

HAMDAN V. RUMSFELD: ESTABLISHING A CONSTITUTIONAL PROCESS

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED NINTH CONGRESS

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HAMDAN V. RUMSFELD: ESTABLISHING A CONSTITUTIONAL PROCESS

TUESDAY, JULY 11, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:29 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, Sessions, Graham, Cornyn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Senate Judiciary Committee will now proceed to hold a hearing on what response should be made to the decision of the Supreme Court of the United States on June 29th, a week ago Thursday, which held that the procedures in place for the trial of certain detainees in Guantanamo did not satisfy the Constitution of the United States or the Geneva Convention. Shortly after 9/11, Senator Durbin and I introduced relevant legislation, as did Senator Leahy, Senator Graham, and others. The Constitution is explicit under Article I, Section 8 that the Congress has the authority and responsibility to establish the rules of trials of those captured on land or sea. And we are now proceeding to follow the requirements of constitutional and international law, as handed down by the Supreme Court of the United States, and to do it in a way which will permit us to fairly try those accused of war crimes and will permit us to fairly, appropriately, and judiciously detain enemy combatants in accordance with the rule of law.

The Judiciary Committee held hearings on Guantanamo in June of 2005. I made a trip to Guantanamo in August of 2005, and we had been working on legislation and had legislation prepared in anticipation of the Supreme Court decision, which we thought would require congressional action. And when the Court came down with its decision, it was studied, and we introduced proposed legislation. But it is a very complex matter, and we need to consider procedures to determine what is appropriate evidence; whether hearsay should be allowed; perhaps not at trials for war criminals or those charged with war crimes, but perhaps for detainees, the issue of whether a detainee's statements can be used if there is a question about whether the statements were voluntary or coerced; the right

to counsel, the right to classified information; where the lawyers are JAG officers, they are cleared; where they are private counsel, they are not cleared. It is more complicated. There are many, many questions which have to be answered.

We have a distinguished group of witnesses today. We have the Principal Deputy General Counsel for the Department of Defense, Daniel Dell'Orto, and we have the Acting Assistant Attorney General in the Office of Legal Counsel, Steve Bradbury, who will be our two lead witnesses.

We are shooting for an 11:30 adjournment. Witnesses will have 5 minutes, and we will have rounds of questioning of 5 minutes.

We did not have the witness testimony submitted in a timely way. Some of the witnesses were notified late, and that makes it difficult for members to prepare adequately. But we will proceed to do the best we can.

Now let me yield to my distinguished Ranking Member, Senator Leahy.

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

Senator LEAHY. Well, thank you, Mr. Chairman, and thank you for having this hearing. In a way, we pick up where the Judiciary Committee started almost 5 years ago, in November-December of 2001, when we urged the President to work with us to construct a just system of special military commissions.

In fact, Mr. Chairman, you and I introduced bills with procedures that would have complied with our obligations under law. It would have provided the kind of full and fair trials that the President has said that he wants to provide.

The hearing today follows the United States Supreme Court's repudiation of the President's military commissions. The Supreme Court determined that the Bush-Cheney administration's system for prosecuting detainees at Guantanamo is illegal, and it told the President, in effect, to stop his illegal conduct.

The decision has given our system of constitutional checks and balances a tonic that is sorely needed. The Supreme Court is right in holding that the President is bound to comply with the rule of law. One of our core American values is that no one is above the law. I commend the Supreme Court for acting as a much needed check on unilateral policies that stretch beyond the President's lawful authority.

When the President announced the creation of these commissions, Alberto Gonzales, then the White House Counsel, touted them as a means to dispense justice swiftly, close to where our forces may be fighting. Were those the results? Not hardly.

In the last 5 years, there have been no trials and no convictions of any of the detainees, and no one has been brought to justice through these commissions. Instead, precious time, effort, and resources have been wasted.

Remember what I said: 5 years, no trials, no convictions.

When the Bush-Cheney administration rejected our advice, refused to work with Congress and chose to go it alone in the development of military commissions, they made a mistake of historic and constitutional proportions. I hope the administration will begin

today's hearings by admitting their mistakes and acknowledging the limits on Presidential authority. As Justice Kennedy emphasized in his opinion, "subject to constitutional limitations, Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them."

The Supreme Court's decision is a triumph for our constitutional system of checks and balances. It stands for a very simple proposition: When Congress passes a law, the President is bound to follow it. The Congress passed the Uniform Code of Military Justice. Our country adopted and is bound to abide by the Geneva Conventions regardless of whether the Attorney General still considers them to be, in his word, "quaint."

This President decided not to follow the law. The Court said in America nobody is above the law, not even the President.

You know, what is surprising is that in the opinions the three Justices who claim the mantle of conservatism were so deferential to the President they would not stand up for the rule of law.

I am going to put my full statement in the record, but I do want to make a couple other points.

Like you, Mr. Chairman, I am a former prosecutor, and I find it hard to fathom that this administration is so incompetent that it needs kangaroo court procedures to convince a tribunal of United States military officers that the worst of the worst in prison at Guantanamo Bay should be held accountable. Military commissions should not be set up as a sham. They should be consistent with the high standard of American military justice that has worked for decades. If they are to be United States military commissions, they should dispense just punishment fairly, not just be an easier way to punish.

For 5 years, the administration has violated fundamental American values, damaged our international reputation, and delayed and weakened prosecution of the war on terror—not because of any coherent strategic view that it had, but because of its stubborn unilateralism and dangerous theory of unfettered executive power, augmented by self-serving legal reasoning. Guantanamo Bay has been such a debacle that even the President now says that it should be shut down. But the damage keeps accumulating.

Some still will not admit this administration's errors. They argue as if the United States should measure itself against the brutality of terrorists. Our standards in our great country have always been higher than that, and I disagree with their argument when it comes to the rule of law. I disagree when it comes to engaging in torture. I disagree when it comes to honoring our legal and international obligations. Americans' ideals are sullied whenever we resort to bumper sticker slogans about giving special privileges to terrorists. No one has urged that.

The President says he is for fairness and justice. Well, so am I, so are you, so is everybody. But I would like to see a system that could determine guilt and punish the guilty. I am for a system that works, a system that honors the American values that have been part of our strength as a good and great Nation.

Military justice is swift and effective. Courts-martial have been used to bring some members of our own armed forces that have

violated the law to justice. Meanwhile, not one of the prisoners at Guantanamo Bay, whom the President has called "the worst of the worst," has been brought to justice. Not one. Iraq may well complete its trial of Saddam Hussein before a single Guantanamo detainee is tried. The system the administration created was fatally flawed. The President decided not to proceed promptly by courts-martial against the detainees. I remain willing to work to develop bipartisan legislation creating military commissions that will comply with our law. That is what I proposed 5 years ago. That is what you proposed 5 years ago. I will still work in a bipartisan fashion to do that despite the 5 years in which the administration has made it very clear they do not want to work with us.

We need to know why we are being asked to deviate from rules for courts-martial, and we also need to see a realization by this administration that it is Congress that writes our laws and that no office holder, branch, or agency of our Government is above the law.

So, Mr. Chairman, again, I thank you for holding these hearings. I went somewhat over time. I will put my whole statement in the record, but I think this is an extraordinarily serious matter.

Chairman SPECTER. Without objection, your full statement will be made a part of the record.

Senator LEAHY. Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Our first witness is Daniel Dell'Orto, who holds a bachelor's degree from Notre Dame, master's from Pepperdine, law degree from St. John's, and a master in law from the Georgetown University Law Center; colonel in the United States Army from 1971 to 1998; extensive background as a judge advocate; has been Principal Deputy Counsel since the beginning of President Bush's administration.

We welcome you here, Mr. Dell'Orto, and look forward to your testimony.

**STATEMENT OF DANIEL J. DELL'ORTO, PRINCIPAL DEPUTY
GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S.
DEPARTMENT OF DEFENSE, WASHINGTON, D.C.**

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

Mr. Bradbury will speak shortly after me, and I will tell you in advance that I join wholeheartedly in his statement, and I ask that you consider these words as a supplement to his.

The United States military has convened criminal tribunals other than courts-martial since the days of the very first Commander-in-Chief, George Washington. From the Revolutionary, Mexican-American, and Civil Wars on through World War II and the present, our Nation and its military have considered these tribunals an indispensable tool for the dispensation of justice in the chaotic and irregular circumstances of armed conflict. The military

commission system reviewed by the Court in *Hamdan* fits squarely within this long tradition.

Tradition, however, is not the only justification for employing criminal adjudication processes other than courts-martial in times of armed conflict. Alternative processes are necessary to avoid the absurd result of adopting protections for terrorists that American citizens do not receive in civilian courts, nor do our service members receive in courts-martial.

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

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

While tradition and common sense, therefore, provide strong support for alternative adjudication processes for terrorists and other unlawful enemy combatants, military necessity is perhaps the strongest reason of all. It is simply not feasible in time of war to gather evidence in a manner that meets strict criminal procedural requirements. Service personnel are generally not trained to execute military combat and intelligence missions while simultaneously adhering to law enforcement standards, constraints, and concerns about chains of custody and authentication of evidence. Asking our fighting men and women to take on additional duties traditionally performed by police officers, detectives, evidence custodians, and prosecutors would not only distract from their mission, but endanger their lives as well.

Intelligence gathering would also suffer terribly. It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial. Similarly, full application of court-martial rules would force the Government either to drop

prosecutions or to disclose intelligence information to our enemies in such a way as to compromise ongoing or future military operations, the identity of intelligence sources, and the lives of many. Military necessity demands a better way.

The *Hamdan* decision provides Congress and the President an opportunity to address these critical matters together. We look forward to working with you. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Dell'Orto appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Dell'Orto.

We now turn to Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel. Mr. Bradbury has a bachelor's degree from Stanford, a law degree from the University of Michigan magna cum laude; practiced law with Kirkland and Ellis, where he was a partner for 10 years; and he has been in his current position in the Office of Legal Counsel since 2004.

We appreciate your coming in, Mr. Bradbury, and the floor is yours.

STATEMENT OF STEVEN G. BRADBURY, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRADBURY. Thank you, Mr. Chairman, Senator Leahy, and members of the Committee.

The Supreme Court in *Hamdan v. Rumsfeld* held that the military commissions that the President established were inconsistent with the Uniform Code of Military Justice and the Geneva Conventions. The Court's reasoning in *Hamdan* may be surprising and disappointing to many of us. Certainly it is without historical analogue. But it is not my intent to reargue the case this morning. The administration will, of course, as the President has said, abide by the decision of the Court.

It is important to point out, however, that the Court did not question the authority of the United States to detain enemy combatants in the war on terror, and its decision does not require us to close Gitmo or release any terrorist. The Court implicitly recognized that the vicious attacks of al Qaeda triggered our right to use military force in self-defense and that we are involved in an armed conflict with al Qaeda.

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

In moving forward after *Hamdan*, the basic question we must answer is how best to pursue the prosecution of al Qaeda and other terrorist combatants in this armed conflict. *Hamdan* held that Congress had restricted the President's authority to establish procedures for military commissions. The Court read the Uniform Code of Military Justice to require presumptively that captured enemy combatants, including unlawful combatants such as al Qaeda ter-

rorists, will get the same military court-martial procedures that are provided for the members of our armed forces.

But in trying al Qaeda terrorists for their war crimes, it is not appropriate, as a matter of national policy, not practical as a matter of military reality, not required by the Constitution, and not feasible in protecting sensitive intelligence sources and methods, to require that military commissions follow all the procedures of a court-martial.

All the issues with military commissions identified by the Supreme Court can be addressed and resolved through legislation. That includes the use of hearsay evidence, for example. It includes the use of classified information. It includes the presence of the accused. All of these issues can be addressed through legislation consistent with the Constitution and pursuant to statute adopted by Congress. The administration stands ready to work with Congress to do just that so that trials of captured al Qaeda terrorists can move forward.

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

The Court's conclusion that Common Article 3 applies to members of al Qaeda is a significant development that must be considered as we continue the healthy discussion between the political branches about the rules governing the treatment of terrorist detainees. Of course, the terrorists who fight for al Qaeda have nothing but contempt for the rules of law and the laws of war. They have killed thousands of innocent civilians in New York, Washington, and Pennsylvania and thousands more in numerous countries around the world. They advocate unrestrained violence and chaos. They kidnap relief workers, behead contractors, journalists, and U.S. military personnel, and bomb shrines, wedding parties, restaurants, and hotels. They openly mock the rule of law, the Geneva Conventions, and the standards of civilized people everywhere, and they will attack us again if given the chance.

The United States has never before applied Common Article 3 in the context of an armed conflict within international terrorists. When the Geneva Conventions were concluded in 1949, the drafters of the Conventions certainly did not anticipate armed conflicts with international terrorist organizations.

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

baseline standard that would govern the treatment of detainees by the United States in the war on terror.

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

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

On the other hand, although Common Article 3 should be understood to apply only to serious misconduct, it is undeniable, Mr. Chairman, that some of the terms in Common Article 3 are inherently vague.

Chairman SPECTER. Mr. Bradbury, how much longer will you require?

Mr. BRADBURY. Approximately 1 more minute.

Chairman SPECTER. Thank you.

Mr. BRADBURY. Common Article 3 prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment—a phrase that is susceptible of uncertain and unpredictable application.

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

Many of these interpretations to date have been consistent with the reading that we would give to Common Article 3. Nevertheless, the application of Common Article 3 will create a degree of uncertainty for those who fight to defend us from terrorist attack. The meaning of Common Article 3 is not merely academic. The War Crimes Act makes any violation of Common Article 3 a felony offense.

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

Mr. Chairman, notwithstanding the problematic aspects of the Court's opinion, the decision in *Hamdan* gives the political branches an opportunity to work as one to establish the legitimate authority of the United States to rely on military commissions to bring the terrorists to justice. It is also an opportunity to come together to affirm our values as a Nation and our faith in the rule of law. We in the administration look forward to working with Congress to protect the American people and to ensure that unlawful terrorist combatants can be brought to justice consistent with the Supreme Court's guidance.

I look forward to discussing these issues with the Committee this morning. Thank you, Mr. Chairman.

[The prepared statement of Mr. Bradbury appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Bradbury.

We will now proceed to the 5-minute rounds for members' questioning.

At the outset, I would ask each of you to review Senate bill 3614, which was introduced on June 29th, and give us your comments, where you think it is appropriate.

Mr. Bradbury has said that he believes it is not necessary to follow all the procedures from courts-martial, and Mr. Dell'Orto has indicated his agreement with Mr. Bradbury's statement. We would like to have a specification from each of you as to which provisions for the rules of courts-martial you think should not apply, and we would ask in addition that you supply to the Committee draft legislation which you think would be adequate to meet the test of the Supreme Court and adequately protect the classified, secret information which you have alluded to in your opening statements.

The opening statements contain the expected level of generalization, and if you will provide responses to what I have asked for, do you think 2 weeks would be sufficient, Mr. Dell'Orto?

Mr. DELL'ORTO. I believe so, Mr. Chairman.

Chairman SPECTER. Mr. Bradbury.

Mr. BRADBURY. Well, Mr. Chairman, I am happy right now to talk about specific provisions of the UCMJ.

Chairman SPECTER. Well, I am going to ask you about some, but I want you to respond to S. 3614 and the court-martial provisions that you do not think should be followed and draft legislation. We want to proceed expeditiously in coordination with the Armed Services Committee, and then ultimately with the House, so let's say 2 weeks from today to have the materials to us.

Mr. BRADBURY. I appreciate that. Mr. Chairman, I will provide responses on the draft legislation that you referenced and the specific provisions—

Chairman SPECTER. Well, let me proceed now—

Mr. BRADBURY. But, Mr. Chairman, only the President has the decision to introduce legislation from the executive branch, so the administration stands ready to work with Congress on legislation. I cannot commit, as I sit here now, that the administration will submit a particular bill. But I know the President looks forward to working and moving ahead quickly with Congress—

Chairman SPECTER. Mr. Bradbury, we understand that it is the President's decision in the executive branch. What I am trying to do is establish the time parameters so we can get moving.

Mr. BRADBURY. I will take that back. Thank you.

Chairman SPECTER. Okay.

Let me take up three issues of criminal procedure: right to counsel, evidentiary standards, and the use of incriminating statements. Is there any doubt that either of you have that there has to be a right to counsel in proceeding by the military commission trying people for war crimes?

Mr. DELL'ORTO. No doubt in my mind, Mr. Chairman.

