrutiny? If not, what are its weaknesses?

Mr. DELL'ORTO. I believe the MCA will stand up to Supreme Court scrutiny. Congress did a thorough job in drafting the MCA to ensure protection of U.S. interests while providing due process for alien unlawful enemy combatants.

Mr. SMITH. While I cannot speculate on how the Supreme Court will rule on the constitutionality of the MCA during its upcoming term, I certainly hope that the Court will carefully scrutinize the law and recognize its weaknesses. In my mind, its largest problems are the suspension of *habeas* rights for alien enemy combatants and the very limited judicial review process, which is currently the only means to challenge a military commission's decisions.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. Regardless of whether these trials take place in the United States or Guantanamo, it is my view that the Supreme Court will ultimately hold that the Constitution's fundamental guarantees govern these trials. As it stands, the MCA discriminates against people on the basis of alienage, and I believe that, as such, it will eventually be struck down by the Federal courts. As I explained above, the Equal Protection components of the 5th and 14th Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply cannot survive the stringent constitutional standard. For further elaboration, please see my answer to question 35, above.

Mr. DENBEAUX. No, it will not.

Mr. RIVKIN. Although it is impossible accurately to predict what the result of Supreme Court review is in any given case, I believe that the MCA will stand up to Supreme Court scrutiny. That law was the result of a direct invitation to Congress by the Court, in *Hamdan v. Rumsfeld* (2006), to revise the UCMJ in a way that would permit the use of military commissions in the war on terror. The law is firmly grounded in the Supreme Court's own laws of war precedents, and in the laws and customs of law generally.

QUESTIONS SUBMITTED BY SENATOR JEFF SESSIONS

SPECIFIC COURT CASES

75. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), was correctly decided?

Mr. DELL'ORTO. Yes.

Mr. SMITH. On its facts, the decision in *Eisentrager* strikes me as a sensible one. I nevertheless agree with the Court's decision in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), effectively overturning *Eisentrager's* statutory predicate, and I am also persuaded by the Court's treatment of *Eisentrager* in *Rasul v. Bush*, 542 U.S. 466 (2004). Accordingly, I am quite sensitive to the ways in which *Eisentrager* has modest relevance to the current situation in Guantanamo.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. The Supreme Court correctly decided in *Eisentrager* that geography alone does not create or destroy rights; rather, the Court based its denial of a *habeas* petition on the fact that the petitioners, German war criminals held in a U.S.-administered German prison who had never stepped foot onto American territory, did not have enough of a connection to the United States to be entitled to *habeas corpus* rights. 339 U.S. 763 (1950).

However, Guantanamo is different. The Supreme Court has already determined that our base there is effectively U.S. soil for reviewing detainee claims. *Rasul v. Bush*, 542 U.S. 466, 480 (2004). Guantanamo Bay is a unique situation, not at all like the American occupation of Germany after World War II, or the American occupation of any other country, for that matter. Therefore, the core issue in *Eisentrager*, whether or not alien enemy combatants held abroad are entitled to *habeas* rights, is not an issue in analyzing *habeas* rights for the detainees at Guantanamo Bay.

Mr. DENBEAUX. *Eisentrager* at its core is a simple case, which is too often viewed through narrow and highly partisan lenses. In one sense it is irrelevant because in that case before the *habeas* petition each received a duly constituted military commission which had all of the safeguards that the United States Code of Military Justice provided. The lawful enemy combatants have had neither a military commission nor a *habeas corpus* proceeding.

Mr. RIVKIN. Yes.

76. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that *Yamashita v. Styer*, 327 U.S. 1 (1946), was correctly decided?

Mr. DELL'ORTO. Yes.

Mr. SMITH. I agree with the Court's statement that it had jurisdiction over *Yamashita's habeas* petition but have reservations regarding the narrowness of its holding, namely that it could only "inquire whether the detention complained of is within the authority of those detaining the petitioner."

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No.

Mr. DENBEAUX. *Yamashita's* case, his trial, demonstrated, as far as the Supreme Court was concerned in *Hamdan*, in what emergent and necessary circumstances a military tribunal constituted absent procedural guarantees might be appropriate for civilians and the Court then delineated how the circumstances of the Guantanamo detainees do not rise to the appropriate necessary and dire emergent level. *Yamashita* shows that the administration lacks the power to institute unconstitutional proceedings.

Yamashita also stated that Congress "has not withdrawn [jurisdiction], and the executive branch of the Government could not withdraw jurisdiction, unless there was suspension of the writ [of] *habeas corpus*." That requires invocation of the Suspension Clause under the requisite circumstances. Therefore, this holding demonstrates the necessity, the truly mandatory constitutional requirement, of affording *habeas* rights for the Guantanamo detainees.

Further, *Yamashita* was found responsible for atrocities carried out by his men without his knowledge. No evidence was presented at trial which could establish that he had knowledge of what occurred. I find it difficult to assume that command responsibility should go so far. That principle would certainly place many high American officials in jeopardy as a result of Abu Ghraib. While I support prosecution of individuals for war crimes and while I believe that commanders may not hide behind studied lack of knowledge, *Yamashita* goes too far.

Mr. RIVKIN. I believe that the jurisdictional questions were resolved correctly by the *Yamashita* Court. I question, however, the very broad approach to "command responsibility" liability that was effectively upheld in that case and, as a consequence, must to that extent agree with Justice Murphy's dissent.

77. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that *Ex parte Quirin*, 317 U.S. 1 (1942), was correctly decided?

Mr. DELL'ORTO. Yes.

Mr. SMITH. I do not believe the Court's holding in *Ex Parte Quirin* is applicable far beyond its facts. I agree with Professors Fallon and Meltzer who read *Quirin* as applying only when the detainees "bear unchallenged indicia of enemy combatant status."

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. For an extended description of why, please see *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002) (with Laurence Tribe).

Mr. DENBEAUX. On one hand, *Ex parte Quirin* demonstrates the novel circumstances which the tribunals at hand, applicable only to foreigners, represent. The current procedures discriminate against noncitizens in a way that has been constitutionally prohibited and generally frowned upon since the founding of the Republic. This policy is further treacherous as the terrorist threat knows no nationality, and discriminating on this basis may well prove fatal. The Intelligence Community universally acknowledges that the threat of terror is as likely to come from a homegrown source as from a foreign one.

Also, *Ex parte Quirin* is of particular note as it demonstrates that *habeas* rights have been extended to every individual in U.S. jurisdiction, universally—to citizen or alien, traitor, or enemy combatant. The importance of *Quirin* lies in its decision of a *habeas corpus* application by enemy aliens on the merits, despite a presidential proclamation to the contrary. The underlying fundamentals of the case illustrate the point that we do not object to proper trial. We object to improper, incompetent, and invalid trial. *Habeas* is our proper remedy.

Mr. RIVKIN. Yes.

INTERNATIONAL CRIMINAL TRIBUNALS

78. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that the evidentiary rules adopted by the International Criminal Tribunal for Yugoslavia (ICTY) are acceptable—that they satisfy basic standards of justice for a war-crimes tribunal?

Mr. DELL'ORTO. Yes, those evidentiary rules are acceptable, and they satisfy basic standards of justice for a war-crimes tribunal.

Mr. SMITH. As I am not familiar with the details of the procedures of these tribunals, I am comfortable answering these questions only at a general level. That said, I believe that the international criminal tribunals' treatment of evidence based on its perceived probative value is a sensible one. I also understand that the tribunals forbid forced confessions, which strikes me as a necessary prohibition in the name of justice.

I am not sure, however, that those tribunals have had to grapple as directly with the evidentiary concerns that trouble me most about the proceedings in question here: (1) what to do with coerced, inculpatory testimony proffered by a third party and (2) how to ensure an adequate defense (and an adequately counseled defense) when the accused and his attorneys are not given much access to evidence or an opportunity to seek exculpatory materials. Were the international tribunals to adopt some of the evidentiary standards that the Pentagon has enacted in Guantanamo, I'd certainly have to question whether basic standards of justice were satisfied.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Please see my answer to question 66, above.

Mr. DENBEAUX. While it is true that these proceedings apply a mixture of the civil and common law evidentiary principle, the ICTY has not always conformed to the evidentiary standards of U.S. jurisprudence. The rulings and precedents of the ICTY are not per se violative of the rights of a defendant, however, we must use caution when considering the standards of an ad hoc proceeding which relies heavily on civil law principles. True, the ICTY incorporates common law principles, but the procedures retain certain deficiencies of the civil law system. For example, the civil law system does not truly embrace the adversary system, nor the principle of openness, which our common law system has always held dear. As illustration, in the ICTY, the rules for admission of hearsay evidence are looser than in our own system. They are in fact "loose" to a point which would be unacceptable to American legal sensibilities. As well, in the *Prosecutor v. Dusko Tadic* case, the ICTY permitted the

introduction of anonymous witness testimony, a practice wrought with problems vis à vis the rights of the accused, and would be held unconstitutional in an American court. The principles of the civil system do not require that defense counsel be permitted to examine such anonymous witnesses, but rather would allow examination to be conducted by a judge or other court official. Of course, if a system implemented by the United States acknowledged that the *Tadic* case represents unique and novel circumstances—in particular the need to protect victims of sexual slavery—then the general standards of the ICTY, with a nod to where the evidentiary standards of this international tribunal deviates from our own American standards, should be considered acceptable standards of justice for the prosecution of detainees for war crimes. At the least, the standards applied at the ICTY would most likely placate, if not fully satisfy, the international community.

Mr. RIVKIN. I believe that the ICTY's procedures satisfy basic standards of justice for a war-crimes tribunal as applied to combatants. That tribunal, however, also has jurisdiction over civilians. Although I believe that its level of due process is generally consistent with that available in European civil law courts—I do not believe that the ICTY's procedures are equivalent to the Bill of Rights guarantees prevailing in our civilian common law courts. In this regard, I believe that our civilian system is—appropriately—more protective of individual rights than is the civil law system.

79. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that the evidentiary rules adopted by the International Criminal Tribunal for Rwanda (ICTR) are acceptable—that they satisfy basic standards of justice for a war-crimes tribunal?

Mr. DELL'ORTO. Yes.

Mr. SMITH. See answer to question 78.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. Please see my answer to question 66, above.

Mr. DENBEAUX. These proceedings apply a mixture of the civil and common law evidentiary principle. Indeed, the codified rules incorporate a large measure of common law rules. The ICTR endeavored to maintain high standards and provide a fair trial. The ICTR, like other international criminal tribunals provide what the world community regards as the essentials of a fair trial. However, the ICTR—an ad hoc tribunal formulated entirely to fit the tragic situation at hand—does not represent the best that our country has to offer. We may look to these tribunals for guidance. But we are Americans. We are the shining city upon the hill, and our standards of justice must be faithful to our lofty ideals. Our system of justice, our modern courts-martial system and the apparatus of our criminal justice system, have long been the gold standard of international justice. Our system was a guide for the ICTR, not the other way around. Only through enactment of the MCA and the DTA have we betrayed our standards. Only through such unfortunate legislative misjudgment has a situation arisen which would lead to such a question: what would the international community do? We must remember the voices of our founders. We must remember the blood that has been shed for our Constitution. We must regain our proper place as the aspirational ideal for the administration of justice.

Mr. RIVKIN. As with the ICTY, I believe that the ICTR's rules satisfy basic standards of justice for military courts like the U.S. military commissions, although they would not be sufficient for a civilian tribunal.

80. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that the evidentiary rules adopted by the International Criminal Court (ICC) are acceptable—that they satisfy basic standards of justice for a war-crimes tribunal?

Mr. DELL'ORTO. Since the ICC has yet to hold a trial, I would not comment on whether its evidentiary rules as they may be applied to particular cases would satisfy basic standards of justice. The details of the ICC's evidentiary rules aside, the administration has concerns about the ICC, and objects in particular to its claim of authority to assert jurisdiction over U.S. persons without the consent of the U.S. Government.

Mr. SMITH. See answer to question 78.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. I am not an expert in these rules and so would prefer not to comment. In general, I prefer to play by American, not international, rules.

Mr. DENBEAUX. The drafters of the Rome Statute put forth a valiant effort to address any deficiencies present in the procedures of the the ad hoc tribunals, i.e. the

ICTY and the ICTR. Further, the proceedings adopted by the ICC reflect the significant input and influence of the United States during the drafting of the statute. The representatives of the United States believed these processes reflected the best system that the modern world could offer. The evidentiary rules of the ICC provide what the world community regards as the essentials of a fair trial. But again, I reiterate that the United States should lead the world in providing fair hearings for whom may well be our worst enemies.

Mr. RIVKIN. The evidentiary rules adopted by the ICC would, again, be acceptable in a military court. However, since the ICC also has jurisdiction over civilians, I do not believe that its rules are adequate for a civilian tribunal.

FOREIGN HABEAS CORPUS PETITIONS

81. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, can you cite a single recorded English or American case since the 13th century in which a court has granted relief on a *habeas corpus* petition filed by an alien detained by the military as an enemy combatant? Please cite all cases fitting this description of which you are aware.

Mr. DELL'ORTO. I am not aware of any such instance. I would refer you to the Department of Justice for further information.

Mr. SMITH. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). I might add that, because *Rasul* and *Habib* were both released prior to the Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the Court did not address the merits of their petitions. One might wonder, however, whether they would have been released had they not had the opportunity to petition for *habeas*.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. *Hamdan v. Rumsfeld*, which I argued, is one. In that case, the Supreme Court granted relief to petitioner *Hamdan*, an alien detained by the military as an "enemy combatant," in invalidating the makeshift tribunal scheme devised by presidential fiat alone as a violation of the UCMJ and the four Geneva Conventions. 126 S.Ct 2749 (2006). Depending on the meaning of the question, *Rasul v. Bush* (2004) may be another.

Earlier this week, the Fourth Circuit decided another case that granted *habeas* relief to an alien detained by the military as an enemy combatant. See *Al Marri v. Wright*, —F. 3d—(June 11, 2007).

Mr. DENBEAUX. This question would appear to assume that enemy combatants have been around since the 13th century and that militaries have detained people as enemy combatants since the same time. The history of detaining people as enemy combatants by the military does not begin until the middle of the 20th century.

Before answering I need to put the history of the laws of war in context. A brief summary would be as follows: The first codification of the laws of war did not begin until the 1880s. That is when the conventions began to be drafted. Not until 1910 were the treaties with respect to the laws of war were first completed. These treaties were updated again in 1949.

Second, the question seems to ask for instances in which alien enemy combatants detained by the military prevailed in their *habeas corpus* proceeding. I do not know of anyone who is arguing that any detainee must prevail in his *habeas corpus* proceeding. The question is whether they should have a chance to test their detention through a *habeas corpus* petition. I know of no cases in which aliens held as enemy combatants by the military who were given a military commission hearing were granted or denied any right to *habeas corpus*.

Mr. RIVKIN. I am unaware of any such case.

82. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, can you cite any specific example of a foreign nation that allows noncitizen enemy soldiers captured during war to use that nation's domestic courts to challenge their detention?

Mr. DELL'ORTO. To my knowledge, no foreign nation allows non-citizen enemy soldiers captured during war to use that nation's domestic courts to challenge their detention. The provision in the DTA that allows al Qaeda detainees who have received a CSRT determination some access to United States domestic courts is an unprecedented protection in the history of armed conflict.