Chairman SPECTER. Mr. Bradbury.

Mr. BRADBURY. Of course, Mr. Chairman, that was a right that was provided under the military commission procedures.

Chairman SPECTER. With respect to enemy combatants who are not to be tried, Mr. Dell'Orto, do you think it is necessary to give those individuals counsel when their status is reviewed?

Mr. DELL'ORTO. I do not believe there is an absolute—there is a right to a detained enemy combatant to counsel to represent his interests with respect to his detention. We do provide—

Chairman SPECTER. Well, the question isn't whether there is a right. The question is whether we should legislate a right. Do you think that Congress would be correct if we give enemy combatants who are detained a right to counsel so that they can have an opportunity to contest the reasons for their detention?

Mr. DELL'ORTO. I would disagree that we should legislate that provision with respect to detention.

Chairman SPECTER. With respect to incriminating statements which have been made by detainees in Guantanamo, Mr. Bradbury, do you think that the rules which exclude coerced confessions should be applied by the military commissions as they are in civilian courts?

Mr. BRADBURY. Well, Mr. Chairman, as a matter of policy, the Detainee Treatment Act included provisions about statements obtained through coercive questioning and indicated in the context of the CSRTs, the Combatant Status Review Tribunals, that the CSRTs should weigh the probative value of those statements, and they could determine—

Chairman SPECTER. So if the statements have high probative value, they ought to be admitted, even if they are coerced?

Mr. BRADBURY. It should be available to the decisionmaker in the CSRT process, for example, to weigh the probative value against the prejudice of the statements. I think that is the approach Congress took in the Detainee Treatment Act. We think that is an appropriate approach for the CSRTs—

Chairman SPECTER. My time is about up. I want to ask one more question before the red light goes on. How much evidence should be presented to keep people detained in Guantanamo in enemy combatant status? I would like each of you to answer.

Mr. BRADBURY. Do you mean the standard of proof or the level of evidence?

Chairman SPECTER. Correct.

Mr. BRADBURY. Well, that is a policy question. Obviously, the CSRTs that have been created are not required by international

law. It is a policy determination. It is open for Congress to look at that. We think—

Chairman SPECTER. Mr. Bradbury, it is a policy question. What is your recommendation to Congress to establish the policy?

Mr. BRADBURY. We think that it does not necessarily have to be a preponderance-of-the-evidence standard, that perhaps a substantial-evidence standard could be used. But that is a question that we believe should be left up to the Department of Defense with respect to the CSRTs. In other words, we think the approach taken in the Detainee Treatment Act which allows the Secretary of Defense to design standards and procedures for CSRTs and then provides for court review of CSRT determinations is an appropriate one. And when the Congress addresses the issue of military commission procedures, at least initially we do not think there is a need to revisit the question of CSRT procedures. We think that was decided in the Detainee Treatment Act and that is an appropriate approach that has not been called into question by the courts. We think that should stay the way it is and that what we need to address in legislation is the military commission procedures and court review process.

Chairman SPECTER. Mr. Dell'Orto, I am not going to ask you to answer the question because I want to move on, but just a final comment, Mr. Bradbury. I doubt very much that Congress is going to be disposed to leave these issues to the Department of Defense. When you talk about policy, we understand that it is a policy matter. But the Congress is going to establish the policy. That is our job. So I would like to have your recommendations on the policy as to what Congress ought to establish. We are not going to leave it to the Department of Defense or give the Department of Defense a blank check. We are going to establish the standards and the policy, but we want your input before we do it.

Senator Leahy.

Senator LEAHY. Well, thank you, Mr. Chairman. I was interested in listening to Mr. Bradbury. I had spoken about trying to get away from thinking we could put all this thing down into kind of a bumper sticker sloganeering on the war.

Mr. Bradbury, you spoke at great length about the beheadings by al Qaeda, the murders of wedding parties, and so on, something all of us find reprehensible. Are you suggesting that because we do not resort to that same thing that the United States is at a disadvantage?

Mr. BRADBURY. No, Senator, I am not.

Senator LEAHY. Okay. I thought we would clear that up because it certainly sounded otherwise in your testimony.

Now, this Committee, as I mentioned before, held hearings a few weeks after the President's military order was released in November of 2001, 5 years ago. We asked the Attorney General and the administration to work with us in a bipartisan way to establish a fair and effective, legitimate system for trying detainees in Guantanamo Bay. We offered to remove all doubts about their legality. And the response we received from your administration, the Bush-Cheney administration, was that you had all the power you needed, and basically you told us to take off.

Now, 4½ years later, we find nobody has been brought to justice under that system; nobody has been convicted. The Supreme Court has said what the President set up on his own was illegal and that he is breaking the law by doing it. Is there any admission on the part of the Bush-Cheney administration that perhaps they were wrong?

Mr. BRADBURY. Well, Senator, I will say that in 2001 it was completely reasonable, given the state of Supreme Court precedent, to approach the military commission issues the way the administration—

Senator LEAHY. Well, I would disagree with that, Mr. Bradbury. We have had both Republicans and Democrats that said you need legislation. These are Republicans and Democrats who think about this a great deal, as I know you do, and who felt there was not a clear thing that would allow the President basically to act on his own, take the law into his own hands, and that is why Republicans and Democrats alike have told the administration let's work on doing something that might actually stand up in any court.

Now, 4 years later, we still have not seen anybody convicted. We have had a whole lot of litigation, a lot of wasted time. My question is: In hindsight, would it not have been better for the Bush-Cheney administration, instead of saying they would do this alone, to actually have worked with the Congress and put together something, as we would have, that would have stood up and, having read the *Hamdan* decision, would have been upheld?

Mr. BRADBURY. Well, I will say, Senator, that it has never been the case in the history of the country that the procedures of military commissions have been established by legislation of Congress. That has always been something that has been left, in time of war and armed conflict, to the executive branch, and that is the way the executive branch proceeded here.

Now, with 20/20 hindsight, obviously we are where we are. The Court has now spoken. It is now incumbent, we think, on both political branches to get together. We very much want to work with you—

Senator LEAHY. I am glad to hear that because that was a completely different attitude than you had 5 years ago, and had there been that attitude 5 years ago, we probably would not be in the situation where we are, which is not a single detainee brought to justice.

Now does the administration intend to try any of these detainees through courts-martial?

Mr. BRADBURY. No, Senator. We do not believe, at least in general, that the use of the court-martial proceedings are appropriate. We think—

Senator LEAHY. We have a letter from retired judge advocates, including two former judge advocates general of the Navy, a former judge advocate general of the Army, and two brigadier generals, saying that we should start with the premise that we already have—to use their words, “start with the premise that the United States already has the best system of military justice in the world, and that throughout our Nation's history both military commissions used to try enemies captured in war and courts-martial used to try our own personnel have applied the same basic procedures.

We are fortunate enough to have this tried and true system which would be used to bring terrorists to justice.” Are these retired judge advocates general wrong?

Mr. BRADBURY. Well, Mr. Dell’Orto I think can speak better than I to the issue. I will say from what little I know—and I will not question the expertise of the retired JAGs—the court-martial procedures are wholly inappropriate for the current circumstances and would be infeasible for the trial of these alien enemy combatants. Hearsay rules required by the UCMJ simply cannot be squared with the proceedings we are talking about here, and I will say, Senator, that a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact finder, and as long as it is not outweighed by undue prejudice—a simple approach which is consistent with international practice in international criminal tribunals trying war crimes, which is what we are talking about here. So I think that approach is the approach to look to.

We do not think it is appropriate, for example, to start with the UCMJ in its full panoply of procedural protections and rights and then talk about individual procedures that might be stripped out.

Senator LEAHY. Mr. Dell’Orto, do you agree?

Mr. DELL’ORTO. I do agree, Senator.

Senator LEAHY. Do you think these retired JAGs are wrong?

Mr. DELL’ORTO. Well, first of all, I do not know who they are, Senator, and I would suspect that there is going to be considerable disagreement with that view from other members of the uniform legal leadership.

Senator LEAHY. I will put their letter in the record and make sure you have a copy. It is Major General John Pugh, U.S. Army; Rear Admiral Donald Guter; Rear Admiral John D. Hudson; Brigadier General David Brahms, U.S. Marine Corps; and Brigadier General James Cullen, U.S. Army, all retired.

Chairman SPECTER. Without objection, the letter will be made a part of the record.

Under our early-bird rule, we call on Senators in order of arrival, and they will be Senator Sessions, Senator Kyl, Senator Hatch, Senator Cornyn, and Senator Graham on the Republican side, and Senator Feinstein, Senator Kohl, Senator Feingold, Senator Biden, Senator Kennedy on the Democratic side.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

With regard to the decision of the Court and the court-martial process, it seems to me that they did not require a following of the specific standards of the United States court-martial. Is that correct?

Mr. BRADBURY. That is correct, Senator.

Senator SESSIONS. And I guess Justice Stevens suggested those were general procedures that would be considered in drafting, creating a legitimate procedure?

Mr. BRADBURY. Well, Senator, of course, the Court only was addressing the President’s authority under existing statutes. And what the Court said was under existing statutes, when the Presi-

dent sets up military commissions, presumptively their procedures have to be uniform with courts-martial unless there is a very strong, practical reason why they should vary from that. And they did not accept the President's reasons.

With respect to Congress and your choices in designing procedures, the Court set no limitations on that, did not speak to the limitations that might apply under the Constitution.

Senator SESSIONS. Well, I think this is a key point, and I think we need to focus on it. This Congress has got to be realistic. I was in Iraq. I talked to the team that investigates bombings, examines the material and the bomb explosives to identify the people who may have done it. They identified a bomber that had made, they thought, many, many bombs, and this person was released on some technicality.

All I would say is this is a life-and-death matter. People are dying in Iraq and can die in this country on a regular basis, and we have got to provide people with a legitimate trial process. I have no doubt about that. And I do not believe we have any basis or legitimacy in torture, which the President has consistently rejected.

But let's talk about some of the practical problems of trying people captured somewhere on the battlefield in Afghanistan or in Iraq. They are now being held in Guantanamo. Mr. Dell'Orto, thinking about it from the Department of Defense's position, have we got to have every witness who was present there at the time at the scene? We may not even know who they are, correct?

Mr. DELL'ORTO. Correct, Senator.

Senator SESSIONS. And soldiers who go out and kick in a door and find bomb materials and information that implicates a certain person, they are not police officers; they do not maintain chain of custody like the average police officer is trained to do. Would they?

Mr. DELL'ORTO. That is absolutely correct, Senator.

Senator SESSIONS. What about if there might be Iraqi citizens participating. Have we now got to search them out all over the world and bring them here because they may have been a witness to the events?

Mr. DELL'ORTO. It is a practical problem with respect to conducting trials away from the site of the offense.

Senator SESSIONS. I think there are a lot of things that concern me about that. When we talk about coerced confessions, I am a prosecutor and I know how strict the rules are in the United States and in the courts-martial with regard to coerced confessions. But I have never believed—and a number of Justices on the Supreme Court have so dissented—that it is required you read someone the Constitution before you ask them questions about whether or not they were involved in an act, a criminal act. But we do that under the *Miranda* rules. We give them all these warnings.

Do you think that those kind of warnings are required before someone should be tried under this commission process?

Mr. DELL'ORTO. Senator, under the Uniform Code of Military Justice, the right to remain silent, the so-called *Miranda* rights kick in far earlier than they do in a civilian police apprehension setting. And so—

Senator SESSIONS. They are even more strict in the court-martial military justice system than in the court system of the United States.

Mr. DELL'ORTO. That is the point, Senator.

Senator SESSIONS. And then we would be providing these terrorists who have been captured by untrained military officers, by soldiers who are untrained in those issues, we would be trying them and providing them greater privileges than are legitimate under the—

Mr. DELL'ORTO. Under our civilian practice.

Senator SESSIONS. Civil law.

Mr. DELL'ORTO. Yes, Senator.

Senator SESSIONS. And with regard to coercion, Mr. Chairman, let me just say this: We do not allow any coercion. Do you remember the great burial speech case where, 5–4, the U.S. Supreme Court ruled that a police officer had a man in the car with him, he had said he wanted counsel, he said, “Well, that young child is out there in the snow. You ought to tell where that body is so they can have a Christian burial.” That was the statement. And he said, “OK, turn left here,” and took them to the body. They struck that down as a coercive statement.

We do not need to be providing that kind of privileges to people captured on the battlefield. I think this is very, very serious. It has tremendous practical implications. We want a fair trial. We want a just trial. We want to give people legitimate privileges that are necessary to a just trial. But all the provisions that are engrafted in the United States Code, State law, and Federal constitutional privileges are not required in military commissions. They never have been.

So as we go forward, I just would urge that we be careful, Mr. Chairman, that we think this through, consider the practical implications, and I am sure you will.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and welcome, gentlemen. Let me begin by trying to get a couple of facts straight. What is the detainee population today, not just Guantanamo but the total detainee population today?

Mr. DELL'ORTO. We are talking about the war on terror, Senator?

Senator FEINSTEIN. Yes.

Mr. DELL'ORTO. I would say that it is probably on the order of about a thousand.

Senator FEINSTEIN. How many of the thousand have had some form of hearing?

Mr. DELL'ORTO. Well, all those that we have at Guantanamo have had their Combatant Status Review Tribunal hearings and at least, I believe, one Administrative Review Board hearing.

Senator FEINSTEIN. And the Guantanamo population is around 400 today?

Mr. DELL'ORTO. It is a little bit higher than that, probably on the order of about 450, Senator. But, of course, it does vary.

Senator FEINSTEIN. So everybody there has had a hearing. Now, how many—and I do not know the correct words, but let me strug-

gle. How many convictions and sentences have been leveled from the hearings?

Mr. DELL'ORTO. Well, those are administrative determinations, Senator, that determine, with respect to the Combatant Status Review Tribunal, first whether those people continue to be unlawful enemy combatants. So that is the first—that is the second determination that is made as to the appropriateness of continuing to detain them.

Senator FEINSTEIN. Thank you. That is helpful. How many then are unlawful enemy combatants?

Mr. DELL'ORTO. Well, all of those who are currently at Guantanamo have—

Senator FEINSTEIN. All 425, or whatever that—

Mr. DELL'ORTO. All 450, 425, whatever that current number is.

Senator FEINSTEIN. Okay.

Mr. DELL'ORTO. And the second review is the Administrative Review Board, which is conducted on an annual basis, to determine whether the person should continue to be detained.

Senator FEINSTEIN. And how many of those hearings have been held?

Mr. DELL'ORTO. At least one per detainee, is my belief at this point.

Senator FEINSTEIN. At Guantanamo.

Mr. DELL'ORTO. At Guantanamo, we may be actually going beyond that at this point for the second round or third round of—probably the second round of those.

Senator FEINSTEIN. Okay. Now, this morning's Financial Times is reporting that the Pentagon has reversed its policy on detainees and stated that the protections provided by the Geneva Conventions will be afforded to those at Guantanamo. Mr. Bradbury, in your written testimony, you state, and I quote, "The Supreme Court's conclusions that Common Article 3 applies to members of al Qaeda is a significant development that must be considered as we discuss what standards and procedures govern."

Is the Financial Times correct?

Mr. DELL'ORTO. Senator, if I may, let me try to answer that. The Supreme Court spoke in *Hamdan* when it issued its decision. Based upon that decision, the Department determined that it would be appropriate to announce that decision to our forces and to ensure that what we believed to be the case prior to the decision was still the case, and that is that our people were being treated humanely. In order to ensure that that word got out and also that we had the opportunity to have our commanders in the field and others with responsibilities in this area report back that what they were doing was consistent with what our guidance had been previously, that memo went out. It does not indicate a shift in policy. It just announces the decision of the Court and with specificity as to the decision as it related to the commission process.

Senator FEINSTEIN. Well, I know you regard the Geneva Conventions as vague, but let me ask it this way: Today, are the Geneva Conventions being carried out, Common Article 3?

Mr. DELL'ORTO. We believe that the treatment that all detainees are receiving under DOD control, under DOD custody, are being

treated in a manner that meets the Common Article 3 standard or exceeds it.

Senator FEINSTEIN. So the answer is yes?

Mr. DELL'ORTO. Yes.

Senator FEINSTEIN. Mr. Bradbury, in reading your testimony, beginning on page 4, you say that it is not possible to provide *Miranda* rights, a right to counsel, to utilize rules of evidence, you cannot get reliable hearsay evidence, no sworn testimony.