Mr. SMITH. Because this question falls outside of my expertise, my answer is a qualified no.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. I am not a comparative law scholar, so this is outside of my area. I believe that one potentially analogous instance is *Somerset's case*, a 1771 English case in which a *habeas* petition was filed on behalf of a slave (a noncitizen, though not an enemy soldier), and the English judge granted relief to the slave, outlawing slavery in the process. Another example is a 1923 case where a man named O'Brien, on the losing side in the Irish Civil War, was located and detained in England, then transferred back to the Irish Free State. While in an Irish prison, he sought *habeas* review in the United Kingdom because it was held that his detention was subject to the control of the British Home Secretary, similar to the Supreme Court determination in *Rasul* that Guantanamo Bay is effectively U.S. soil for the purpose of detainee claims. *R v. Secretary of State, ex parte O'Brien* [1923] 2 KB 361 (CA) on appeal [1923] AC 603(HL(E)).

Though looking to the international community can be informative on some matters, it is important to remember our history and the uniqueness of our Constitution. We are a melting pot; 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's the heart of the Equal Protection Clause, which gives all persons constitutional rights, not simply our citizens.

In addition, I do not take the position that only the Federal civilian justice system is appropriate for trying noncitizen enemy soldiers. Quite the contrary, I can imagine that there are reasons why we may want to have an alternative to the civilian justice system. I take it that this was the point of Congress' 1916 statute, still on the books, that gives courts-martial the ability to try violations of the laws of war. See 10 U.S.C. 818. That statute, as the Supreme Court emphasized in *Hamdan v. Rumsfeld*, provides the President with the power to try terrorism cases in courts-martial. For further elaboration on this point, please see my answer to question 53, above.

Mr. DENBEAUX. I do not know of any such cases. But again, sir, with all due respect, I cannot fathom your preoccupation with foreign nations. The United States of America is a world leader, not a world follower. We did not seek nor did we provoke an assault on our freedom and our way of life. We did not imagine nor did we invite a confrontation with evil. Yet the true measure of a people's strength is how they rise to master that moment when it does arrive. We will be measured by our capacity to meet this challenge with our values intact. We will be measured by how well we guard America's freedoms—our civil rights, our civil liberties—in the face of this new challenge. The world is measuring us. History is judging us. America is counting on us.

Mr. RIVKIN. I am unaware of any such nation.

GUANTANAMO DETAINEES

83. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, after the United States Supreme Court denied certiorari in the *Boumediene* and *Al Odah* cases, Michael Ratner, the President of the Center for Constitutional Rights, was quoted in the press as saying: "If [the Guantanamo detainees] had a full and fair hearing, there would be hardly anyone left at Guantanamo." Do you agree with Mr. Ratner's assessment?

Mr. DELL'ORTO. I do not agree with that statement. As I have said, the DOD has two processes in place that serve to ensure that we detain at Guantanamo Bay only those enemy combatants whose detention there is necessary in the security interests of the United States. I believe the CSRT and ARB processes serve that purpose.

Mr. SMITH. I do not have enough information to endorse or take exception with Mr. Ratner's assessment.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No. A fair hearing would not automatically entitle detainees to be released. A fair hearing would restore the basic principles of justice enshrined in our Constitution and alleviate international criticism of Guantanamo, but it is unlikely that it would lead to release of all detainees. In any event, in the context of military commission trials, we are talking about the most awesome powers of government—dispensing the death penalty and life imprisonment; for that reason we must carefully scrutinize the procedures and rules for trial.

Mr. DENBEAUX. I am sad to say that that assessment is supported by our Government's own data. Contrary to the assertions that Guantanamo holds the "worst of the worst," our analysis of the Government's assertions of the factual basis upon which detainees have been found to be enemy combatants establishes that the ma-

majority of those detained in Guantanamo are no more than individuals mistakenly picked up for being in the wrong place at the wrong time. As our report analyzing the Government's data makes clear:

1. Fifty-five percent of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.

2. Only 8 percent of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40 percent have no definitive connection with al Qaeda at all and 18 percent have no definitive affiliation with either al Qaeda or the Taliban.

3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watch list. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for"; 30 percent considered "members of"; a large majority—60 percent—are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2 percent of the prisoners their nexus to any terrorist group is unidentified.

4. Only 5 percent of the detainees were captured by United States forces. 86 percent of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. The 86 percent of detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

Mr. RIVKIN. No, I strongly disagree with Mr. Ratner's statement. The Guantanamo detainees have been given an exceptional level of due process to date, arguably more than any set of captured enemy combatants in United States history—perhaps world history. Although it is impossible to say that no mistakes have been made (the Defense Department has, in fact, released a handful of individuals who it believes were not properly classified as enemy combatants), I believe that the record demonstrates a genuine and determined effort by the United States to ensure that every individual held at Guantanamo Bay as an enemy combatant is, in fact, properly subject to that classification.

84. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that all or nearly all of the detainees being held at Guantanamo are not enemy combatants and that the United States should release them?

Mr. DELL'ORTO. I do not. Please see also the answer to question 83.

Mr. SMITH. I do not have enough information to answer this question either.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. I think we currently lack a process to know the answer to this question. I have not found any empirical data to suggest that "all or nearly all" of the detainees being held at Guantanamo are not enemy combatants, though evidence has arisen to suggest that at least a percentage of the detainees are not "the worst of the worst" as they are proclaimed to be. Please see questions 34 and 59, above.

Mr. DENBEAUX. The DOD's own records make clear that most of the detainees in Guantanamo do not meet any reasonable definition of enemy combatant. According to DOD's records most of the detainees should be released. Our analysis of that data is contained in The Seton Hall School of Law report of February 8, 2006 (see Annex F). [Information retained in committee files.]

Mr. RIVKIN. As noted above, I believe that the United States has made a determined effort to ensure that every individual held as an enemy combatant has been properly so classified. As a result, I strongly disagree with the proposition that all, or nearly all, of the Guantanamo detainees are not enemy combatants who should be released.

85. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that, as part of the CSRT hearings, the United States should share classified evidence with Guantanamo detainees?

Mr. DELL'ORTO. It would be unheard of and extremely unwise to permit detained enemy combatants access to classified information while hostilities are ongoing. However, given that there is a good deal of classified information utilized in the CSRT proceedings, the CSRT procedures allow for the personal representative, outside the presence of the detainee, to comment upon classified information submitted by the recorder that bears upon the presentation made on the detainee's behalf.

This allows for the protection of classified information while allowing the personal representative to share with the tribunal information provided by the detainee that is relevant to the classified information.

Mr. SMITH. In order to defend themselves adequately, detainees need to have some access to most, if not all, of the evidence against them. At the very least, the tribunal ought to share the classified information with cleared counsel to the detainees, and, as we do pursuant to CIPA, present a non-classified summary of the evidence to the detainees. As I have previously stated, the Government ought to retain the right to assert a national security privilege. Limitations on its exercise of this trump card must be explored and certainly should not be permitted to block an inquiry by the court into the question of whether evidence was obtained by coercive or other improper techniques.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. No.

Mr. DENBEAUX. If it were necessary to withhold classified evidence from detainees in order to allow for a full adversary proceeding that might be an acceptable trade off. It obviously raises problems for the attorney client relationship. It would be unfortunate if that were necessary.

I believe the issue should not be whether the evidence has been classified by some classification process. Rather the Government should be required to identify what should not be shared and then the court should decide how much, if any, of it should be withheld.

Mr. RIVKIN. I believe that the current system strike an appropriate balance between the needs of the Government to maintain the secrecy of classified material and the individual detainee's need for information in the context of a CSRT hearing.

86. Senator SESSIONS. Mr. Dell'Orto, Mr. Smith, Admiral Hutson, Mr. Katyal, Mr. Denbeaux, and Mr. Rivkin, do you believe that foreign governments would stop criticizing the detention of the individuals now held at Guantanamo Bay if the Guantanamo facility were closed and those detainees were instead held inside the United States?

Mr. DELL'ORTO. Although the administration is aware of the international criticism of Guantanamo, in all likelihood there would continue to be criticism from many even if Guantanamo were closed. In the event the United States were to move the detention of enemy combatants to locations other than Guantanamo, it appears likely that there would remain disagreement about U.S. detention under the law of war during the ongoing armed conflict, as well as the procedures that should be used to determine who can remain detained. For further information on the international reaction to Guantanamo, I would refer you to the Department of State.

Mr. SMITH. I believe that some countries would continue to criticize us regardless of what we would do about Guantanamo. However, I agree that the Guantanamo facility should be closed in no small part because it has been an impediment to America's efforts in winning the broader war against terrorists. Guantanamo hurts us among allies who worry about our disregarding the rule of law and it serves as a rallying cry to those who are—or can be persuaded to become our enemies. Though it may take decades for the United States to regain its moral standing in the world, closing the Guantanamo facility would no doubt be a step in the right direction.

I do believe that international criticism would be substantially reduced if the United States were to adopt a statutorily based preventative detention regime that assured basic human rights, including the right of *habeas corpus* or a substantially similar right. Guantanamo could then be closed and the detainees brought to this country and held pursuant to this legal regime.

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

Mr. KATYAL. As I testified before the committee, 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. As former Secretary of State Colin Powell recently stated:

We have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission. We don't need it, and it's causing us far [more] damage than any good we get for it. But . . . I started in this discussion saying, 'Don't let any of them go.' Put them into a different system, a system that is experienced, that knows how to handle people like this.

MSNBC Meet the Press Transcript for June 10, 2007, available at <http://www.msnbc.msn.com/id/19092206> (see Annex D). [Information retained in committee files].

Moving the trials would communicate to the world that America has no intention of relegating these incredibly important trials to a “legal black hole,” and that the fundamental trial rights we enjoy at home will not be treated as special privileges, doled out to foreign prisoners at the pleasure of an absentee warden.

However, while moving the trials to America 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 not do enough to substantively further that goal. It would, of course, serve the important symbolic goal of divorcing these proceedings from the blight of Guantanamo, but some of the constitutional and prudential defects of the MCA would follow these alien detainees on their trip from Guantanamo to the United States. It is these defects—the treatment that detainees receive as a result of being labeled an “enemy combatant”—to which the international community is objecting, not the location. Whether these trials take place in the United States or Guantanamo, it is my view that the Supreme Court will ultimately hold that the Constitution’s fundamental guarantees 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.

Mr. DENBEAUX. Yes.

Mr. RIVKIN. It is, of course, impossible to predict with any certainty what foreign states may do in any given circumstance. However, my own belief is that most of the critics of the current American policy of detaining enemy combatants captured in the war on terror at the Guantanamo base would not stop their attacks if the detainees were transferred to facilities in the United States. For many, if not most, of the critics Guantanamo is only part of their objection to U.S. policy. They believe that the United States is not, and should not claim to be, engaged in a legally cognizable armed conflict with al Qaeda, and that it should use its criminal justice system to meet the threat posed by transnational terror. This was, of course, largely the status quo before the September 11 attacks.

Therefore, unless the United States were prepared to limit or eliminate its military response to al Qaeda and other jihadi groups, it can expect that foreign criticism will continue even if the Guantanamo detention facilities are closed.

RELEASED DETAINEES RETURNING TO FIGHT

87. Senator SESSIONS. Mr. Dell’Orto, you stated during your testimony that of the approximately 390 detainees who have been released by the DOD from the detention facility at Guantanamo Bay, approximately 30 have since returned to war and been killed or captured on the battlefield. I find this statistic shocking, and am surprised that this information has not received more attention in the news media. Please provide more information about the released detainees who returned to war, including, if appropriate, when they were released, how and to whom they were released, when they were killed or captured, the circumstances of their death or capture, and whether the DOD knows of other former detainees who have returned to war but have not yet been killed or captured.

Mr. DELL’ORTO. Some of the information is classified and would need to be provided separately to the committee. The following information is provided on six of the individuals who have returned to the fight.

Mohamed Yusif Yaqub AKA Mullah Shazada:

After his release from Guantanamo on May 8, 2003, Shazada assumed control of Taliban operations in Southern Afghanistan. In this role, his activities reportedly included the organization and execution of a jailbreak in Kandahar, and a nearly successful capture of the border town of Spin Boldak. Shazada was killed on May 7, 2004, while fighting against U.S. forces.

Abdullah Mahsud:

Mahsud was captured in northern Afghanistan in late 2001 and held until March 2004. After his release he went back to the fight, becoming a militant leader within the Mahsud tribe in southern Waziristan. We have since discovered that he had been associated with the Taliban since his teen years and has been described as an al Qaeda-linked facilitator. In mid-October 2004, Mahsud directed the kidnapping

of two Chinese engineers in Pakistan. During rescue operations by Pakistani forces, a kidnapper shot one of the hostages. Five of the kidnappers were killed. Mahsud was not among those killed.

Maulavi Abdul Ghaffar:

After being captured in early 2002 and held at Guantanamo for 8 months, Ghaffar was released and reportedly became the Taliban's regional commander in Uruzgan and Helmand provinces, carrying out attacks on U.S. and Afghan forces. On September 25, 2004, while planning an attack against Afghan police, Ghaffar and two of his men were killed in a raid by Afghan security forces.

Mohammed Ismail:

Ismail was one of the "juveniles" released from Guantanamo in 2004. During a press interview after his release, he described his experience at Guantanamo by saying, "they gave me a good time in Cuba. They were very nice to me, giving me English lessons." He concluded his interview saying he would have to find work once he finished visiting all his relatives. He was recaptured 4 months later in May 2004, participating in an attack on U.S. forces near Kandahar. At the time of his recapture, Ismail carried a letter confirming his status as a Taliban member in good standing.

Abdul Rahman Noor:

Noor was released in July 2003, and has since participated in fighting against U.S. forces near Kandahar. After his release, Noor was identified as the person in an October 7, 2001, video interview with al-Jazeera TV network, wherein he is identified as the "deputy defense minister of the Taliban." In this interview, he described the defensive position of the Mujahideen and claimed they had recently downed an airplane.

Mohammed Nayim Farouq:

After his release from U.S. custody in July 2003, Farouq quickly renewed his association with Taliban and al Qaeda members and has returned to anti-coalition militant activity.

EVIDENCE OBTAINED UNDER COERCIVE CIRCUMSTANCES

88. Senator SESSIONS. Mr. Dell'Orto, do the rules for any war-crimes tribunals other than those authorized by the MCA allow evidence that was obtained under coercive circumstances to be considered by the tribunal if the evidence is found to be reliable and probative? If so, please cite examples.

Mr. DELL'ORTO. Most tribunals permit the introduction of any evidence found to be reliable and probative. Nuremberg had no rule of evidence that prohibited the use of evidence derived from coercion. The rules of evidence applied by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, indicate that those tribunals may admit any relevant evidence that is deemed to have probative value, but exclude evidence if it was obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

WWII AND NUREMBERG WAR CRIMES TRIALS

89. Senator SESSIONS. Mr. Dell'Orto, many critics of the MCA's trial procedures purport to compare them unfavorably to the procedures and rules governing the Nuremberg war crimes trials. Can you cite examples of procedures or rights that the MCA affords to war-crimes defendants that were not afforded to defendants tried by the Nuremberg tribunals?

Mr. DELL'ORTO. The Nuremberg Tribunals did not provide the same level of process afforded by the Military Commissions. For example, at Nuremberg no presumption of innocence was specified, the burden of proof shifted to the defense if the accused belonged to an organization declared criminal by the tribunal (i.e., the Nazis), the standard of proof was not specified, trial in absentia was permitted, and there was no right to appellate review.