Based on all of the areas that you feel that provide due process to people are not possible to grant in a setting such as Guantanamo, do you believe that the Guantanamo facility still serves a useful purpose following the Supreme Court decision? Or would it be better to have a commission, if it was authorized by the Congress, function in surroundings closer to the availability of witnesses and evidence?

Mr. BRADBURY. Well, Senator, I am not in a position to express a military judgment, but it is my sense that Guantanamo certainly provides an important function of keeping dangerous terrorists off the battlefield. With legislation from Congress, military commissions for those detainees held at Guantanamo can move forward again. And just to clarify, in my testimony I am not suggesting they should have no right to counsel in military commissions. I am simply contrasting what we believe the military commission process should be against the Uniform Code of Military Justice requirements that persons who are suspected of crimes, as soon as they are suspected of crimes, get their *Miranda* warnings and get free access to counsel immediately. And it is that kind of extraordinary access to counsel and *Miranda* warnings that we think, for example, would be inconsistent with simply questioning detainees to get vital intelligence from them.

So that kind of access to counsel at that point in the proceedings, we are not saying that there should not be access to counsel for military commissions, absolutely not. The military commissions that the Secretary of Defense has set up does provide a right to counsel, a right, in fact, to both Government counsel provided by the military, a trained Government defense counsel, and the right to private counsel of the detainee's choice, subject to certain conditions. And we would see no reason to change that in any legislation that we might talk to you about.

Senator FEINSTEIN. My time is up. Thank you, Mr. Chairman. Thank you.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator KYL.

Senator KYL. Thank you, Mr. Chairman. I appreciate Senator Feinstein's referral to that article in the Financial Times because I think it is important to clarify what the Defense Department's position is. And as I—well, Mr. Chairman, I ask unanimous consent that the statement of Gordon England regarding the application of Common Article 3 dated July 7, 2006, be inserted in the record at this point.

Chairman SPECTER. Without objection, it will be made part of the record.

Senator KYL. And it is very clear that what Secretary England was saying is the Court has spoken, and, therefore—and I am

quoting now—"you will ensure that all DOD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your review to ensure that they comply with the standards of Common Article 3."

In other words, Mr. Chairman, he is simply saying, in effect, that until something changes, we have got to follow what the Court said and just make sure that you do so, and I think that is appropriate under the circumstance.

I would like to ask three questions here. First of all, to distinguish between the matter of holding detainees to prevent them from returning to the battlefield from a decision to prosecute them, just give us a sense, Mr. Dell'Orto, of why that decision is sometimes made and the rough number of people compared to the total detained to whom it would apply.

And, second, I would like to have you just emphasize a little bit more the distinction between the rationale for our soldiers, whom we put in harm's way and send into dangerous places to perform missions, and grant them rights under the UCMJ when they are accused of a crime, the rationale for the rights granted to them versus the rationale for treatment of terrorists captured on the battlefield, is there a rationale for treating them equally?

And, finally, if you could be a little bit more specific in detailing the damage to the prosecution, damage to intelligence collection, and damage to intelligence protection if you apply the UCMJ to terrorists, and I would be happy to specify that third question if I have gone too far here.

Mr. DELL'ORTO. With respect to the first part of the question, Senator, I think you were asking what decisions are made with respect to detention versus what decisions are made with respect to prosecution.

Senator KYL. Right.

Mr. DELL'ORTO. When we detain people on the battlefield, it is consistent with historical law of armed conflict that those people may be detained until the end of the conflict, whenever that may be. When prisoners were picked up during World War II, at the time of their capture they had no way of knowing how long they would be detained. And, indeed, we detained upwards of half a million principally German and Italian soldiers within the United States during World War II until the conflict ended, and even beyond, before they could be repatriated.

And so we go through that process with respect to these people. They are picked up on the battlefield. They are screened on the battlefield. Some number of them do wind up at Guantanamo, and some of them do remain in Afghanistan. Those detainees can be detained under the law of armed conflict until such time as this conflict ends. Now, granted, it may take a significant period of time. We have already been at this longer than we were during World War II.

We have taken some extraordinary steps in that we have returned some of these individuals to their countries based upon an assessment while the hostilities continue that they do not pose a significant threat to this country.

Now, there are some number of those who we believe to have committed acts that are so significant as unlawful combatants that they merit trial by military commission and for violations of the law of war. And so some number of those people are under scrutiny right now—some have been charged, others are under scrutiny—for the process of a military commission, whether—now based upon what this body proposes by way of legislation that is ultimately signed by the President, whatever form that might be. There are some number of those people, and probably on the order of right now I would say 50 to 80 or 100 or so who probably are serious candidates for commission processes.

And so that is where we deal with those folks, and those people ultimately when they are tried, if they are convicted, will serve some sort of a sentence that is imposed by that commission.

Senator KYL. Before the time runs out, let me forget the third question for right now but at least ask you to comment on the second question I asked, which is: Is there a distinction between the rationale for the rights provided to members of our military under the Uniform Military Code of Justice and the rationale for the rights provided to terrorists?

Mr. DELL'ORTO. We have taken great care and this body has taken great care to ensure that our soldiers, sailors, airmen, and marines get the greatest protections possible in our court-martial process, going back to 1950, the Military Justice Act of 1950, in the aftermath of World War II. Given the concerns over the types of proceedings that were conducted by the court-martial equivalent during World War II, we did provide greater protections for our servicemembers.

In 1968, we did the same as a result of concerns about lack of a trial judiciary, the role of the judge in a court-martial proceeding and other things, we further enhanced our system. And in 1983, we brought the Federal Rules of Evidence, to the extent that they can be applied, into that system as well—all because we wanted to ensure that our soldiers, sailors, airmen, and marines and Coast Guardsmen had the best possible protection when they underwent the disciplinary process that is part of a court-martial.

It contains numerous rights for an accused that go well beyond what, as I have said, we have in our civilian courts, go well beyond what takes place in domestic criminal courts in other countries. It would be ludicrous in my estimation to accord those sorts of rights at that level to that degree to the sorts of people we have here who would get far less in the way of protections were they tried in their home countries, wherever those countries might be.

Senator KYL. Thank you.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator KOHL.

Senator KOHL. Thank you, Mr. Chairman.

Gentlemen, in defending the need for military tribunals, the administration has claimed that the tribunals were important for swift justice in prosecuting enemy combatants, and yet here only several years later, only ten people have been charged, probably as a result of the questionable legal status of the tribunals themselves.

Gentlemen, can we agree that there has to be a better way to prosecute the terrorists in our custody and achieve the administration's express desire for swift justice?

Mr. BRADBURY. Well, Senator, I would say that certainly in the wake of the Court's decision, the only way forward with confidence to have military commissions where we can now swiftly bring them to justice is through legislation that puts military commissions on a solid footing in the eyes of the Court.

The Court did leave open the theoretical possibility that the President could come back on his own and provide more of a detailed justification for why in particular instances he thinks it is impractical to use the court-martial proceeding. So the Court did leave us that option, but, frankly, I think at this point, as you suggest, the President believes it is better to move forward jointly with Congress to get legislation we can all agree on to define the military commission authorization and to some extent the procedures so that we can move forward and be ensured that at the end of the day they will be upheld by the courts.

Mr. DELL'ORTO. Senator, I would say that given the system that has been designed as structured, were this body to render its approval for that system as it is currently configured with all the rights that are embodied in that system and allow us to go forward would be a very expeditious way to move these trials very quickly.

Senator KOHL. Gentlemen, the majority's opinion in *Hamdan* has been characterized by some as a rebuke of this administration's expansive theory of executive power. Do you agree with that characterization?

Mr. BRADBURY. I actually do not, Senator, because what I emphasized at the beginning, the Court carefully, I think, made it clear it did not reach constitutional issues, did not address the President's inherent authority under Article II, kept itself limited, and Justice Kennedy, who provided the fifth vote, made it very clear in his concurring opinion that his joining of the majority was quite limited and focused to two provisions in the UCMJ and the Common Article 3 provision of the Geneva Conventions that we have discussed. And all of the Justices, all eight of them, including Justice Breyer, for example, in his separation opinion, made it very clear that all of the issues the Court addressed could be addressed and resolved through legislation by Congress.

Mr. DELL'ORTO. I disagree with the characterization that you report, Senator.

Senator KOHL. Gentlemen, in *Hamdan*, the Court said there were two options available for trying terrorist suspects in Guantanamo under current law: first, the administration could use the existing courts-martial system; and, second, it could use military commissions that comply with the requirements of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.

Are either of these options, in your opinion, adequate?

Mr. DELL'ORTO. Senator, I would say, consistent with my earlier answer, that the most expeditious way to do it would be to essentially ratify the process that is already in place with the military commissions. I think to rework, even modestly, the court-martial process to account for the difficulties, the real practical difficulties

in trying these particular combatants for their war crimes would cause probably a greater period of time, probably less productive debate, and ultimately cost us time in getting on with the business of trying these folks. And so I would urge that we move forward with the military commission process that the Supreme Court seems to—apparently, based upon what you say, has been open to us—has left open to us as an option.

Senator KOHL. Mr. Bradbury.

Mr. BRADBURY. Yes, certainly as I have said before, Senator, I do not think the use of the UCMJ procedures is appropriate or is feasible. And I spoke about the option of the President acting unilaterally to try to put in place, again, the military commission process. That would entail, in effect, going back to the courts and having the same discussion with the courts that we intend to have with the Congress about the need for each of the provisions in the military commission process, why it is impractical to use other provisions of the UCMJ, et cetera.

I think the risk there is that you can only have that dialog after the fact with the Court in litigation briefs. The Court may disagree, and then you are right back to where we are now. So we think it is better at this point to have that dialog with Congress.

We do think when the Congress looks at the current procedures that have been set up for the military commissions, the Congress will agree that there are good, sound policy reasons and practical need—reasons of practical necessity to have the provisions that are currently in there. But it is obviously up to Congress to look at those provisions. We think that that is something that does need to happen now in the wake of the court case, and we are ready, willing, and able to work quickly with Congress to make it happen.

Senator KOHL. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator HATCH.

Senator HATCH. Well, thank you, Mr. Chairman.

As the Ranking Member of the Senate Intelligence Committee, I am very concerned that classified information does not fall into the hands of the enemy, and that is only one of the reasons why the *Hamdan* decision troubles me greatly.

Now, the Court stated that the rules in the manual for court-martial must apply to military commissions unless impracticable. At least that is the way I interpret it. Those rules are codified in the Uniform Code of Military Justice, but that raises a number of questions, and Mr. Dell'Orto, you pointed out in your statement, in your testimony, that courts-martial are actually more solicitous of the rights of the accused than our own civilian courts.

Now, let me ask both of you to comment on one example and perhaps add your own. In an Article 32 proceeding, which is the military version of a grand jury, the investigation is conducted by an impartial investigating officer and is open to the public. Am I right?

Mr. DELL'ORTO. Generally, they are open to the public, Senator.

Senator HATCH. Unless the accused is disruptive, he must be present and has a right to call his own witnesses and cross-examine the Government witnesses and, like I say, call his own witnesses. That is right, isn't it?

Mr. DELL'ORTO. That is correct.

Senator HATCH. Okay. If the accused chooses to make "an unsworn" statement at the Article 32 proceeding, it is not subject to cross-examination by Government counsel, right?

Mr. DELL'ORTO. Senator, I am not sure about that, off the top of my head. Certainly at trial, with respect to sentencing, that is a permissible way for the accused to offer his statement to the Court. I am not sure that applies—I would have to go back and take a look at the rules.

Senator HATCH. Would you check on that for us?

Mr. DELL'ORTO. I will.

Senator HATCH. Because that is my understanding.

Now, does the Supreme Court's decision not open the possibility that classified information presented in an Article 32 proceeding would be compromised and possibly fall into the hands of terrorists?

Mr. DELL'ORTO. Certainly that classified information could, and that is a huge concern in these proceedings.

Senator HATCH. Under the decision, will not the suspected terrorist be exposed to our classified information?

Mr. DELL'ORTO. If we proceed under a court-martial process, it would call for disclosure to the defendant or exclusion of the evidence so that it is not presentable in the case against him.

Senator HATCH. So you might not be able to make the case—

Mr. DELL'ORTO. That is possible, Senator.

Senator HATCH [continuing].—With the evidence that you have.

Mr. DELL'ORTO. Possible.

Senator HATCH. Or is this one of the considerations that would make application of these court-martial procedures impracticable?

Mr. DELL'ORTO. That is one of the key considerations in my estimation, Senator.

Senator HATCH. Okay. Now, Mr. Bradbury, do you care to comment on any of those questions or any of those comments?

Mr. BRADBURY. Well, I will just say quickly, Senator, that an Article 32 investigation, as it is done under the UCMJ, makes absolutely no sense in the context of a military commission prosecution. That is a very generous investigation procedure, much more generous and open than a grand jury proceeding. The defendant gets to participate fully, as you suggest, in the investigation—

Senator HATCH. But some are interpreting this decision to require that, right?

Mr. BRADBURY. Well, currently it does since it requires the President to use military commission—excuse me, court-martial proceedings if he is going to move forward with military commissions. And that is part of a court-martial proceeding.

As to classified information generally at trial, the procedures under Article 46 of the UCMJ require the prosecution to share with the defendant any classified information that the prosecution intends to use as evidence in the trial, and we think that, again, that kind of absolute right is unworkable and inappropriate because there will necessarily be some cases—

Senator HATCH. Especially in a wartime situation.

Mr. BRADBURY. That is correct, where there is some classified information obtained, sources and methods of intelligence that simply

cannot be shared with the defendant himself who is a terrorist. But obviously we are talking about circumstances under the current rules where we do provide counsel and the counsel would have access to that information. And then the military commission panel itself would be able to judge whether summaries or substitutes should be used as evidence in the trial and exposed to the detainee and would be able to judge whether the exclusion of the detainee from any aspect of the proceedings calls into question the fundamental fairness of the proceedings. That is a judgment that has to be made on a case-by-case basis by the commission panel, and then it can be reviewed. Under the DTA, it can be reviewed by the D.C. Circuit.

Senator HATCH. Let me just ask one other question. You said in your testimony, Mr. Bradbury, that you were concerned about the fact that *Miranda* rights would have to be given under certain circumstances, that hearsay testimony would be disallowed. Explain that to all of us so that people watching will understand what you are talking about there.

Mr. BRADBURY. Well, of course, *Miranda* rights, as we all know, tell the defendant, "You have the right to remain silent. You have the right to a lawyer."

Senator HATCH. Right off the bat.

Mr. BRADBURY. Right off the bat. And under the UCMJ, of course, it is much more protective than in civilian criminal courts. In civilian courts, it does not apply until the person is in custody for questioning, custodial questioning. Under the UCMJ, it applies as soon as there is a suspicion that the person may have committed a crime. At the first point of suspicion, articles of UCMJ require the Government prosecutors to inform the person of the suspicion and to advise the person he has a right to remain silent and he has a right to a lawyer and that a lawyer will be provided free of charge to him.

Of course, if you did that with detainees in the war on terror, you are not going to get any further information out of them at that point.

Senator HATCH. Well, it could make the difference between whether thousands die or not.

Mr. BRADBURY. It could. You are not going to—it pretty much will put a stop to the questioning of the detainee for intelligence purposes.

Senator HATCH. Hearsay?

Mr. BRADBURY. In point of fact, Senator, it would obligate the soldier of the field, the corporal who beats down, knocks down the door, to advise that detainee of his rights if he believed that detainee to have committed a crime.

Senator HATCH. Hearsay?

Mr. BRADBURY. On hearsay, Senator, of course, that might require—prohibition on the use of hearsay might require front-line troops to come home from the battlefield to participate in legal proceedings. So, in other words, they will have to fight the terrorists not only on the battlefield, but also in the courtroom.

In addition, it is very difficult to get all the witnesses that may be needed from whom sworn statements may be taken or statements that are reliable and probative may be taken on the battle-

field from other terrorists, for example, from collaborators with the person who is on trial. And the requirement that those persons have to be present in court for their statements to be received into evidence is not a requirement, for example, that is imposed in the international criminal tribunals for Yugoslavia or for Rwanda, because it is understood that when you are trying war crimes, it is not always practicable that the people who were the witnesses to the acts can be brought in from the far-flung locations where the acts may have taken place.

If you have reliable statements from them and they are probative—and that, again, is something that ought to be judged by the panel that is reviewing the evidence—

Chairman SPECTER. Thank you very much, Senator Hatch.