90. Senator SESSIONS. Mr. Dell'Orto, how many defendants were tried by the Nuremberg tribunals?

Mr. DELL'ORTO. Approximately 200 German war crimes defendants were tried by the International Military Tribunal at Nuremberg and subsequent Nuremberg tribunals. Approximately 1,700 others were tried by U.S. military commissions.

91. Senator SESSIONS. Mr. Dell'Orto, how many defendants were tried by military commissions in the Pacific theater of World War II?

Mr. DELL'ORTO. The United States tried approximately 1,400 Japanese defendants by military commissions in the Pacific Theater of World War II. The International Military Tribunal for the Far East, also known as the Tokyo War Crimes Tribunal, tried more than 5,000 Japanese defendants for crimes against peace, war crimes, and crimes against humanity.

COMBATANT STATUS REVIEW TRIBUNALS

92. Senator SESSIONS. Mr. Dell'Orto, Admiral Hutson stated in his testimony that CSRTs are "fatally and fundamentally flawed" as compared to Geneva Convention Article 5 or Army Regulation 190-8 hearings because CSRTs are conducted "on the other side of the face of the Earth and they are months, if not years, removed from the proximity of the capture. There is nobody—no witnesses, no evidence, no understanding of the nature of the capture." Admiral Hutson also said that the other reason that CSRTs cannot be fixed is because command influence prevents the tribunals from reversing earlier military decisions that the detainees are enemy combatants and need to be held. In actual practice, do Article 5 or Army Regulation 190-8 hearings allow detainees to present evidence or witnesses that would be unavailable to a detainee in a CSRT hearing?

Mr. DELL'ORTO. No, Army Regulation 190-8 hearings, which implement Article 5 of the Geneva Conventions, do not allow detainees to present evidence or witnesses that would be unavailable to the detainee in a CSRT hearing. CSRT hearings afford the detainee the right to testify before the tribunal, call witnesses, and introduce other information. Moreover, there is no provision in Article 5 or Army Regulation 190-8 that guarantees either a timeframe during which the hearing must take place or a location in close proximity to the point of capture for such a hearing. Finally, command influence clearly does not prevent tribunals from reversing earlier military decisions that the detainees are enemy combatants and need to be held. Thirty eight detainees were determined no longer to be enemy combatants by CSRTs held in 2004 and 2005. That fact corroborates our assessment that the tribunals are conducted fairly and impartially, without command influence, and that military personnel are not predisposed to the belief that the detainees are enemy combatants.

93. Senator SESSIONS. Mr. Dell'Orto, is there any other reason why an Article 5 hearing would develop a greater understanding of the nature of the capture than would a CSRT hearing?

Mr. DELL'ORTO. No. There is no characteristic of an Article 5 hearing that enhances the amount or quality of information that can be presented to the tribunal in comparison with a CSRT hearing.

94. Senator SESSIONS. Mr. Dell'Orto, do you agree with Admiral Hutson's assertion that CSRTs will be dominated by command influence and will be unable to act independently? If not, why not?

Mr. DELL'ORTO. I do not agree with that assertion. The CSRT is an administrative proceeding in which the detainee has the opportunity to have his status considered by a neutral decisionmaking panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. I do not believe that these military officers would do anything other than carry out their responsibility with integrity and fidelity to these oaths. Thirty eight detainees were determined to be No Longer Enemy Combatants by CSRTs held in 2004 and 2005. That fact corroborates our assessment that military personnel are not predisposed to the belief that the detainees are enemy combatants.

95. Senator SESSIONS. Mr. Dell'Orto and Mr. Rivkin, Admiral Hutson stated in his written testimony that "[w]e dare not legitimize the CSRTs" because "[i]t is our own troops who are most often in harm's way." Can you cite any examples of any foreign nation that currently provides more process to captured enemy soldiers than does the CSRT system?

Mr. DELL'ORTO. I am unaware of any other nation that currently provides a level of process for captured enemy soldiers approaching that provided under our CSRT system.

Mr. RIVKIN. The premise of Admiral Hutson's statement, which is that, unless the United States provides captured enemy combatants with an exceptional level of due process, our service people will suffer, is incorrect. The Armed Forces of the United

States are lawful combatants and, therefore, are by law entitled to the highest level of treatment (as POWs under the Geneva Conventions) upon capture.

In the event, however, our forces have not received this treatment from our enemies, certainly not at the level guaranteed by the Geneva Conventions, in any of the conflicts in which the United States has been engaged since the Second World War—not in Korea, not in Vietnam, and not in the first Gulf War. In Vietnam, a policy decision was made to treat the Viet Cong guerillas—who otherwise could have been classified and treated as unlawful enemy combatants—as POWs did not result in Geneva-compliant treatment for our prisoners in Hanoi.

Today, our enemies make no pretense of compliance with either the Geneva Conventions or the customary laws and customs of war. As a result, the processes adopted by the United States to assure itself that individuals detained at Guantanamo Bay are properly classified as enemy combatants are not likely to have any affect whatsoever on how our own people are treated by this savage foe.

96. Senator SESSIONS. Mr. Dell’Orto and Mr. Rivkin, can you cite any examples of past conflicts in which a foreign nation has provided more process to American soldiers whom it has captured and held prisoner than is afforded to the Guantanamo detainees in the CSRT hearings?

Mr. DELL’ORTO. No. I am unaware of any historical examples in which another nation has provided even the same level of process, let alone more, to American prisoners of war as that afforded to detainees at Guantanamo in the CSRT hearings.

Mr. RIVKIN. I cannot.

ENEMY COMBATANTS AND *HABEAS CORPUS*

97. Senator SESSIONS. Mr. Dell’Orto, how many enemy combatants did the United States detain inside this country during World War II?

Mr. DELL’ORTO. Our research indicates that more than 400,000 enemy combatants were detained inside the United States during World War II.

98. Senator SESSIONS. Mr. Dell’Orto, if the Leahy or Dodd legislation (S. 185 and S. 576) were enacted and subsection (e) of 28 U.S.C. §2241 were repealed, would the United States be required to allow enemy combatants detained inside this country to pursue *habeas* litigation?

Mr. DELL’ORTO. Yes.

99. Senator SESSIONS. Mr. Dell’Orto, if the United States would be required to allow enemy combatants detained inside this country to pursue *habeas* litigation and assuming that this legal regime had been in place at the time, would the Justice and Defense Departments have been able to respond to all of the *habeas* petitions that World War II prisoners could have filed?

Mr. DELL’ORTO. Given the numbers of personnel and the amount of resources required to undertake such a monumental task, it would have been extremely difficult to respond to the hundreds of thousands of *habeas* petitions that World War II prisoners could have filed if all enemy combatants detained in this country would have had a right to pursue *habeas* litigation.

100. Senator SESSIONS. Mr. Dell’Orto, the United States’s April 9 brief in the Bismullah litigation cites to a Declaration by Commander Patrick M. McCarthy that discusses serious security issues created by the previous regime of legal representation at Guantanamo. Please provide the McCarthy Declaration, and any other relevant information about the burdens imposed on the military by the Guantanamo *habeas* litigation.

Mr. DELL’ORTO. That declaration is enclosed. We would also refer the committee to the D.C. Circuit’s decision in that case. (See Appendix G)

101. Senator SESSIONS. Mr. Dell’Orto, some reports in the media have indicated that detainees have assaulted guards at Guantanamo. Can you describe the nature and number of these assaults?

Mr. DELL’ORTO. It is true that detainees have assaulted guards at Guantanamo. In July 2006 we released reports documenting more than 440 such assaults between December 2002 and the summer of 2005. The documents are posted at: <http://www.dod.mil/pubs/foi/detainees/Abuse—by—Detainees.pdf> (see Appendix H) [information retained in committee files]. These assaults included using various items to make weapons, such as toilet parts, utensils, radios, and even a bloody lizard tail.