We are going to have to move on.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you for holding this hearing, and I want to ask a couple questions so I will ask that my full statement be included in the record. But first—

Chairman SPECTER. Without objection, your full statement will be made a part of the record.

Senator FEINGOLD. Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator FEINGOLD. The Supreme Court's decision striking down the President's military commissions is, in fact, yet another major rebuke to an administration that has too often disregarded the rule of law. The Supreme Court has once again affirmed that detainees must be accorded basic rights and treated humanely pursuant to U.S. law as well as universally respected international standards. It is a testament to our system of Government that the Supreme Court stood up against this administration's overreaching.

We are fortunate to live in a country where the checks and balances in Government are real. The administration's extreme theories of executive power, its unilateral approach, and its refusal to listen to any dissent, including from military attorneys and experts in the executive branch, have been entirely counterproductive and have harmed our relations around the world, weakening us in the fight against al Qaeda and its allies.

If this administration had not argued that detainees were not subject to the Geneva Conventions, if this administration had not argued that detainees had no right to counsel or to make their case in Federal court, if this administration had not insisted on trying those few detainees who were charged with crimes in tribunals lacking basic due process, and if this administration had not sought to exploit every ambiguity in the law to justify its unprecedented actions, we would not be where we are today.

Now, in the aftermath of the *Hamdan* decision, we are faced with an important question, one that Congress and the President should have worked together to answer 4 years ago:

How do we try a suspected terrorist captured overseas?

There is one option that would allow trials to begin immediately, without further legislation and with the least likelihood of further successful legal challenges: use our long-established military system of justice. In fact, Justice Kennedy, whom Mr. Bradbury cited,

also said in his concurrence that that might be our best option when he said, "The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."

However we move forward, the individuals held at Guantanamo Bay should be tried in accordance with our fundamental American values and the laws of war. Unfortunately, we have already heard some Members of Congress argue that Congress should simply authorize the President's existing military commission structure. I think that would be a grave mistake. How the Congress proceeds in the wake of the *Hamdan* decision will say a lot about how it views the fundamental principles that make our country great.

Mr. Bradbury, I would like to talk to you a little bit about the effect of the *Hamdan* decision on your legal analysis of the President's authority to direct the National Security Agency to conduct warrantless wiretaps in violation of FISA. The Supreme Court held in *Hamdan* that the Authorization for Use of Military Force passed by Congress in September 2001 did not authorize military commissions or change in any way the existing statute in the Uniform Code of Military Justice. Not only that, but Justice Kennedy's opinion made clear that the President has to follow the statutes that Congress writes, even when he is acting under his Article II powers as Commander-in-Chief.

Let me read to you what a majority of Justices on the Supreme Court said: "There is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization of Article 21 of the UCMJ."

Mr. Bradbury, doesn't the Court's rejection of the administration's AUMF argument apply equally to the position it has taken on the NSA program?

Mr. BRADBURY. Senator, I really do not think so, and let me explain just briefly why.

The Court in *Hamdi*, as you well know, held that the AUMF does authorize the President to detain enemy combatants in the war on terror, including those who are U.S. citizens. And, of course, the Court there addressed another statute, which the petitioner in that case relied on, which is 18 U.S.C. 4001(a), which says that no U.S. citizen shall be detained, except pursuant to an act of Congress. And the Court in *Hamdi* said the AUMF, even though it does not say anything on its face about detention or authority to detain U.S. citizens, did provide authority pursuant to an act of Congress consistent with 4001 to detain enemy—that U.S. citizen.

Now, we have not argued with respect to the NSA program, the terrorist surveillance program, that the Authorization for the Use of Military Force altered or expanded or superseded the Foreign Intelligence Surveillance Act, FISA.

Senator FEINGOLD. I understand that part.

Mr. BRADBURY. Instead, FISA, just like the statute at issue in *Hamdi*, says you do not do electronic surveillance under color of law unless authorized—except as authorized by statute. And the Authorization for the Use of Military Force is a statute.

Senator FEINGOLD. I see my time is up, but let me just say, Mr. Chairman, that I find these arguments to be astounding. I mean, Justice Kennedy basically followed the principles of the steel sei-

zure case, and this sort of argument that somehow there is this whole independent way of looking at clear statutory language flies in the face of reality. Even Cass Sunstein, who was one of the few lawyers who previously thought that the AUMF argument might have some basis, now has said, "After *Hamdan*, the defense of the NSA foreign surveillance program is much more difficult." And I would hope that there would be some honest acknowledgment that this does have an enormous impact on what I already consider to be a clearly illegal program.

Mr. Chairman, my time is up.

Chairman SPECTER. Thank you, Senator Feingold.

Mr. Bradbury, do you want to respond to that?

Mr. BRADBURY. Yes, please, Mr. Chairman.

Senator, I would refer the Senator to a letter we just sent this week to Senator Schumer in response to his questions on this exact point, where we laid out our current thinking. I will say that we are continuing to look at the opinion. We are always looking at legal developments. As the Chairman well knows, we are working closely with the Chairman, with Senator DeWine, other Members of Congress, on the possibility of legislation moving forward on the NSA program as well. But I would be happy to speak further with you about these issues in response to your review of the letter to Senator Schumer.

Senator FEINGOLD. I thank you for that offer.

Mr. Chairman, I would just say to the administration that, you know, maybe you can come up with some argument and you can litigate this and take it all the way to the Supreme Court. My guess is you are going to lose again, and there comes a point where this does harm to us and our system of Government to constantly assert the most extreme and tortured interpretation. We should be working together, and I know in your last statement you did suggest that that might be a possibility. Let's see if we can get to the point where we—

Chairman SPECTER. Thank you, Senator Feingold. Thank you, Mr. Bradbury.

Moving on now to Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Gentlemen, I want to see if we can achieve some common understanding as to what the Court held and what it did not hold. When I read the *Hamdan* opinion, it appears to say, the Court appears to say that detainees must be tried before a regularly constituted court, and they look to Common Article 3 of the Geneva Convention as establishing that requirement, among other places.

What the Court did not say is what the procedures that would apply, what they should be. In fact, as has been noted previously, there was an emphasis on what is practicable in terms of those procedures, and I want to explore that a little bit with you.

First of all, I want to say that, you know, we have all come to learn in the last 5 years that the pre-9/11 mind-set where we treated terrorists as criminals only, but did not recognize the importance of intelligence gathering to detect, deter, and disrupt terrorist activities was an important part of our ability to keep our country safe. Some have suggested that the Court's reference to Common Article 3 was much broader than just the requirement that detain-

ees be tried before a regularly constituted court, but to suggest that detainees would be entitled to special privileges accorded to prisoners of war under the Geneva Convention or perhaps the rights of an American citizen tried in a regular criminal court in the country.

First of all, let me ask Mr. Dell'Orto and Mr. Bradbury, do you and I share a common understanding about the scope of the Court's decision relating primarily to the forum and the nature of the forum as opposed to the procedures that must be applied to that trial?

Mr. BRADBURY. Senator, if I may, actually I think it is somewhere in between. As to Common Article 3, I think the implications of the Court's holding do go beyond simply the conduct of military commissions and the procedures that would apply to military commissions. What the Court said is Common Article 3 applies to our conflict with al Qaeda. The Court actually said the conflict with al Qaeda is not an international conflict, contrary to what the President had previously determined and, therefore, that Common Article 3, which only applies to conflicts that are not international in character—internal civil wars, for example—it applies. Common Article 3 carries with it a number of standards, both procedural but also, perhaps more importantly, substantive.

Senator CORNYN. Let me ask you about, and I know the clock keeps ticking. The Red Cross' own guidelines make clear, though, that for an individual to earn POW status as opposed to the rights that a detainee has to receive humane treatment, the individual must be commanded by a person responsible for his subordinates, must have a fixed distinctive sign recognizable at a distance, must carry arms openly, and, four, must conduct their operations in accordance with the laws and customs of war.

Would you agree with me that the detainees at Guantanamo Bay, al Qaeda specifically, are not entitled to POW status for the reasons they do not meet those qualifications and the Court did not hold that they are entitled to full POW status?

Mr. BRADBURY. That is absolutely right.

Mr. DELL'ORTO. I agree, Senator.

Mr. BRADBURY. The President made a determination on that. That was not an issue the Court addressed, and Common Article 3 does not provide the full privileges of prisoner of war status.

Senator CORNYN. And just to take the point a little further, if they were entitled to POW status, would they have to merely produce name, rank, and serial number in response to our interrogations? In other words, could we use the kind of interrogation techniques that have produced actionable intelligence if these individuals were entitled to the full protection of POW status?

Mr. DELL'ORTO. They would only be obligated to answer certain questions. That does not mean they could not be asked additional questions, and repeatedly asked those questions, to see if they would be willing to divulge the information.

Senator CORNYN. But the kind of information that we have obtained in the course of those interrogations at Guantanamo Bay, have they produced actionable intelligence that has saved American lives, Mr. Dell'Orto?

Mr. DELL'ORTO. We believe they have produced that sort of information that we are using, Senator.

Senator CORNYN. And, in fact, the Pentagon sent me a letter following one of the earlier hearings during Judge Alberto Gonzales' confirmation as Attorney General, which lays out a detail of some of the instances where that kind of actionable intelligence has been obtained. And I would ask unanimous consent, Mr. Chairman, that that be made part of the record.

Chairman SPECTER. Without objection, that letter will be made a part of the record.

Senator CORNYN. Thank you.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Biden.

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

Gentlemen, I think there are two very legitimate and different paths and pieces we can focus on. One is the constitutionality under our Constitution of our behavior, our actions dealing with detainees. The second is the efficacy of the action we are taking in the war on terror. They may be separable. One could argue that something could be very efficacious and that we are doing in the war on terror that may be unconstitutional. One could argue that they have to be the same. But I would like to sort of separate these two arguments.

One of my problems with the administration that concerns me the most is that with regard to the so-called war on terror—and this is a little above maybe both our pay grades. It is not your responsibility, I understand. But with regard to the war on terror, the administration has focused almost exclusively on tactic and not on strategy. And let me explain what I mean by that.

Secretary Rumsfeld is very well known for his snowflakes, those memoranda he sends throughout the Defense Department that raise real questions. Not long ago he sent out one of his snowflakes that asked the question—I am paraphrasing—Are our actions creating more terrorists than we are deterring? And to me, the answer is clearly no, they are not deterring more terrorists than we are creating.

To use a phrase that was used by Tom Friedman, he refers to Guantanamo as “the anti-Statue of Liberty.” You need only look at the international polling data. You need only travel the world, as I do as a member of the Foreign Relations Committee. You need only visit and talk to our military people of flag rank in Iraq, as I did this past weekend, to understand that they think these actions are hurting us, not helping us.

So there are separable arguments here, and so from my standpoint, I wonder whether or not, although we must focus on the constitutionality—and that is what the *Hamdan* case calls into question—I would argue that we are not paying a whole lot of attention to the larger, broader strategic question of are we winning this war on terror. You may get one detainee through actions that the rest of the world views as totally illegitimate and inconsistent with who we are, although arguably constitutional, and as a consequence of that produce four more suicide bombers coming out of Somalia.

Does anybody here think the actions that have taken place in Guantanamo, does anybody here think that the actions taking

place at Abu Ghraib, does anybody think the actions that were alleged to have taken place at the hands of renegade military, American military, have not fundamentally put our troops in danger? Does anybody think that?

I don't know what planet we are on here. And yet we necessarily have to argue about the tactic. I got that. That is legitimate. But I think we should sort of just get above this about 1,000 feet and look down. I am telling you, guys, things ain't good in Happy Valley. Come back to Iraq with me, my seventh trip. Speak to our military. Listen to them. Listen to them. Go around the world, every single capital, even those folks who were with us.

So here is my question: The U.S. Government—the 9/11 Commission issued a report giving our country a grade of “Unfulfilled” when it comes to detainee policies. The Commission stated, “The U.S. Government’s treatment of captured terrorists, including detention and prosecution of suspected terrorists in military prisons and secret detention centers abroad, as well as reports of the abuse of detainees, have elicited criticism around the globe. Dissension either at home or abroad on how the United States treats captured terrorists only makes it harder to build the diplomatic, political, and military alliances necessary to fight the war on terror effectively.”

It then goes on to suggest the following: “The U.S. should work with its allies to develop a mutually acceptable standard for terrorist detention.”

Don't you all think that is a good idea, sit down with our allies, beyond what we are doing here, and get a mutually agreed to way in which it is appropriate to treat detainees for our own safety's sake?

Mr. BRADBURY. Senator, I would say I know for a fact that good people at the State Department and the President are working hard to do just that. I would say, though, that the world we live in is a dangerous place. It is not Happy Valley. And the President has done what he thought is best to protect the country from another attack consistent—

Senator BIDEN. But he has been so wrong so many times on so many things—

Mr. BRADBURY. Consistent with the Constitution.

Senator BIDEN [continuing].—So consistently—so consistently that I find it—and I realize my time is up, Mr. Chairman. I find it difficult for us—and I believe his motive to be pure. I find it difficult for us to buy into the notion of let's trust the President's judgment. God love him, his judgment has been terrible on Iraq. His judgment has been terrible on the conduct of the war. I love him, but I am not prepared to accept his judgment, nor Mr. Cheney's.

I thank you very much.

Chairman SPECTER. Thank you, Senator Biden.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I guess lessons learned from this court case is that collaboration is probably better than unilateral action. Do you both agree with that?

Mr. BRADBURY. It is always better for the branches to be working together, and the war effort is one that requires the work of certainly both political branches working together.

Senator GRAHAM. And that is Justice Jackson's opinion. Not only was it a wise legal decision, I think it was a good political dynamic. So, gentlemen, I appreciate your service to our country. I want to work with you. I am not going to look backward. I am going to look forward, and we are going to try to fix this problem.

My goal, simply put, is to come up with a legal infrastructure the Nation can be proud of that will allow us to defend ourselves in an appropriate way and that will meet the hallmark of a fair trial. And I think we will be stronger as a Nation if the Congress and the administration come up with a work product that eventually is blessed by the Court because then we can go to our friends overseas and say every branch of the Government has bought into our new way of doing business.

And what would that new way look like? Here is what I think it would look like: Justice Kennedy's opinion to me is the most instructive of the fallacy in terms of Military Order 1. It says that if you are going to create a military commission that is different from the UCMJ, you need to show why the changes are made. Convenience is not enough, and you have to prove through some legislative history that a practical application of the Uniform Code of Military Justice to a terrorist suspect is inappropriate.

Do you agree with that?

Mr. BRADBURY. No, Senator, I do not.

Senator GRAHAM. You do not. Okay.

Mr. BRADBURY. Justice Kennedy was talking in terms of the framework of the current statutes, which he read to require the President to use court-martial proceedings so that the President has to start from court-martial proceedings and work backward.

Senator GRAHAM. Right.

Mr. BRADBURY. This body does not have to do that. You should ask yourselves what are the reasons we have the Court—

Senator GRAHAM. Well, this Senator is going to do that.

Mr. BRADBURY. That is certainly within the rights of Congress. Obviously, my suggestion—

Senator GRAHAM. Well, I am just one, but I think it is a good way to start.

Now, my challenge to you is this: Explain to us why would the Congress authorize two trial forums if one size fit all. Why is there the mention of a military commission separate and apart from a normal court-martial procedure?

Mr. DELL'ORTO. Senator, I would say to the extent that they have been recognized traditionally as being needed apart from an existing court-martial system, going back to—I mean, certainly throughout history, but going back more recently to the post-World War II era, I would say in light of the evolution and the development of the military justice system, the framework of the UCMJ and the Manual of Courts-Martial, post-World War II right to the present, argues even more today for a separate system to deal with particularly these types of offenders of the law of war, al Qaeda and Taliban and others.

Senator GRAHAM. I could not agree with you more, and my point is that the reason Congress has authorized two different forums, one for our own troops when they violate the UCMJ, when they engage in misconduct, and another forum called the military commission for someone not covered by the UCMJ, not part of our armed forces, is because military necessity and legal necessity has understood for about 50 years that you have two different creatures here and you may need to go down one road versus the other. And in World War II, and before and since, when it comes to foreign agents, enemy combatants, they have been tried in a military commission forum. Do you agree with that?

Mr. BRADBURY. Yes.

Mr. DELL'ORTO. I agree, Senator.