They also document the fact that guards are routinely doused with detainee “cocktails” of feces and bodily fluids collected in cups by the prisoners. Detainees have also grabbed, punched, and assaulted guards on numerous occasions.

102. Senator SESSIONS. Mr. Dell’Orto, critics of the Guantanamo Bay facility often complain that the majority of the enemy combatants held there have not been charged with a crime. Of all of the enemy combatants detained by the United States during World War II, approximately what percentage were “charged with a crime,” as opposed to simply being detained as enemy combatants?

Mr. DELL’ORTO. Although exact overall figures are difficult to obtain, it appears from the information available that less than 1 percent of all enemy combatants detained by the United States during World War II were ever charged with a crime.

103. Senator SESSIONS. Mr. Smith, during the hearing, there was some discussion over whether the Leahy bill (S. 185) or Dodd bill (S. 576) “grants” *habeas* rights to enemy combatants. Do you agree that, if the Leahy or Dodd legislation were enacted into law, then regardless of whether the Constitution guarantees *habeas* rights to noncitizen enemy combatants, such combatants would enjoy a statutory right to pursue *habeas* litigation in Federal courts?

Mr. SMITH. As I read the Dodd bill (S. 576) and the Leahy bill (S. 185) neither affirmatively grants *habeas* rights. Rather, both merely involve a repeal of the provisions in the MCA that denied detainees the right to file *habeas* petitions.

MILITARY COMMISSIONS ACT

104. Senator SESSIONS. Mr. Rivkin, in his testimony before the Senate Armed Services Committee, Senator Leahy stated that under the MCA, that “[o]n the basis of a charitable donation, perhaps a report of suspicious behavior from an overzealous neighbor, or from information secretly obtained, maybe from a cursory review of what a person borrowed from the public library, [a] permanent resident can be brought in for questioning, denied a lawyer, confined. They have no recourse in the courts for years or decades, maybe forever.” Does this statement accurately portray the circumstances under which the MCA would allow the United States to detain an enemy combatant?

Mr. RIVKIN. No. Under the MCA, an individual can be subject to trial by military commission only if he is an alien unlawful enemy combatant. To qualify as an alien unlawful enemy combatant, an individual must have engaged in hostilities against the United States or its co-belligerents, or have purposefully and materially supported such hostilities, or be a part of the Taliban, al Qaeda, or associated forces, or have been determined to have been an unlawful enemy combatant by a CSRT or other competent tribunal on or before the MCA was enacted. Neither “suspicious behavior” nor a simple “charitable” donation would bring an individual within the definition of an unlawful enemy combatant subject to the MCA—however the evidence of these activities was obtained.

IRREGULAR COMBATANTS

105. Senator SESSIONS. Mr. Rivkin, you stated during your testimony, in response to a question posed by Senator McCaskill, that “there’s nothing unprecedented about this war. The engagement by organized states against irregular combatants has been around for centuries. Think about the 15th- and 16th-century examples.” Can you describe the 15th- and 16th-century examples that you mentioned, and any other examples of organized states engaged in warfare with irregular or unlawful combatants that you think it would be appropriate for Congress to consider?

Mr. RIVKIN. As I suggested during my testimony, the very severe problems involved when non-state actors resort to armed force are not new—and civilian populations have almost always been the losers when this occurs. In this regard, states have had to deal with violent and often ruthless groups willing and able to use armed force, in their interest or the interest of other states, in the past—and the responses have been varied. As a legal matter, however, individuals who resort to war without lawful authority have generally been considered to be more culpable than simple criminals. As one leading historian has explained:

It has been said that taking a part in legally unjust war doubled the risks which a soldier ran. This was because if he did so, he was automatically guilty of lese-majeste. If he took up arms despite of binding allegiance, this was obviously so. It was so in any other case too because only a sovereign prince could levy public war, and if a man levied public war without a li-

cense or avowal of such a prince, he was usurping sovereign authority and injuring majesty.

M.H. Keen, *The Laws of War in the Late Middle Ages* 92 (1965).

The examples I was thinking of in particular during my testimony involved the “free companies,” which were the bane of Western Europe—and especially Italy—during the later Middle Ages and Renaissance. There were dozens of these companies, some of a few individuals, and others that were thousands strong with their own bureaucracies. One prototypical such company was “The White Company,” led by Sir John Hawkwood in the later 14th century. Hawkwood had been a commander during the Anglo-French “Hundred Years War” in the 1350s. When the Treaty of Bretigny (1360) brought active hostilities to a close—for a time—Hawkwood (and many of his compatriots) were put out of work.

They organized themselves into free wheeling bands of experienced fighters, and sought employment wherever it could be found. When they could not find employment as mercenaries by states, they simply lived off the land, i.e., took what they needed or desired from the local population. Hawkwood, who was generally better behaved than many of what came to be called the condottieri (“condotta” being the Italian word for a mercenary contract) led his force into Italy where it fought for rival city-states, or the Pope, or itself, variously.

These free companies continued to be a political force—particularly in Italy—throughout the 15th and into the 16th centuries—sometimes threatening their own employers or fighting each other. It was, in fact, only the development of regular, standing armies by states that brought the free companies under control by the early 16th century. However, the legal position of a private individual making war without public authority did not improve, and this activity remained a grave violation of the laws of war for which individuals could be, and were, severely punished—not simply as civilians who had committed murder or theft, but as war criminals.

PRIOR WARS AND DEFERENCE TO THE COMMANDER IN CHIEF

106. Senator SESSIONS. Admiral Hutson, you stated in your testimony that “[i]n prior wars, that system [for detention and trial of enemy combatants] was upset to some extent because Congress and the courts very much deferred to the President as Commander in Chief.” During which past wars and in what ways in particular do you believe that Congress and the courts have deferred excessively to the executive branch with regard to the detention and trial of noncitizen enemy soldiers?

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

107. Senator SESSIONS. Admiral Hutson, during which of this Nation’s prior wars, if any, do you believe that Congress and the courts did not defer excessively to executive branch determinations as to the detention and trial of alien enemy combatants?

Admiral HUTSON. Admiral Hutson failed to respond in time for printing. When received, answer will be retained in committee files.

RENDITION OF TERRORISTS

108. Senator SESSIONS. Mr. Smith, you stated during your testimony that you believe that rendition of terrorists to foreign countries “has been a very valuable tool in the war on terror and in law enforcement matters.” Please elaborate on this statement. Why do you believe that such renditions are a valuable tool?

Mr. SMITH. I am familiar with many renditions that have been very valuable in law enforcement, including in bringing terrorists to justice. In some instances, extradition is not a legal or practical alternative. For example, the United States cooperated with French and Sudanese authorities in the early 1990s to have the infamous terrorist Carlos the Jackal deported from Sudan into the hands of the French police and returned to France to stand trial for murdering two French intelligence officers. Similarly, in the 1980s the United States persuaded Paraguayan authorities to deport a Croatian terrorist into the custody of U.S. Marshals on board an American civil flight in Paraguay for his return to the United States to face trial for several murders in New York. There are lots of other similar examples.

That said, I am troubled by media reports of some recent renditions that appear to have the sole purpose of “getting someone off the street” or of sending an individual to a country where there is a strong likelihood that they would be tortured. I believe that the President should issue an Executive order that lays out clear

guidelines for the conduct of renditions, including the reasons for which a rendition may be conducted, the procedures to be followed in approving a rendition, and a requirement that the United States obtain assurances—with a reasonable right of verification—that any person we send to another state will not be tortured or otherwise subjected to treatment that does not meet internationally accepted standards.

[Annexes A through H follow:]

ANNEX A

[Information retained in committee files.]

ANNEX B

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JUL 14 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR POLICY

SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba

References: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004
(c) Detainee Treatment Act of 2005
(d) Deputy Secretary of Defense Administrative Review Board Implementation Order
(current)

Enclosures: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet
(10) Implementation of the Detainee Treatment Act of 2005

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Deputy Secretary of Defense has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and

oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process. Reference (c) requires that the procedures governing the CSRT process provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee (Section 1405, (a)(3) of Reference (c)). Reference (c) also requires that the procedures governing the CSRT process ensure that, in making a determination of a detainee's status, a CSRT, to the extent practicable, assess whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement (Section 1405(b)(1) of Reference (c)). Procedures for implementation of the Detainee Treatment Act are described in Enclosure 10.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). The CSRT shall follow the requirements of the Detainee Treatment Act delineated in enclosure (10). This implementing directive is subject to revision at any time.



CC:
 Secretary of State
 Secretary of Defense
 Attorney General
 Secretary of Homeland Security
 Director, Central Intelligence Agency
 Assistant to the President for National Security Affairs
 Counsel to the President
 Director, Federal Bureau of Investigation
 Director, Office of Administrative Review of the Detention
 Of Enemy Combatants

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OFFICE OF THE
 SECRETARY OF THE
 NAVY

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

- (1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above. One of

Enclosure (1)

the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

- (2) **Recorder.** Each Tribunal shall have a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).
- (3) **Personal Representative.** Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of O-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).
- (4) **Legal Advisor.** The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.
- (5) **Interpreter.** If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

- (1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.
- (2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the

originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

- (3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

- (1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.
- (2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.
- (3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").
 - (a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.
- (4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

- (1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).
- (2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.
- (3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.
- (4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.
- (5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.
- (6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.
- (7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.
- (8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.
- (9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

- (1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.
- (2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.
- (3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.
- (4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.
- (5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.
- (6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

- (7) **Admissibility of Evidence.** The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.
- (8) **Control of Case.** The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.
- (9) **Availability of Witnesses.** The President of the Tribunal is the decision authority on reasonable availability of witnesses.
- (a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.
- (b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.
- (c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.
- (10) **CSRT Determinations on Availability of Evidence.** If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.
- (11) **Burden of Proof.** Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

- (12) **Voting.** The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

- (1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.
- (2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.
- (3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.
- (4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.
- (5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.
- (6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.
- (7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of

information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

- (8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.
- (9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (*e.g.*, Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.
- (10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

- (1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.
- (2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.
- (4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

- (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and
- (e) A dissenting member's summary report, if any.
- (5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.
- (6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.
- (7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.
- (8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.
- (9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.
- (10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities**A. Qualifications of the Recorder**

- (1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of O-3 or higher, preferably a judge advocate, to serve as a Recorder.
- (2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

- (1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.
- (2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

- (1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).
- (2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.
- (3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.
- (4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.
- (5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.
- (6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

Enclosure (2)

- (7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).
- (8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;
 - (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and
 - (e) A dissenting member's summary report, if any.
- (9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.
- (11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities**A. Qualifications of Personal Representative**

- (1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of O-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.
- (2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

- (1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.
- (2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

- (1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.
- (2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

Enclosure (3)

- (3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.
- (4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.
- (5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.
- (6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.
- (7) The Personal Representative shall answer questions, if any, asked by the Tribunal.
- (8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.

A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.

I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.
2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.
3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.
4. You will be provided with an interpreter during the Tribunal hearing if necessary.
5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

Detainee Election:

- Wants to Participate in Tribunal
- Wants Assistance of Personal Representative
- Affirmatively Declines to Participate in Tribunal
- Uncooperative or Unresponsive

Personal Representative Comments:

Personal Representative

Sample Nomination Questionnaire



Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI) _____ 2. Rank/Grade _____
3. Date of Rank _____ 4. Service _____ 5. Active Duty Service Date _____
6. Desig/MOS _____ 7. Date Current Tour Began: _____
8. Security Clearance Level _____ 9. Date of clearance: _____
10. Military Awards / Decorations: _____

11. Current Duty Position _____ 12. Unit: _____
13. Date of Birth _____ 14. Gender _____ 15. Race or Ethnic Origin _____
16. Civilian Education. College/Vocational/Civilian Professional School: _____
17. Date graduated or dates attended (and number of years), school, location, degree/major: _____

18. Military Education. Dates attended, school/course title. _____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

Enclosure (6)

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? _____ Explain. _____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain. _____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process? Y/N _____ Explain. _____

SIGNATURE OF OFFICER: _____ DATE: _____

Approved _____ Disapproved _____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel



Department of Defense
Director, Combatant Status Review Tribunals

Ser

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Enclosure (7)

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the *italicized* portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: *Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?*

INTERPRETER: I do.

Enclosure (8)

PRESIDENT: We will take a brief recess while the detainee is brought into the room.

RECORDER: All Rise.

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: All Rise. [The Tribunal members enter the room.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether you [or Name of Detainee] meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: (TRANSLATION OF ABOVE).

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: The Recorder will now administer the oath to the Personal

Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).
PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: [Name of detainee] (or Personal Representative), do you (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: [Name of detainee] do you have any other evidence to present to this Tribunal?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____

DATE: _____

- Ref: (a) Convening Order of XX YYY 2004
- (b) CSRT Implementation Directive of XX July 2004
- (c) DEPSECDEF Memo of 7 July 2004

- Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)
- (2) Classified Summary of Basis for Tribunal Decision (U)
- (3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

(Rank, Name) President

Enclosure (9)

IMPLEMENTATION OF
THE DETAINEE TREATMENT ACT OF 2005

A. Consideration of new evidence relating to enemy combatant status.

If, pursuant to the procedures set forth in the Implementation Order of the Administrative Review Boards (reference (d)), the Deputy Secretary of Defense directs that a Combatant Status Review Tribunal be convened for the purpose of re-evaluating a detainee's status in light of new information, the tribunal shall conduct its proceeding in accordance with reference (a).

B. Consideration of whether any statement derived from or relating to a detainee was obtained as a result of coercion.

In making a determination regarding the status of any detainee, the CSRT shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.

Enclosure (10)

ANNEX C

[Information retained in committee files.]

ANNEX D

[Information retained in committee files.]

ANNEX E



Department of Defense
Office for the Administrative Review of
the Detention of Enemy Combatants (OARDEC)
at U.S. Naval Base Guantanamo Bay, Cuba
1010 Defense Pentagon, Washington, D.C. 20301-1010

OARDECINST 5421.1
7 May 2007

OARDEC INSTRUCTION 5421.1

Subj: PROCEDURE FOR REVIEW OF "NEW EVIDENCE" RELATING TO ENEMY
COMBATANT (EC) STATUS

Ref: (a) Detainee Treatment Act of 2005 (DTA)
(b) Implementation of Combatant Status Review Tribunal Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006
(c) Revised Implementation of Administrative Review Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006

1. Purpose: This regulation creates a unified procedure for the submission of new evidence relating to a Guantanamo detainee's EC status, including those who do not receive ARB hearings.

a. Section 1405(a)(3) of the reference (a) provides that Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) procedures, outlined in references (b) and (c), for individuals detained by the Department of Defense at Guantanamo "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee."

b. Enclosure (13) of reference (c) provides that new information relating to the enemy combatant status of a Guantanamo detainee presented at an ARB shall be brought to the attention of the Deputy Secretary of Defense (DSD). Under that memorandum, the Department reviews new evidence and may either direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information, or determine that the new information does not warrant review by a CSRT.

c. Certain detainees (such as those previously approved for transfer/release or those subject to military commission charges) are not provided ARB hearings.