Senator GRAHAM. What I think Justice Kennedy is telling us and the way I approach this, even within Article 36 of the UCMJ, where it authorizes military commissions, it instructs through the statute that any deviations made from a court-martial needs to have some explanation.

So I would suggest to the administration that the best way to work with Congress to solve this problem is to take the UCMJ as your basic guide and we work through the document, and where the hearsay rules are inappropriate for a military commission, let's change them; where Article 32 referral pre-trial investigations are inappropriate, where we have classified information problems, that we draft a system through collaboration using military commission necessity, but use the UCMJ as your basic document.

My advice to you in the next 4 seconds, if you will adopt that attitude and that approach, we can get a product that not only will pass Court muster but the Nation can be proud of. If you fight that approach, it is going to be a long, hot summer.

Chairman SPECTER. Thank you, Senator Graham.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

You know, we have, I think, lost some focus and attention of why we are concerned about rights and liberties and protection and why we are talking about how we are going to treat detainees, because what we are interested in fundamentally is how our prisoners are going to be treated. They have not been treated well to date, but this is basically about how we want our prisoners treated. And that is something that I think we have to continue to give focus and attention on as to how we want captured Americans to be treated.

Over the last 5 years, the administration has taken us down a different path, violating the well-established checks and balances of the Constitution, and then in *Hamdan v. Rumsfeld*, the Supreme Court said that the President had gone too far. Justice Breyer wrote, "Congress has not issued the Executive a blank check."

So the Court's decision is, I believe, the victory of the rule of law, and following the landmark decision, we have the opportunity to shed more light into the legal black hole at Guantanamo Bay. But at the outset, we should make a few things clear, and the decision is not a "Get Out of Guantanamo Free Card" for any detainees. No one is suggesting that any person engaging in terrorism should not be held accountable as a result of the decision.

The Supreme Court made it clear the President can prosecute terrorists. The President also has all the necessary authority to proceed with trials of war criminals if he does it in accord with the Uniform Code of Military Justice and the Geneva Conventions. But instead of using that well-established authority to prosecute the detainees quickly and fairly, the administration created a system of ad hoc military commissions that led to extended litigation and the Supreme Court ruling. And as a result, more than 4 years later we have not yet successfully prosecuted a single detainee, and Guantánamo has become an international embarrassment.

Under the traditional laws of war, POWs may be held until the end of the conflict. Certainly no one wants us to impose a standard that would free dangerous detainees to return to acts of terror. That will be one of the major challenges we face as we move forward.

The path ahead will speak volumes about our dedication to the rule of law and the Constitution. It will have a significant consequence for our National security, and if our future actions are consistent with our Nation's long-held values, then perhaps this outrageous chapter will finally come to an end.

As we deliberate about these matters, we should take heed of the courageous words of Alberto Mora, the former Navy General Counsel. He urged us to care about the fate of these detainees because, and I quote, "A tolerance of cruelty will corrode our values and our rights and degrade the world in which we live. It will corrupt our heritage, cheapen the valor of the soldiers upon whose past and present sacrifices our freedoms depend, and debate the legacy we will leave to our sons and our daughters." I thought that was an excellent comment.

Let me just ask, Mr. Bradbury, in your testimony today, talking about Article 3, you mentioned on page 9 of your testimony that "Article 3 prohibits 'outrages upon personal dignity, in particular, humiliating and degrading treatment,' a phrase that is susceptible of uncertain and unpredictable application."

Now we have Secretary England's memo that has just been put out today, and he mentions, "To this end, the following acts shall remain prohibited at any time, any place whatever, with respect to the above-mentioned persons," and he uses that identical language: "Section (c), outrages upon personal dignity, in particular, humiliating and degrading treatment."

Whose understanding are we supposed to use?

Mr. BRADBURY. Actually, Senator, that is exactly the question to ask: whose understanding defines what that term means. That is—

Senator KENNEDY. Let me, if I just can, because my time is running out here. You say that this language in your testimony—and obviously you are speaking for the administration—is not subject to understanding. And yet we have Secretary England using those exact words. Are we to assume that he does not understand it either? Or is he sharing your view? Or is this a different view?

Mr. BRADBURY. I think the Department of Defense trains to the Geneva Convention standards as they have historically understood them. Common Article 3 is not a standard that we have applied in particular conflicts on a regular basis.

I think that in terms of the training at the Department of Defense—and Mr. Dell’Orto can tell you—they have an understanding as they approach the issues as to what it means, and they have a confidence in that understanding.

My point is that it is susceptible to interpretation. It is clearly a vague term. It is basically the same term, the inhuman and degrading treatment term, that caused Congress to take a reservation to the Convention Against Torture because of the uncertainty as to how that term might be interpreted by foreign tribunals, for example. And it is the reservation to the Convention Against Torture standard, which refers back to our own constitutional precedents, that was adopted in the McCain administration to set a baseline standard for our own conduct in the war on terror. This now takes us back to that capacious phrase, “humiliating and degrading treatment.”

We believe and I believe it can be given reasonable content and it can be given a reasonable interpretation, and there are many international sources that suggest as much. At the same time, however, there are other international sources construing that same phrase in a very broad way, applying it to facts that we might not all agree constitute the kind of misconduct that you would like to prohibit. And to it leaves real question marks.

And now, as a result of the Court’s decision, it has universal application to all of the folks who are handling on our behalf detainees in the war on terror. And, moreover, as a result of that determination, it is a war crime under the War Crimes Act to violate that standard.

We just think as you approach these issues, it is important for Congress to consider how to give definition and certainty to those phrases, which are now criminally enforceable, which now apply to all of our folks around the world in the war on terror; whereas, previously they did not apply as a matter of treaty interpretation by the President.

So that is why I am saying it is a significant development. We may have confidence from a top-down command structure or perspective that we think we are training to it. But the folks on the front line are subject to it, and everything they do in handling a detainee may now be affected and chilled by this new standard. And so I would encourage the Congress to look at these issues and to think about how best to bring certainty to these standards so that we define them as a matter of U.S. law but consistent with our treaty obligations.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

I listened to your testimony, and I cannot believe that 24 hours ago I was in Guantanamo sitting across the table from the chief interrogator and asked this gentleman the following question: “If I told you that tomorrow you had to live by the Geneva Conventions in terms of the detention and interrogation of detainees, what would change at Guantanamo?” And you know what he said? “Nothing.”

"And if I told you tomorrow the Uniform Code of Military Justice applied to everything you did, what would change?" He said, "Nothing."

"How about the McCain torture amendment?"

"We are living by it."

They seem clear in their job. And when I hear suggestions from this panel and from our witnesses that it is impossible to wage the war on terrorism and stand by these basic rules and values that we have had for generations, I do not understand it. I cannot follow your thinking on this thing.

Let me say, the thing that troubles me is this: The men and women in uniform who are serving us in Guantanamo have been the best—steadfast, professional, often heroic, working in a very difficult place, bleak and barren, hotter than the hinges of Hell. They go to work every day to watch these detainees and try to derive information. They are not using torture. They may have at some moment in time when this administration's policy on torture was impossible to follow. You will recall the torture memo, produced by your administration and then revoked. You will recall when this administration did not listen to Secretary of State Colin Powell and decided the Geneva Conventions did not apply to the war on terrorism. The confusion that came out of that could not have been easy for our men and women in uniform trying to serve our country at Guantanamo and around the world. But today they understand it.

I watched yesterday in a remote camera as there was an interrogation of a man suspected to be part of al Qaeda, and I will tell you, the pressure put on him? They handed him a Subway sandwich. He lit up and started talking. They handed him Chicken McNuggets, and they love it, and they start to talk. Sure, they could be limited to name, rank, and serial number, but they volunteer information that helps us in the war on terror.

Here is what troubles me: We clearly have in Guantanamo a negative symbol of the United States around the world. Ask any of our embassies. Ask our Ambassadors what Guantanamo means, despite the best efforts of our military there. I do not blame them. I blame the administration for putting them in this predicament. I think it is time for us to close Guantanamo and transfer these prisoners to another place. For us to say it is a clear break from the past, the Supreme Court has made it clear the administration cannot continue to write its own laws and avoid the law. And I happen to agree with Senator Graham. We need a common, bipartisan starting point, and I think courts-martial, Uniform Code of Military Justice, is that starting point.

Can we agree on some other things? We are not going to use evidence that is a result of coercion or torture. Would you agree with that, Mr. Bradbury, that we should not use that in any of our trials?

Mr. BRADBURY. I certainly agree we should not use any evidence obtained through torture. That is, in fact, a rule in our military commissions. It is an obligation under our Convention Against Torture. We do not use any evidence that is determined to be obtained through torture in any of these proceedings. As to coercion, Senator, as I indicated before, the Detainee Treatment Act addresses

that, and it provides that the Combatant Status Review Tribunals will review the probative value of any evidence that is suggested to have been obtained through coercion. There are gradations of coercion much lower than torture, and those can be challenged in Article 3 criminal proceedings. So I think there is room for discussion on that point. There is no room for discussion on torture.

Senator DURBIN. No room for discussion on torture. You are unequivocal.

Mr. BRADBURY. That is right.

Senator DURBIN. Do you believe that it should be the policy of our administration that we do not engage in rendition, that is, the transfer of prisoners to circumstances where they could be subject to torture or they would be subject to torture?

Mr. BRADBURY. We do not transfer individuals to countries where we believe it is more likely than not that they will be tortured. That is a treaty obligation we have and a policy we apply on a worldwide basis today. Rendition itself covers a wide range of activities, many of them quite legitimate and traditionally used by countries all over the world to bring people to justice.

Senator DURBIN. Do you think it should be a fundamental part of any type of commission or tribunal that a person is aware of the charges against them?

Mr. BRADBURY. Well, under the military commission procedures that we have set up, they are aware of the charges against them once the proceeding begins.

Senator DURBIN. And should they be allowed to see the evidence that is being used to prosecute them before any commission or tribunal?

Mr. BRADBURY. Generally speaking, that is a good approach to take, and, of course, under the current procedures they do get to see the evidence that is used against them with a few narrow potential exceptions.

Senator DURBIN. Do you disagree with the right to counsel so that those charged have representation at commissions and tribunals that we are discussing?

Mr. BRADBURY. We provide right to counsel in the military commission procedures, and we suggest that should be included in anything that Congress is looking at.

Senator DURBIN. So aside from the issue of coercion, which may be an issue of fact, and aside from questions of hearsay, which I can understand, what is it that you object to in basic due process when it comes to the creation of these commissions and tribunals?

Mr. BRADBURY. Well, there has been a lot of discussion of starting with the Uniform Code of Military Justice, and I think as we have discussed with some of the Senators, there are a lot of provisions and procedures set forth in that code and in the procedures that have been issued under the UCMJ. And many of them are simply unworkable and unnecessary in this context, and so there are many of them, and we have discussed some of them here today.

Senator DURBIN. I am over my time, but I might just say in defense of Senator Graham's position, the Supreme Court in *Hamdan* did not say you have to accept this in totality. They said as far as practicable. So we can make modifications to recognize the reality of the war on terrorism.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Durbin.

Before recognizing Senator Schumer, a couple of announcements. One is that late yesterday I was asked to come to the White House to meet with the President at noon, so I am going to have to excuse myself. I have asked Senator Hatch to take the gavel and chair the hearings. I have asked Senator Hatch to adjourn the hearing at 12:30 where we customarily on Tuesdays have our caucus meetings until 2:15. I do not want to cut this hearing short in any way, so we will resume at 2:15 with the second panel probably still being questioned at that time.

I want to thank Mr. Bradbury and Mr. Dell'Orto for appearing here today and to re-emphasize—Senator Leahy, do you want to make a comment?

Senator LEAHY. Just before you dismiss them, I have questions.

Chairman SPECTER. They are not going to be dismissed. Senator Schumer is going to question them before they leave.

We want to move, I want to repeat, with dispatch so we would ask you to make your comments within 2 weeks on Senate bill 3614, on what way the Uniform Code of Courts-Martial Procedures should not apply, and to give us recommendations for statutory provisions which you think ought to apply as a matter of policy. But we are working in coordination with the Armed Services Committee, and I think we all agree there is a necessity to move ahead on trial of war crimes and also on the detention of enemy combatants as to what the procedures should be for review of detention status which we have embodied within 3614. And I think Congress would want to legislate on that matter, so at least we want your views on the subject.

We do appreciate your coming in on relatively short notice, and, Senator Leahy, do you want to make a comment?

Senator LEAHY. Mr. Chairman, I just want to make sure. Are we going to have time to ask any followup questions here on the record of Mr. Bradbury and Mr. Dell'Orto?

Chairman SPECTER. Well, I think that would be advisable.

Senator LEAHY. Because I had a couple of followups I wanted to do after everybody's time.

Chairman SPECTER. Let me see a show of hands of people who want to have a second round.

Well, good. Then we will just hear from Senator Leahy on followup questions, and then we will move to Senator Schumer now.

Senator LEAHY. And what about the Haynes nomination? I have been asked by some about that.

Chairman SPECTER. We have the confirmation hearing for Mr. Haynes scheduled for 2:15 by the Judiciary Committee, and that will proceed just as soon as we finish with this hearing.

To repeat, this is a very important hearing. We have some very high-powered witnesses, and we want to hear them and have a chance for questioning. So we will proceed until 12:30, and then we will reconvene at 2:15 to hear what we need to hear. And Senator Leahy as Ranking Member can have some followup questions following Senator Schumer.

Senator LEAHY. Thank you.

Chairman SPECTER. Senator Schumer, you are recognized.

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing in a prompt manner on such an important issue. Before I ask my questions, I am going to make three quick points.

First, I continue to believe the President should have every tool necessary to fight an effective war on terror. In times such as these, the balance between liberty and security may have to tip a little bit in the direction of security, and we have to be flexible. But I believe that if the process works right, you end up almost every time having both. When Attorney General Gonzales was here last, he agreed with me that Americans can demand both liberty and security.

Second, the determination of the appropriate balance is not the President's prerogative alone. The Congress has a vital role, and, of course, as the *Hamdan* decision so recently and poignantly reminded us, whether we like it or not, the courts have a role as well. But time and time again, Mr. Chairman, this President and this administration act as if they are the whole Government. Time and time again, the President acts like a bull in a china shop and sets back the war on terror.

If the administration had asked Congress at the time for some flexibility, saying that we have a different war with this war on terror—A, our heartland can be hit; B, there are no uniforms or battle ranks—people would have understood that. And the administration probably would have gotten just about all of the changes it needed—maybe not in exactly the way it needed, but all of the changes it needed, because we are in a brave, new world and we are fighting a different type of warfare. And I for one am not rigid and saying, well, what was good in World War II has to be here now. Some people are. I am not.

But the President should not need the Supreme Court to tell him to consult with Congress. There is an arrogance and an arrogation of power that I have not seen in my entire life in public life. And that arrogance and arrogation of power threatens to result in more catastrophic legal missteps in the future. That is why I have asked the Attorney General to oversee a comprehensive review by an independent commission of legal scholars and constitutional experts so we can anticipate any future Supreme Court problems and come to Congress ahead of time to avoid future problems, because obviously whatever our individual views are, what has happened with the Supreme Court has set back our mutual goals in moving forward in terms of the war on terror and stopping future terrorist acts from occurring.

So given the administration's headstrong attitude, we do not need another court blocking things that might need to be done. The *Hamdan* decision, in my judgment, shows that the administration's bull in a china shop approach is actually impeding the war on terror.

And so that leads to my first question. I am glad that the administration finally stands ready, as you said, Mr. Bradbury, to work with us. You say, "We would like to see Congress act quickly to establish a solid statutory basis for the military commission process." That kind of testimony has a bit of an Alice in Wonderland quality

to it because where have you been for the last 4 or 5 years? But it leads to a specific question. Okay?

Are you undertaking within the Justice Department a review of other decisions that are also based on the AUMF, which has been discredited by the Supreme Court, so that we will avoid a Supreme Court decision? Are you prepared not just in the issues before us in *Hamdan* but in other issues to come back to Congress now and say, "We need authorization from Congress"?

So, first question, is such a review being undertaken? Two, would the administration consider, before another court rules, coming back to us where you have not before on wiretapping or other things and saying, "We would like to work with the Congress to get something authorized"? And as I said, in all likelihood, if you did you would get most, if not all, of what you wanted. Mr. Bradbury?

Mr. BRADBURY. Thank you, Senator. We are always looking at developments in the law to see how they affect our legal analysis on any particular aspect of the executive branch activities. So to that extent, yes, and the *Hamdan* decision is something that we are carefully looking at and taking into account.