2. Cancellation: This is the first instruction in this series; no cancellation clause will be used.

OARDECINST 5421.1
7 May 2007

3. Initiation of a "New Evidence Review": A detainee or a person lawfully acting on the detainee's behalf can submit evidence that is new and relates to the detainee's EC status by mailing it to:

Director, OARDEC
1010 Defense Pentagon
Room 3A730
Washington, DC 20301-1010.

a. If any such evidence is submitted by a detainee to his ARB, it will be forwarded to the above office, consistent with the DSD Memorandum on Revised Implementation of Administrative Review Procedures.

b. If an individual submitting information on a detainee's behalf has had access to classified material, it is the responsibility of that individual to follow all applicable information security regulations with respect to the handling of classified or otherwise protected information. These procedures do not absolve those individuals of that responsibility.

4. Definition of "New Evidence"

a. For purposes of these procedures, "new evidence" must meet the following two criteria:

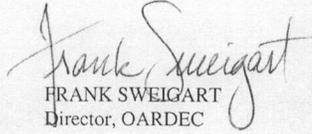
(1) It must be factual information that was not previously presented to the detainee's CSRT, and

(2) It must be information that is material to the factual question of whether the detainee is an EC. Information will be deemed "material" if it creates a substantial likelihood that the "new evidence" would have altered the CSRT's prior determination that the detainee is an enemy combatant, as that term is defined by Deputy Secretary of Defense Order of July 7, 2004, and the Deputy Secretary of Defense Memorandum of July 14, 2006.

b. New "evidence" and "information" does not include legal argument or factual assertions not supported through documentation or witness testimony. For example, documents that merely claim the detainee is not an enemy combatant and/or that primarily focus on the legality of his detention or the propriety of his CSRT/ARB process will not be reviewed under these procedures. Information that contends the detainee is not an enemy combatant and that contains photographs, affidavits, videotaped witness statements or other supporting exhibits may be considered new evidence or information, as would documentation of investigative results.

5. Conduct of a "New Evidence Review"

- a. Every effort will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the "new evidence" being received at the above address.
- b. If the evidence is found to meet the "new evidence" standard, the DSD will direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information. This CSRT will follow the procedures found in the "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo, Cuba."
- c. If the evidence does not meet the "new evidence" standard, a new CSRT will not be convened.
- d. The decision to convene a CSRT to reconsider the basis of the detainee's EC status in light of "new evidence" is a matter vested in the unreviewable discretion of the DSD.


FRANK SWEIGART
Director, OARDEC

ANNEX F

[Information retained in committee files.]

ANNEX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|------------------------------|---|-----------------------------------|
| SALIM SAID, ET AL., |) | |
| Petitioners, |) | |
| v. |) | Civil Action No. 05-CV-2384 (RWR) |
| GEORGE WALKER BUSH, ET. AL., |) | |
| Respondents |) | |

Pursuant to 28 U.S.C. § 1746, I, Patrick McCarthy, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am a Commander in the United States Navy with over eighteen (18) years of active duty service. I currently serve as the Staff Judge Advocate, Joint Task Force - Guantanamo Bay, Cuba (JTF-GTMO). I am responsible for all legal advice and the completion of all legal responsibilities on behalf of JTF-GTMO. I have served in this position since May 2, 2006.
2. My responsibilities include facilitating habeas corpus counsel access to their clients who are detained by JTF-GTMO and compliance by such counsel with JTF-GTMO security procedures and force protection safeguards.
3. On June 8, 2006, as I was entering Camp Echo, one of the detention areas of Camp Delta, Guantanamo Bay, Cuba, I came upon a discussion between Camp Echo guard staff and habeas corpus attorneys who were being screened prior to their entry into the camp to meet with their client. In fact, as I entered the camp, guards were attempting to contact my office to alert my staff that there was a problem with the materials counsel were attempting to take into the camp. It is normal procedure for the guard staff to seek guidance whenever they find something out of the ordinary when dealing with habeas

corpus counsel. As I approached the guards, I was advised that the guards had discovered Internet news articles and summaries of ongoing Guantanamo cases, that were unrelated to the habeas counsel's clients, among the materials the attorneys were attempting to take into the camp. The guard staff further advised me that they had confiscated the foregoing items as contraband. At that time, I asked the attorney, who had been speaking to the guard staff to identify himself. He advised me his name was "Colman." I then asked Mr. Colman to describe the materials in question. He confirmed the guard's description, stating that the case summaries were actually summaries of ongoing habeas cases prepared by the Center for Constitutional Rights. Based on this description of the materials, I advised Mr. Colman, during a very polite conversation, that such material was not directly related to his client's case and, in accordance with the Protective Order of November 8, 2004, and JTF-GTMO security procedures and force protection safeguards, the material would not be permitted into the camp. I then advised Mr. Colman that the Camp Echo guard staff would retain the confiscated materials. Shortly thereafter, those materials were delivered to a member of my staff, under a cover sheet. Subsequently, the materials were placed into an envelope, sealed, and transported to Washington, D.C., for delivery to the Court Security Officer, without further discussion, disclosure, or examination of the contents of those materials.

4. The guards' actions were undertaken according to standard operating procedures, which require the guards to search visiting counsel, as well as their bags and briefcases, for contraband prior to meeting with any detainees. If any contraband is discovered during the search, it is confiscated and counsel is informed that the contraband will be held pending further investigation.

5. The guards at Camp Echo take the time necessary to screen all incoming persons into the camp as is required by the given circumstances. The length of time required to screen attorneys and those accompanying them varies, but is in direct relation to the amount of material the attorneys seek to bring into the camp. The more materials that attorneys seek to bring into the camp, the longer the period of time required for the screening. With respect to the incident involving Mr. Colman's party, the guards discovered that one of three individuals in the party, Mr. Colman, was attempting to bring a substantial amount of contraband material into Camp Echo in violation of the Protective Order and JTF-GTMO security procedures and force protection safeguards. According to the guards, this material included various news articles related to Guantanamo that Mr. Colman said he mistakenly failed to remove from his briefcase prior to entry into Camp Echo. In light of that discovery, the guards proceeded with a thorough contraband inspection to ensure that none of the other persons in Mr. Colman's party were in violation of the Protective Order and JTF-GTMO security procedures and force protection safeguards. During the course of this search, guards discovered additional materials, that is, summaries of ongoing Guantanamo cases that appeared to be contraband under the terms of the Protective Order and JTF-GTMO security procedures and force protection safeguards. Accordingly, the actions taken by the guard force were reasonable under the circumstances. I am unsure of the precise time that was required to properly screen Mr. Colman's party on June 8, 2006, however, our conversation lasted between 10 and 20 minutes. I do not believe the guards took anything approaching 45 minutes to do the search, although the entire process, including my conversation with Mr. Colman, could have taken 30 to 40 minutes.

6. The Office of the Staff Judge Advocate, JTF-GTMO, delivers legal mail addressed to detainees after it has been screened as provided for in the Protective Order of November 8, 2004. On July 10, 2006, the Office of the Staff Judge Advocate received two letters through the legal mail system addressed to petitioner Bandar Al Jaabir (ISN#182). The letters were delivered that day. On June 21, 2006, the Office of the Staff Judge Advocate received a legal mail envelope addressed to petitioner Saad Al Qahtaani (ISN # 200). That letter was delivered on June 23, 2006. On July 10, 2006, the office of the Staff Judge Advocate received another legal mail envelope for petitioner Saad Al Qahtaani (ISN #200) that was delivered to the detainee that same day. Finally, 5 legal mail envelopes for petitioner Saad Al Qahtaani (ISN# 200) were received on July 17, 2006, and those envelopes were delivered on July 18, 2006.
7. In addition to the legal mail that petitioner Saad Al Qahtaani (ISN# 200) received in June and July of this year, JTF-GTMO mail records show that he also received non-legal mail in both October 2003 and in August 2005, which was delivered.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct, to the best of my knowledge, information and belief.

Dated: August 2, 2006



Patrick McCarthy
Commander, JAGC, U.S. Navy
Staff Judge Advocate, JTF-GTMO

ANNEX H

[Information retained in committee files.]

[Whereupon, at 1:07 p.m., the committee adjourned.]