It is not my decision, obviously, to say whether we are going to come before Congress on any particular issue and make a proposal, a legislative proposal. As I indicated, that is the President's determination under the Constitution.

Senator SCHUMER. But you are undergoing a review?

Mr. BRADBURY. Well, it is my job to give legal advice to the executive branch on all manner of issues, including the types of programs we have been talking about, including programs like the NSA program, including issues like what does the *Hamdan* decision mean, how do we move forward. Obviously, we have a lot of folks who litigate these cases in the Department of Justice, and they are obviously taking account of the *Hamdan* decision as we move forward with the other major cases in the habeas litigation on detainees that are pending and the litigation, as you know, that we are facing on the NSA program. So we are looking at all of those issues and always taking into account those developments and reconsidering whether—

Senator SCHUMER. May I just ask, who is doing this review since the Court decision?

Mr. BRADBURY. Well, I am not suggesting that there is any particular formal process of review. I am saying that it is my job always to look at developments in the law and determine how they may affect advice that we have given on the basis, the lawful basis for programs, and it is always the job of the folks in the Civil Division at the Justice Department who are handling matters in litigation to look at how cases like *Hamdan* may affect arguments that are being made in litigation. So that is a process that goes on constantly in the Department.

Senator SCHUMER. And it has been renewed since *Hamdan*, I take it.

Mr. BRADBURY. Absolutely.

Senator SCHUMER. Thank you, Mr. Chairman.

Senator HATCH [presiding]. Thank you, Senator.

Senator Leahy.

Senator LEAHY. Thank you.

I am a little bit confused in listening to you, especially in your answer to Senator Schumer. Mr. Dell'Orto's earlier statement and answer seemed to suggest that we should simply ratify the administration's or the President's or the Bush-Cheney administration's commissions. And, Mr. Bradbury, you seem to say in a reversal from the earlier position of the administration 5 years ago, that you are now ready to work with Congress on legislation to allow you to operate within *Hamdan*. Which is it? Are we going to be asked simply to ratify what the President is already doing which the Court found illegal? Or are we supposed to go somewhere new?

Mr. DELL'ORTO. I do not think those answers are inconsistent, Senator. I think we would ask that you take a look at the commission procedures as they are laid out, and to the extent that you believe that they do demonstrate what the President has set out as the standard, that is, a full and fair trial, that you authorize those procedures.

Senator LEAHY. Mr. Bradbury, is that consistent with what you are saying?

Mr. BRADBURY. Oh, yes, absolutely. Even—

Senator LEAHY. Because the reason I say this is, when we tried to do that before, we were rebuffed by the administration. It is interesting now, after the Supreme Court has told them to stop illegal activity, that they are willing to talk to us. And I am just trying to figure out which statements to follow.

For example, before the Supreme Court's *Hamdan* decision, the President said he was waiting on the Court's decision to determine whether to close Guantanamo Bay. And then after the Court issued its ruling, the President said the Court had accepted and upheld his decision to open Guantanamo. But the Supreme Court was not asked to address the Guantanamo question, the legal question.

Was this based on the Department of Justice telling the President that the—did the Department of Justice tell the President that the *Hamdan* decision was really on Guantanamo prior to it being released, or afterward they released it—even though neither would be true?

Mr. BRADBURY. Well, Senator, I think as I said in my testimony, obviously the Court's decision does not call into question our ability to hold detainees—

Senator LEAHY. That is not my question. The President has said very specifically, and he said it to our European allies, that he was waiting for the Supreme Court decision and that would tell him whether he was supposed to close Guantanamo or not; afterward, he said the Court upheld his position on Guantanamo. In effect, it actually said neither. Where did he get that impression? The President is not a lawyer. You are. The Justice Department advised him. Did you give him such a cockamamie idea, or what?

Mr. BRADBURY. Well, I try not to give anybody cockamamie ideas, and—

Senator LEAHY. Well, where did he get the idea?

Mr. BRADBURY. Obviously, the *Hamdan* decision, Senator, does implicitly recognize that we are in a war, that the President's war powers were triggered by the attacks on the country, and that the law-of-war paradigm applies. The whole case was about—

Senator LEAHY. I do not think the President was talking about the nuances of the law-of-war paradigm. He was saying that this was going to tell him whether he could keep Guantanamo open or not; afterward, he said it said he could. Was the President right or was he wrong?

Mr. BRADBURY. It is under the law of war—

Senator LEAHY. Was the President right or was he wrong?

Mr. BRADBURY.—that we—the President is always right, Senator.

Senator LEAHY. Well, you may have even heard both Republicans and Democrats say that there have been a few mistakes made here. One of the things that we tend to forget is that 9/11 did happen on this administration's watch, and a lot of the mistakes that were made before are still being made.

Mr. BRADBURY. Well, Senator—

Senator LEAHY. And, Mr. Dell'Orto, you had mentioned the—in fact, this follows the difficulty of getting witnesses, you know, following up on what then-White House Counsel Gonzales talked about, military commissions being able to dispense justice close to where the actions are happening. And I think you both talked about the fact that if people were down at Guantanamo, what are you going to do, bring folks back from the front to testify?

I understand that problem. I understand that problem. Then why not have the commissions and why not have the people held near the battlefield. We have held over 350 courts-martial on the battlefields of Iraq and Afghanistan. That is close to where everything was going on. It enabled witnesses to be called. It seemed to work very well. Why transfer everybody halfway around the world to Guantanamo where nobody is available? Did we just set that up as a way to allow us to completely ignore going to any trial?

Mr. DELL'ORTO. Senator, I would say that, regardless of where you hold the military commissions, you are going to be faced with that problem. You have instances where people committed crimes outside Afghanistan or other places that we have captured. The witness to those may not be in Afghanistan. We have soldiers who rotate back from the battlefields on a regular basis.

Senator LEAHY. They were able to do 350 courts-martial over there.

Mr. DELL'ORTO. Yes, Senator, and I would say that if you look at those 350 courts-martial, you will find they are more the traditional military offenses that involved undiscipline, disobedience of orders, disrespect—the more normal undiscipline cases that a military court-martial was very much designed to deal with anywhere around the world.

Senator LEAHY. So bringing these people to Guantanamo was not to keep them from having witnesses available?

Mr. DELL'ORTO. No, sir. It was to provide principally a secure place to hold these folks.

Senator LEAHY. And the people that we have sent off to other countries, turned them over to other countries, as we now know in many instances to be tortured, what was the reason for doing that?

Mr. DELL'ORTO. Well, as Mr. Bradbury said, we do not send people off to other countries where we believe they—

Senator LEAHY. But they have been. They have been.

Mr. DELL'ORTO. Senator, I am not aware of that personally.

Senator LEAHY. It is in some of the information that has come out. It is almost as though we take the attitude like in "Casablanca." I am "shocked, shocked" to see this is going on here.

All right. My time is up. I will have questions to follow-up further in writing, Mr. Chairman.

Senator SCHUMER. Mr. Chairman?

Senator HATCH. Senator Schumer.

Senator SCHUMER. I would like to ask for a second round. I did not ask for one before because I had not asked my first round and did not know if my questions—

Senator HATCH. Well, before you do, I notice that you wanted to answer some of these questions and were not given the opportunity. So if you would care to make statements, either one of you, before I turn to Senator Schumer—and I hope Senator Schumer will be the last one, unless somebody on this side feels they absolutely have to. Mr. Bradbury, we will turn to you. Any final comments you would care to make? Mr. Dell'Orto, we will turn to you after Mr. Bradbury.

Mr. DELL'ORTO. Yes, Mr. Chairman. I actually have one correction I would like to add to an answer that I gave Senator Feinstein, if I could.

Senator HATCH. That would be fine.

Mr. BRADBURY. I would just like to make two quick points, one for Senator Leahy.

One of the main functions we hope to carry out in Guantanamo is military commission trials of those detainees who have committed war crimes, and I think what the President is talking about is looking for clarity from the Supreme Court as to whether he can move forward with those military commission procedures at Guantanamo or whether he cannot. And the Court has now said you cannot under the current rules, but there is a way ahead with working with Congress. And if we can get legislation in place quickly, we can move forward, and the process can work as it has been set up.

The one other point I would like to quickly make is in response to a question that Senator Durbin raised. In February of 2002, the President directed the military to apply the principles of Geneva to the extent consistent with military necessity. So that is why in Guantanamo they train to Geneva, they question in accordance with Geneva. So it is not surprising that Senator Durbin would talk to the folks down in Guantanamo and say, well, this decision does not require any change in the procedures at Guantanamo. They are acting consistent with the policy that the President has set as a general matter for the military at Guantanamo.

I am sorry. I just wanted to add those two points.

Senator HATCH. You going to add to that?

Mr. BRADBURY. That is all I wanted to say, Mr. Chairman.

Senator HATCH. Okay. Mr. Dell'Orto?

Mr. DELL'ORTO. Senator Feinstein, when you asked earlier about the people who have gone through CSRTs and ARBs, one fact I—

Senator SESSIONS. Mr. Chairman, would you explain those letters?

Mr. DELL'ORTO. I am sorry. The Combatant Status Review Tribunals, which is the initial board that the detainees go through to

establish that they continue to be enemy combatants, and the Administrative Review Boards, which is an annual follow-on board to assess threat levels and make recommendations as to whether they should be continued to be held.

With respect to the Combatant Status Review Tribunals, the CSRTs, we have probably a handful, I would say—and I am guessing, probably about five or so—people who have been found no longer to be enemy combatants that we still have at Guantanamo, they have been through the CSRT process; they are ready to be transferred to some location that can accept them, that certainly is not going to torture them, but in point of fact, some countries are not willing to take any of these people back because they pose problems for that country as well.

Senator FEINSTEIN. Mr. Chairman, could I ask one follow-up just on that one point?

Senator HATCH. Sure.

Senator FEINSTEIN. On the point of countries that will not take individuals back, what then is the alternative?

Mr. DELL'ORTO. We try to find another country that is willing to take them, and we work through the auspices of the State Department to try to develop that and find a suitable—

Senator FEINSTEIN. And does that work?

Mr. DELL'ORTO. On occasion it does, but it tends to be a very slow process.

Mr. BRADBURY. But, Senator, if we cannot find a third country to take them back and they are dangerous terrorists whom we have captured, we are going to continue to hold them.

Mr. DELL'ORTO. Clearly, and, again, the people who came through the CSRTs and were determined no longer to be enemy combatants are not high-threat people. They are not enemy combatants, and they can be returned.

Senator FEINSTEIN. Thank you. I appreciate that.

Mr. DELL'ORTO. But, clearly, anybody we see who poses a significant threat through either the CSRT or certainly the ARB process, we are going to keep.

Senator FEINSTEIN. Thank you. Thank you very much.

Senator HATCH. Well, I just want to add that I was one of the first to go to Guantanamo, and I went completely through the process and saw that is a reasonable, decent, honorable process, in spite of what some have said about it. And, frankly, everybody I know who has been there has come to that same conclusion, as I think the Senator from Illinois has.

Senator SCHUMER.

Senator SCHUMER. Thank you, Mr. Chairman.

Mr. Bradbury, I just want to ask you, did the *Hamdan* decision come as a complete surprise to the administration? In other words, did you, before the Court ruled, anticipate that the military commissions might be ruled illegal by the Supreme Court?

Mr. BRADBURY. Well, I think there are a lot of people who have had a lot of different views on what might happen with the case. I think going into it, the beginning of this process some years ago, there was, frankly, a high level of confidence because of the historical practice and recognition of military commission authorities that it would all be upheld as crafted. I mean, it was not crafted

to push the envelope. The procedures were crafted consistent with historical practice, so there was every reason to think they would be upheld. But you will need to—I am sure the folks who were closer to the actual handling of the case and the argument of the case than I am had their view as to how things were going.

I have to say I am, as I indicate in my testimony, quite surprised and disappointed with the reasoning in the opinion. But, obviously, it is what it is, and we are going to work with it and move forward.

Senator SCHUMER. Okay. Well, I understand that. So if you were surprised and most of the people in the administration were surprised, you obviously guessed quite wrong, and you pursued a policy that now has been thrown out.

Let me then repeat my question. Why doesn't the administration undertake—I mean, I am glad to hear you say you are reviewing the other situations now in light of *Hamdan*, as you should. But why doesn't the administration take a more formal process and review it to avoid this happening again. This makes me think, you know, everyone makes mistakes, but when you have made a lollapalooza like this one and then you say business as usual, I get worried. And, again, I do not come at this from a perspective that we have to, you know, undo everything that you think needs to be done. But I am just amazed at sort of the—so why isn't there a formal review? Why isn't it a dereliction—why wouldn't it be the responsibility of the President, the Attorney General, the Secretary of Defense, to say, all right, we were wrong this first time in the way we could set things up, we better check everything out in a serious way, not just the Office of Legal Counsel reviewing it himself? Can you please answer that for me? I am totally befuddled here.

Mr. BRADBURY. Well, Senator, all of the officials you mentioned at all times are always considering whether activities undertaken, programs, are consistent with the law, consistent with the current decisions of the Court. That is something that is always going on, and, of course, as a policy matter, in light of circumstances and changes in conditions, things are always being considered and reconsidered.

Senator SCHUMER. But, sir, you made a pretty bad wrong guess.

Mr. BRADBURY. I would say, Senator, we are not saying this is business as usual. We are not saying nothing has changed. The Court has made a very dramatic decision, and it is a historic fact that we are here talking to Congress about legislation to authorize and set up procedures for military commissions—something that has never happened in the history of the country. They have always been set up and handled administratively by the President and the executive branch throughout the history of the country.

This is a historic change. It is not business as usual, and it is a result of what is a very historic and dramatic decision from the Court last week.

Senator SCHUMER. But, again, why wouldn't—give me one good reason why there should not be a serious formal review to look at other issues that might have been based—other policies that you are pursuing that might have been based on AUMF? You know, I was always befuddled by that. I voted for that resolution, and it was never discussed once. I don't recall any discussion on the floor

of the Senate, privately among colleagues, with administration people, that the AUMF was supposed to influence any of these things which we thought was a totally different issue. Why wouldn't you undergo a formal review now? Why doesn't that make sense from your own point of view, from the efficacy of getting things done and getting it right, given that the Court says you have not?

Mr. BRADBURY. Well, I am saying it is part of my job to do a constant serious look at legal issues and how they may be affected by significant decisions by the Court like this one. So it is part of my job description, and that is what—

Senator SCHUMER. Did you warn anybody that you might have decided wrong before?

Mr. BRADBURY. Well, I guess I can plead ignorance there because I was not here at the beginning of this whole process. But as I tried to explain earlier, I think that the decisions that were made?

Senator SCHUMER. Did anyone? Did your predecessor?

Mr. BRADBURY. The decisions that were made in 2001 and 2002 on military commissions and the procedures of military commissions were fully in line—in fact, went further than historical precedents. And, of course, since that time, we went through the process of the Detainee Treatment Act, which creates judicial review procedures, again, unprecedented in the history of the country, for military commission procedures. This is an evolution. And, of course, the judicial review procedures were a result of the Court's decision in *Rasul v. Bush*, which said that the habeas statute applies to aliens held even in Guantanamo for purposes of review of the basis for their detention.

So that, again, was an unprecedented development in the law, and as a result of that, we worked with Congress, and we had the Detainee Treatment Act. And now we are here again for the next step in light of the *Hamdan* decision.

So it is a constant evolution and reconsideration in light of developments in the law.

Senator SCHUMER. Are you going to come to Congress only when the Supreme Court tells you to in the future?

Mr. BRADBURY. Well, Senator, obviously it is not my decision to come to Congress. That is not part of what I do. I just give legal advice to the President, the Attorney General, and the executive branch.

Senator SCHUMER. Thanks, Mr. Chairman.

Mr. DELL'ORTO. Senator, for this record, I would say in the Department of Defense our office is constantly reviewing the advice we have given in light of decisions from the courts, from laws that are passed, and it is not a static process. We are always reviewing the legal advice we have given the Secretary, and he challenges us to do that.

Senator GRAHAM. Mr. Chairman, may I have just a minute or two?

Senator HATCH. Yes, Senator Graham.

Senator GRAHAM. You are about to leave with some guidance from our Chairman to kind of work on producing a product that would help the Congress work with the administration to start over again. And I will be the first to admit this is incredibly difficult. This is new and uncharted territory. The legal infrastructure for

the war on terror is different than a normal war because the enemy is different. I am a big fan of the Geneva Convention. There are four treaties that make up the Geneva Convention. Common Article 3 is common to all four. It is a basic, mini-human rights procedure in all four documents dealing with civilians on land and sea, military personnel, non-military personnel, enemy combatants. And the reason that we have signed up to the Geneva Convention is that when our people are captured, we do not want them not only tortured, we do not want them humiliated; we do not want our troops paraded through downtown capitals and humiliated based on their religion or their status. We want to make sure that if our prisoners are tried in a court, it is a regularly constituted court as required by the Geneva Convention, that it is not a kangaroo court made up for the moment.

So Common Article 3 makes sense in terms of the Geneva Convention. The question is: Does it make sense to apply Common Article 3 to a group of people who do not sign up to the Convention, who show disdain for it, who would do everything in their power to not only trample the values of the Geneva Convention but every other treaty that we have ever entered into?

I agree with the President they should be treated humanely, and I believe it is incumbent upon the Congress to rein in the application of Common Article 3, Geneva Convention, to the war on terrorism within our values.

Now, having made that speech, I believe it is incumbent upon the administration to understand the basic perspective of Justice Kennedy, and he says, "At a minimum, a military commission like the one at issue, a commission specifically convened by the President to try specific persons without express Congressional authority can be regularly constituted by the standards of our military justice system only if some practical need explains deviations from court-martial practices."

So my challenge to the administration is to look at this situation anew. I think you would be well served to forget about Military Commission Order 1. You would be well served to go back to the UCMJ and provide, where practical, changes to the UCMJ to try people in military commission format, because, gentlemen, the military commission source of law comes from a statute. It comes from a congressional enactment. The military commission's roots come from the Uniform Code of Military Justice.

So, if nothing else, I hope you can leave this hearing and at least know where I am coming from, that Military Commission Order 1 as the base document for us to work off of would be a mistake. The base document for us to work off of is the statute from which the military commission originates, the Uniform Code of Military Justice. And if there is a need to deviate, which there will be plenty of needs to deviate, we need to explain to the court through testimony and our Congressional Record why that is practical.

Thank you for listening.

Senator HATCH. Well, thank you both for coming. Did you want to—

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

Senator HATCH. Sure.

Mr. DELL'ORTO. Senator, I have many concerns about taking that approach, but one of them is that, when all is said and done, we do not so change that system of justice, as laid out in the UCMJ and the Manual for Courts-Martial, that it ultimately redounds to the disadvantage of our servicemembers going forward, because we are going to be creating a body of case law out of that that will itself be the source of much litigation.

So I have concerns about that route, given that particular fact down the road.

Senator GRAHAM. If you think that is my proposal, then you misunderstand what I am saying, and I will blame myself for not being articulate enough. But here we have—we are right back to where we started. The military commissions come from a statutory scheme. It is not something that you just pulled out of the air. A military commission is created by a statute, and you did not consult with us when you created the military commissions. The Military Rules of Evidence derive from the Federal Rules of Evidence. They are different in some respects, but the President has shown a practical need to make them different. The Manual for Courts-Martial is an executive enactment to enforce the UCMJ, the rules of the road of how you try somebody.

I do not mind coming up with a manual for military commissions, but the basic problem I have with this whole philosophy is that you are ignoring the source of a military commission. Its being comes from a Congressional statute, and we are not going to respond—at least I am not going to respond to some product that was enacted without any consultation. To me that cannot be the base document. We will go backward, not forward. The base document has to be the Uniform Code of Military Justice.

Senator HATCH. Okay, Senator, let me just say that I recall Lincoln set up military commissions by Executive order, and others have done so as well. But, Mr. Bradbury, you wanted to comment?

Mr. BRADBURY. Actually, Senator, I was just going to make that very point. General Washington set up military commissions in the Revolutionary War, and all prior Presidents have set them up primarily under Article II authority, with recognition in the Uniform Code of Military Justice and other statutes—

Senator GRAHAM. Why are military commissions mentioned in the UCMJ?

Mr. BRADBURY. Because they were recognized by Congress and provided for, and the Court has now said that you need to follow the restrictions that Congress has set for them. And so we are asking—

Senator GRAHAM. What authority did you use to create Military Order 1? Was it the UCMJ reference to military commissions?

Mr. BRADBURY. It was reference, I believe, to Article II of the Constitution, to the UCMJ, including Article 21, which preserves the jurisdiction of military commissions, and the Authorization for the Use of Military Force.

Senator HATCH. I think you are saying you are not going to ignore the UCMJ, but the Executive does have certain powers that have been executed by every President since Washington.

Senator GRAHAM. Mr. Chairman, the only the government I can say it—

Senator HATCH. Now, wait a minute. I am just asking a question. I think I am allowed to do that.

Senator GRAHAM. Yes, sir, I apologize.

Mr. BRADBURY. That is absolutely right, and, of course, Congress has express authority to define and punish offenses against the laws of nations, which is what military commissions do. So we are not at all saying Congress does not have authority here, and, in fact, the Court has said Congress has put restrictions on the use of military commissions—

Senator HATCH. And now with this Court decision, it is incumbent upon Congress to exercise its authority and come up with a way that does not make it impossible for us to protect our country and also our military.

Mr. BRADBURY. Exactly.

Senator HATCH. Just to mention two aspects. Well, we want to thank both of you for being here today. You have been excellent. You have given excellent testimony, and I think all of us here appreciate it very much. So with that, we will allow you to leave.

Mr. BRADBURY. Thank you.

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

Senator HATCH. Now, we have a vote at 12:15, but I think we are going to start with our second panel. At least we will get to introduce you all and maybe take a few testimonies. Let's, if we could, get our second panel at the table.

[Pause.]

Senator HATCH. All right. If we can have order, let's have order. We are going to begin with Theodore Olson, who is a partner in Gibson, Dunn & Crutcher from 2004 to the present. He has a B.A. from the University of the Pacific cum laude; a J.D., University of California at Berkeley. He is former Solicitor General of the United States of America from 2001 to 2004. From 1981 to 1984 he was Assistant Attorney General, the Office of Legal Counsel. Aside from his time with the Reagan and Bush administrations, he has worked as a partner and has continued as partner at Gibson, Dunn & Crutcher, one of the great law firms in this country. He is a member of the President's Privacy and Civil Liberties Oversight Board, a two-time recipient of the Department of Justice's Edmund J. Randolph Award.

Harold Kohn, we welcome you as well, currently Dean of the Yale Law School from 2004 to the present. He has often been a witness before the Committee; Smith Professor of International Law from 1993 to the present. His education was at Harvard for a B.A. summa cum laude. Oxford University, he was a Marshall Scholar, a B.A., first class honors; Harvard Law, J.D., cum laude; and Oxford University master's degree in 1996. He has had a lot of notable experience: a law clerk for Judge Malcolm Richard Wilkey at the U.S. Court of Appeals for the D.C. Circuit from 1980 to 1981, law clerk for Justice Harry Blackmun, the U.S. Supreme Court, from 1981 to 1982, et cetera. We welcome you to the hearing.

Paul W. "Whit" Cobb is Vice President and Deputy General Counsel, BAE Systems, Inc., North America, from 2005 to the present. He has a B.A. from Duke University summa cum laude and a J.D. from Yale University School of Law in 1990. From 2001 to 2004, he was Deputy General Counsel, the Office of Legal Coun-

sel, the Department of Defense. From 1996 to 2001, he was a partner in Jenner & Block LLP. He has been a judicial fellow in the Administrative Office of the U.S. Courts. From 1991 to 1995, Office of General Counsel at the Department of the Army where he achieved the rank of captain. In 1990 and 1991, he was a law clerk of Judge Thomas A. Clark, the U.S. Court of Appeals for the Eleventh Circuit.

Scott Silliman is a professor, Duke University School of Law, from 1993 to the present. He has a B.A. from the University of North Carolina at Chapel Hill; a J.D. from the University of North Carolina-Chapel Hill. From 1968 to 1993, he was United States Air Force Judge Advocate of the General Corps, and during his career as a JAG attorney, Professor Silliman served as Staff Judge Advocate at two large installations and three major Air Force commands, including the Tactical Air Command and the Air Combat Command, where he served as General Counsel to the Commander of 185,000 military and civilian personnel.

Lieutenant Commander Charles Swift, we are very happy to have you here; defense counsel in the Office of Chief Defense Counsel at DOD, Office of Military Commissions, from 2003 to the present; B.S. from the U.S. Naval Academy, Division Officer School as well in San Diego in 1985; J.D. at the Seattle School of Law in 1994; and was educated at the Naval Justice School Basic Lawyer Course in 1994. He has a long history of service in the Navy, and we are just very grateful to have you here as well, Commander.

Daniel Collins is a partner in Munger, Tolles & Olson, LLP, from 2003 to the present; was educated with an A.B. from Harvard College summa cum laude; First Marshall Phi Beta Kappa in 1985, a J.D. from Stanford University with distinction in 1988. Mr. Collins was Associate Deputy Attorney General, the Office of Deputy Attorney General, from 2001 to 2003. During that time, Mr. Collins also served as DOJ's Chief Privacy Officer; from 1997 to 1998, adjunct professor of Loyola Law School, and from 1996 to 2001, again, with Munger, Tolles. He was Assistant Attorney General in the Criminal Division of the U.S. Attorney's Office in Los Angeles, law clerk to Justice Scalia, and attorney-advisor of the Department of Justice Office of Legal Counsel, et cetera. He was a note editor of the Stanford Law Review and recipient of Stanford Law Review's Board of Editors Award and Order of the Coif.

So we are happy to have all of you here. You all have tremendous distinctive records, and we are very proud to have you before the Committee, and if we can, we will go in that order. Mr. Olson, we will take you first.

STATEMENT OF HON. THEODORE B. OLSON, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND PARTNER, GIBSON, DUNN & CRUTCHER, WASHINGTON D.C.

Mr. OLSON. Thank you, Mr. Chairman and members of the Committee, for the opportunity to appear before this distinguished Committee to testify about the Supreme Court's decision in *Hamdan v. Rumsfeld*, which has far-reaching implications for the President's ability to defend our national security and perform his duties as Commander-in-Chief.

No issue deserves more thoughtful consideration from our elected representatives than ensuring that the American people are defended from a savage terrorist enemy that deliberately targets civilians and mutilates our soldiers in an effort to destroy our way of life.

I will confine myself to the 5 minutes. We have submitted written testimony, Mr. Chairman, which I assume will be a part of the record.

Senator HATCH. Without objection, we will put the complete statements of all of you in the record. And, by the way, I want my statement placed in the record at the appropriate place as well, without objection.

Mr. OLSON. It is altogether appropriate and necessary for Congress to consider a legislative response to the Supreme Court's decision in *Hamdan*. All eight Justices who participated in the case—Chief Justice Roberts was recused, but he had agreed with the administration's position as a judge on the United States Court of Appeals. But all eight Justices recognized that Congressional action could cure any perceived inadequacies in the military commissions established by the President.

In response to the Justices' invitation to implement a legislative solution, it is my opinion, first, that Congress should restore the status quo that existed prior to the Supreme Court's decision in *Rasul v. Bush* and make clear that the Federal courts do not possess jurisdiction over pending or future habeas petitions filed by Guantanamo Bay detainees or other noncitizen enemy combatants detained outside the territory of the United States.

In that *Rasul* case, the Supreme Court overturned a precedent, *Johnson v. Eisentrager*, that had stood for 50 years and held in that case for the first time that the Federal habeas statute grants jurisdiction to Federal courts to entertain habeas corpus petitions filed by aliens, noncitizens, who have never had any contact with the United States, captured abroad and detained beyond the sovereign territory of the United States. In the *Hamdan* decision, the Court held that legislation enacted in response to *Rasul* depriving, again, the Federal courts of jurisdiction in such cases did not apply to habeas corpus petitions pending when the legislation was enacted.

Since the emergence of the writ of habeas corpus several centuries ago in English common-law courts, the writ has never been available to enemy aliens captured on the battlefield outside of a country's sovereign territory. Indeed, by requiring the President to justify his military decisions in Federal courts, *Rasul* imposed a substantial and unprecedented burden on the President's ability to react with vigor and dispatch to homeland security threats.

Indeed, none of the 2 million prisoners of war held by the United States at the conclusion of World War II was deemed authorized to file a habeas petition in a U.S. court challenging the terms of conditions of his confinement. One can only imagine the chaos that would have been introduced into the effort to win World War II if each of these detainees, or lawyers on their behalf, had been permitted to file petitions in U.S. courts immediately upon their capture in Europe, Africa, or the islands of the Pacific Ocean.

The *Rasul* decision and the *Hamdan* decision impose a tremendous burden on our military personnel in the field. As the Supreme Court explained in *Eisentrager*, it would be difficult to devise more effective fettering of a field commander than to allow the very enemies he has ordered reduced 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 defense at home. That is the words of Justice Jackson, who has been frequently quoted in these proceedings and in related proceedings in a 6–3 decision upholding what had always been the law of the land. Congress should act to restore the pre-*Rasul* status quo. The Constitution places the decision to detain a noncitizen held abroad squarely within the domain of the President as Commander-in-Chief of the Armed Forces. Congress should restore the constitutional balance by amending the Detainees Treatment Act to clarify that Federal courts lack jurisdiction over habeas petitions filed by detainees held outside the sovereign territory of the United States.

Mr. Chairman, my testimony refers to the military commissions and makes recommendations with respect to that, and it also addresses the point with respect to the Geneva Convention. But I will not take your time now by referring to that because it is in the written testimony.

[The prepared statement of Mr. Olson appears as a submission for the record.]

Senator HATCH. Well, thank you very much, Mr. Olson. Professor Koh, we will take you now.

**STATEMENT OF HAROLD HONGJU KOH, DEAN, YALE LAW
SCHOOL, NEW HAVEN, CONNECTICUT**

Mr. KOH. Thank you, Mr. Chairman. I have twice served in the Government—in the State Department in the 1990s and in the Reagan administration in the 1980s at the Justice Department. I submitted a detailed statement that makes two points:

First, the *Hamdan* decision is much bigger than military commissions. It has broad significance for the separation of powers and the way we conduct the war on terror.

And, second, it suggests principles for how Congress and the President should work together to restore a constitutional process for ensuring a fair trial and humane treatment.

Mr. Olson stated the holdings of *Hamdan*, but as Justice Frankfurter once said, there are some cases that are less important for what they hold than for what they say about a way of looking at the law. And as my written remarks point out, *Hamdan* is the most important case on Executive power decided since the steel seizure case, not just for what it says about military commissions, but for what it says about what the Constitution requires about the President, Congress, and the courts working together to deal with national crisis. And what it says is that when the President is responding to a war on terror, he should not go it alone, citing a broad constitutional theory and statutes which do not give specific authorization; rather, he should fit his actions within the scope of enacted laws, such as the UCMJ, and treaties that have been ratified by the United States, like Common Article 3.

With regard to Common Article 3, there are two important things that it is not. Common Article 3 is not about giving terrorists POW status. It is about giving them a right to minimal humane treatment that we give everybody.

The second thing, Common Article 3 is not about them and what they do. It is about what we are and what we do. We give basic humane treatment. Some have said, well, terrorists have not signed Common Article 3. Well, whales have not signed the Whaling Convention. But it is about how we treat them and how we are obliged to treat them.

When you look at the way that *Hamdan* requires the executive branch to behave within the framework of law, you end up rejecting, as based on the wrong constitutional vision, three recent executive branch positions: the President's supposed freedom to authorize torture and cruel treatment in the face of the McCain amendment would be rejected; the President's supposed freedom to authorize warrantless domestic surveillance in the face of the FISA would be rejected; and the President's supposed freedom to try military terrorist suspects before commissions that do not meet the UCMJ standards should also be rejected.

That brings me to my final point. This Congress and this Committee have two options. The first is it can hastily enact quick-fix legislation to reverse the holdings in *Hamdan*. Mr. Olson now suggests that they also reverse *Rasul*. Ted Olson is a great lawyer. I had the privilege of working with him in the Justice Department 20 years ago. He lost *Rasul*. His successor lost *Hamdan*. And now they would like to reargue those cases here and get them both reversed.

But I think that there is a better approach than relitigating cases that have already been lost, and that is for Congress to hear what the Court said in *Hamdan* about what a constitutional process is, to accept the notion that any detainee in our custody deserves a fair trial and humane treatment. That is what the Pentagon now seems to have accepted, according to the story in the Financial Times. And, third, we should hold hearings about what it takes to make hearings of these detainees truly full and fair, as the President said he would do in creating military commissions.

If Congress follows option one and simply tries to undo the Supreme Court conclusion, it will place us on the wrong side of our own law, statutory and treaty; on the wrong side of international law, on the wrong side of international opinion; and we run the risk that the statute you pass will be struck down again by the courts.

But if you accept the *Hamdan* Court's holdings and work with them, you will place us back on the right side of the law on the right side of international opinion, and I believe on the right side of history.

I have suggested in my statement, starting on page 12, the criteria that military commissions have to satisfy after *Hamdan* with regard to humane treatment, eligible defendants in crimes, meaningful oversight, and procedures comparable to courts-martial. I agree with Senator Graham that if you are to do this, you should start from the UCMJ process.

But let me close by saying that *Hamdan* has presented both Congress and the President with an opportunity to make a fresh start in crafting a fair and durable solution to the problem of humane treatment and fair trial. This body should take this opportunity to craft laws that satisfy the UCMJ and Article 3, and the President should take care that those laws be faithfully executed.

Thank you.

[The prepared statement of Mr. Koh appears as a submission for the record.]

Senator HATCH. Thank you, Professor Koh.

Let's go to Mr. Cobb next, and we will finish with Commander Swift. Or you wanted me to go to Commander Swift first because Senator—why don't we go to Commander Swift first, and we will finish with you, Mr. Cobb. That is contrary to what the Chairman wanted me to do, but I will do it.

STATEMENT OF LIEUTENANT COMMANDER CHARLES D. SWIFT, OFFICE OF MILITARY COMMISSIONS, OFFICE OF CHIEF DEFENSE COUNSEL, U.S. DEPARTMENT OF DEFENSE, WASHINGTON, D.C.

Commander SWIFT. Mr. Chairman, members of the Committee, thank you for again inviting—

Senator HATCH. If you would pull your microphone a little closer to you, I think that would help.

Commander SWIFT. Mr. Chairman, members of the Committee, thank you for again inviting me to testify here today. As you begin the vitally important process of determining the necessity of a legislative response to the Supreme Court's opinion in *Hamdan v. Rumsfeld*.

The first question to be asked is whether the system, as it has been set up, should be reinstated. Based on the past 5 years, the answer is simply no. This is not just the view of a defense counsel who litigated the commission system. It is also the view of some of the commission prosecutors. One of the prosecutors, Air Force Captain John Carr, wrote that in his experience, the commission was, and I quote, "a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged." Another prosecutor, Air Force Major Robert Preston, lamented that "writing a motion saying that the process will be full and fair when you do not really believe it is kind of hard—particularly when you want to call yourself an officer and a lawyer."

Those of us who have litigated in the commission cases in Guantanamo recognized that the military commission system's was flawed in both design and execution. The military commission systems' procedures were simply inadequate to ensure that the trials produced accurate results. Security is always a consideration in trials implicating the defense of our Nation. That consideration is recognized by MRE 505(b) inside the Uniform Code of Military Justice and the Court-Martial that allows security considerations. The commission security rules, however, are written in such a way as to invite abuse, a fact that became only too clear to members of the prosecution as well as the defense. Captain Carr observed to the chief prosecutor, "In our meeting with [a government agency], they

told us that the exculpatory information, if it existed, would be in the 10 percent that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we were not going to worry about it." Captain Carr's e-mail is reflected in the experience of the defense.

The ability of the Government agencies to hide evidence from the prosecution is chilling considering that the prohibition against statements obtained by torture rest solely on whether such statements were obtained through torture in the judgment of the prosecutors. Absent prosecutor judgment, there are no provisions guaranteeing the defense any sort of discovery concerning the use of coercion to obtain testimony.

Publicly, the chief prosecutor argued in the military law journal that such problems would be cured by the defense's ability to argue the shortcomings of any evidence. Privately, Captain Carr reports that the chief prosecutor told him, "The military panel will be hand picked and will not acquit these detainees." Again, the practice of the commissions echo Captain Carr.

To cite just one example, prior to his selection by the Secretary of Defense to serve on the commission's appellate review panel, a very distinguished member, William T. Coleman, met with and assisted the prosecution in their preparation and strategy for trial. Now, using such a member would normally be perfectly Okay to get the prosecution ready. But he was then appointed to serve on the same review panel. In any other legal system, such conduct would have clearly precluded Mr. Coleman from serving in any judicial capacity, but not at the commissions.

The defense, apart from calling the accused, has no meaningful ability to put on a defense. The dissent in *Hamdan* was incorrect when claiming that the petitioner may subpoena his own witnesses, if reasonably available. In fact, the defense had no ability to issue subpoenas and, with only one exception in more than 50 attempts, no success in obtaining witnesses through the prosecution or the presiding officer.

Given the handcuffs this puts on his counsel, the accused is really the only one that can dispute the evidence against him. Without knowing what that evidence is, the accused is left undefended. Yet the accused is not guaranteed even the most fundamental right, and that is, to know what the evidence is against him.

It should not be surprising that in previous commissions the exclusion of a nondisruptive defendant from factual precedents of his own trial is unprecedented. The disregard for the principles of justice in the commissions has increasingly put members of the Chief Defense Counsel's Office in the position where they would either violate ethical requirements incumbent on their practice of law or face criminal charges for the violation of military orders. To do one's job in an ethical manner should not require a military attorney to risk criminal sanctions.

Senator HATCH. Lieutenant Commander, I am going to have to hold you to the 5 minutes so I can make the vote.

[The prepared statement of Commander Swift appears as a submission for the record.]

Senator HATCH. We will turn to Mr. Cobb now. I am going to hold each of you to right on 5 minutes. Otherwise, I cannot make the vote.

Mr. Cobb.

STATEMENT OF PAUL W. "WHIT" COBB, JR., FORMER DEPUTY GENERAL COUNSEL, U.S. DEPOSITION, WASHINGTON, D.C.

Mr. COBB. Thank you, Mr. Chairman and members of the Committee, for the opportunity to appear here today.

As you mentioned, Senator Hatch, I have served as an Army and also as a former Deputy General Counsel for Legal Counsel of the Department of Defense. Of course, today I am appearing solely in my personal capacity.

While I was at the Office of the Secretary of Defense, I had the opportunity to participate in drafting the military commission procedures that were at issue in the *Hamdan* case, and I also had the opportunity to work through many of the issues the Committee is now confronting. I hope my perspective will be helpful.

I would like to address the five key features of war crimes courts that I believe are essential to justice in the broadest sense of the word, and my statement has more details about this, my written statement.

The first key feature, it is critical to have a specialized law of war court designed for the circumstances of each underlying conflict. War crimes court procedures need to differ in a few significant ways from the procedures that have grown up around our domestic criminal courts, including courts-martial. Courts-martial may have some surface appeal, but there are significant problems with using courts-martial to try war crimes. First, they have been designed to protect military personnel in their trials for ordinary criminal offenses and require drastic modifications. And, second, as discussed by Mr. Dell'Orto, it is even more difficult to use courts-martial to prosecute war crimes violations in Federal court.

The second key feature of any war crimes court is that it needs to be a function of the military. The military has the subject matter expertise under the law of war. It has custody of the detainees. And it has always conducted our war crimes trials in the past.

The third key feature, we need to have inclusive rules of evidence that permit the fact finder to weigh the probative value of each piece of evidence. The evidence is simply not going to have the indicia of reliability in all cases that we would expect in our domestic criminal court proceedings.

The fourth feature is the need for heightened protection of classified information over and above the protections in Federal courts and courts-martials. This is required by the fact that our war with al Qaeda is continuing and also the importance of information in that war given the fact that our enemy in the war has no fixed faces or other resources that we would ordinarily attack. I would note that most other war crimes tribunals have taken place after the war had ended.

Of course, defendant's cleared counsel should be given access to all information relevant to the trial, but there are going to be rare but important instances when the defendant cannot be given personal access.

The fifth and final key aspect to a war crimes court is the need for cleared and mandatory defense counsel. The accused should not have the right to self-representation. These war crimes courts will be conducted in a complicated military justice procedural environment. Also, the right to self-representation would defeat protections for classified information.

Now, how should legislation implement these five key features? Fortunately, we are not writing on a blank slate. There is an existing forum that has each of the five qualities that I have discussed, namely, military commissions. Some modifications to military commissions that Congress might consider include increasing the structural independence of the military commissions, for instance, by specifying the appointment of military judges to preside over the trials, and also by articulating further the appellate process. Congress might also desire to specify statutory provisions that would address the court's concerns in *Hamdan* with respect to Articles 21 and 36 of the UCMJ.

The Unprivileged Combatant Act, introduced by Chairman Specter recently, contains almost all of the five key war crimes court features I have discussed and is an excellent first step toward a legislative response to *Hamdan*.

In conclusion, the existing military commission system, with appropriate modifications by Congress, is ideally suited to trying law of war violations. The perfect is the enemy of the good, and perfectly uniform criminal procedures are the enemy of war crimes prosecutions. Surely, it is better to have some war crimes prosecutions under procedures tailored for the circumstances than perfectly uniform procedures and no prosecutions whatsoever.

Mr. Chairman, I would be pleased to answer the Committee's questions.

[The prepared statement of Mr. Cobb appears as a submission for the record.]

Senator HATCH. Well, thank you so much, Mr. Cobb. Professor Silliman, we will take your testimony.

**STATEMENT OF SCOTT L. SILLIMAN, RETIRED AIR FORCE
JUDGE ADVOCATE, CENTER ON LAW, ETHICS, AND NA-
TIONAL SECURITY, DUKE UNIVERSITY SCHOOL OF LAW,
DURHAM, NORTH CAROLINA**

Mr. SILLIMAN. Thank you, Mr. Chairman. With all due respect to Dean Koh, I read the decision in *Hamdan* a bit narrower than he does, as is explained more in detail in my prepared statement. Therefore, I urge the Committee, to the extent it deems legislation necessary, that it carefully tailor it to meet the specific issue raised by the Supreme Court.

For example, the Court did not deal with the broader question of the President's authority to detain. It said, "*Hamdan* did not challenge nor need the Court to address that question."

Also, because the Detainee Treatment Act already prescribes the procedure for status review determinations on detainees, that is an issue which, at least for now, need not be addressed. Therefore, I believe the Congress should address only those lists of deficiencies in military commissions that it pointed out.

If the Congress merely passes a law giving legislative sanction to the prior system from military commissions, putting everything back the way it was, there is no assurance that it would pass judicial muster. Further, it would obviously invite further challenges and lead to greater uncertainty.

Many legal scholars believe that it is possible for this Congress to actually legislate around Common Article 3. However, giving Congressional sanction to the minimal level of due process in commissions, which was criticized as inadequate by the Supreme Court and which fails to satisfy a commonly recognized international legal standards, is, I believe, Mr. Chairman, imprudent.

Congress could also authorize a completely new system for military commissions which remedies most of the defects with the Court cited, but which does perhaps allow for a more flexible standard for the admissibility of evidence. The Congress could legislate an exception for hearsay evidence or unsworn statements. However, in no circumstance should evidence procured by coercive interrogation techniques be admissible.

I would also suggest that there should be a more robust and substantial judicial review, such as in the United States Court of Appeals for the Armed Forces, and that that is absolutely essential.

So Congress could build a new military justice system based on most of the procedures of the court-martial process but, again, making exceptions where the Congress needs it. That would be a far better step, Mr. Chairman, but not the one I advocate.

What I urge the Committee to consider requires no new major legislation. The Supreme Court in *Hamdan* clearly implied that courts-martial under the Uniform Code of Military Justice, the type of trial system we do use for our own servicemen, is more than adequate and appropriate to the task.

To those who suggest that using courts-martial would disadvantage us by taking those relatively small number of military commissions—and, again, Mr. Chairman, remember, the standard for detaining an individual is merely an administrative determination of combatant status. To bring a case before a military commission, there must be a specific framing of a criminal charge under the law of war. That is the only jurisdiction of a war court, a military commission in this case. But by adopting the same system of courts that we use for our own servicemen and making the minor adjustments we need, which has already been brought before this commission, Article 32 need not necessarily obtain. Article 31(b), the Advice of Rights, need not necessarily obtain. The authority already exists in Article 18 to use courts-martial for violations of the law of war.

If we do that, Mr. Chairman, I think that we send a loud and clear signal to the rest of the world, particularly at this time of increasing allegations of atrocities by our own armed service personnel. We send a signal that we are a Nation under the rule of law, not just in rhetoric, Mr. Chairman, but in practice.

Let me close by suggesting, as you already have here before you, as the Senate Armed Services Committee will have on Thursday, that you continue to solicit and seek the advice of those who know this system and these issues best. And I refer to the active-duty judge advocates and retired judge advocates. I believe their advice

and counsel, as you deliberate this very difficult issue, would be of great benefit.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Silliman appears as a submission for the record.]

Senator HATCH. Well, thank you so much, Professor.

Mr. Collins, we are delighted to have you back. We look forward to hearing you.

**STATEMENT OF DANIEL P. COLLINS, FORMER ASSOCIATE
DEPUTY ATTORNEY GENERAL, AND PARTNER, MUNGER,
TOLLES & OLSON, LOS ANGELES, CALIFORNIA**

Mr. COLLINS. Mr. Chairman, I am grateful for the opportunity to testify here today. The extent to which the use of military commissions remains available as a tool for prosecuting terrorists and other unlawful combatants in the ongoing war on terror is an important issue that warrants this Committee's prompt attention. I believe that the Supreme Court's recent decision in *Hamdan v. Rumsfeld* casts sufficient doubt over the manner in which such commissions may proceed in the absence of statutory authorization or clarification as to make it appropriate for Congress to supply that authorization and clarification. It would, I think, be ill advised to try to proceed without the benefit of Congress' assistance in implementing the Court's decision.

Before turning to the specific recommendations that I would make, I did want to emphasize two points about the Court's decision that I think are very important.

First, despite some of the misunderstanding that I think has been reflected in the press and some of the commentary, the Court did not in any respect base its holding on the Constitution of the United States. It, rather, solely found that the procedures set up for the military commissions were not consistent with the provisions of the Uniform Code of Military Justice that the Court deemed to be applicable; and, second, it concluded that the structure and procedures more generally deviated from the requirements of Common Article 3, which it also believed to be applicable to the conflict with al Qaeda.

The Court also, importantly, did not question that the military model and a military tribunal is appropriate in this context. I think that is also important to underscore. In discussing the subject of how to confront and disable al Qaeda, too many people, I think, seem to view the war on terror as a war merely in the rhetorical sense, like the war on drugs or the war on poverty. It is not. It is an armed conflict with an organized enemy that calls forth the military authorities of the Government, including the right to detain and the right to try before a military tribunal. No Justice of the Court questioned that. It is merely a matter of how to exercise the authority to try within the context of a military tribunal.

There are four things that I think the Congress should do in response to *Hamdan*.

First, I believe that the Congress should eliminate the standard of uniformity except as impracticable standard, which we are now left with. That standard is fraught with so much uncertainty that to attempt to implement it would just have everyone back here 5

years from now after another Supreme Court decision saying it was not quite right. If Congress provides the authorization, substitutes that standard with something else, that will provide the best and surest footing for proceeding with appropriate military tribunals.

I think that what Congress should put in its place has two elements: one, it should have some substantial residuum of discretion for the Executive to fill out the details; and then, second, as is clear from the comments of many of the Senators today, there is clearly a desire on the part of Congress to articulate some minimum criteria that will be applied. How you draw those lines I think is a difficult question that will require careful study.

Second, I think that Congress should also eliminate the uncertainty occasioned by the Court's holding with respect to the Geneva Conventions, and I don't think that Congress needs to repudiate the application of Common Article 3 in order to do that. I, rather, read the Court's opinion, and as clarified by Justice Kennedy's concurrence, as indicating that if Congress provides the statutory authorization for this regime and sets it up in a regular fashion, then it will be a regularly constituted court within the meaning of Common Article 3 and will eliminate that problem. And so the Court, by providing a clear statutory authorization and basis for these tribunals, can cure that problem.

I also think, third, that the Congress should provide specific statutory authorization for a war crime of conspiracy, something that is clearly within Congress' constitutional authority.

And then, fourth, I believe that Congress should also revise the judicial review provision so as to effectuate the original intent of the Detainee Treatment Act to ensure that challenges to military commission judgments follow the judgment and not precede it. In some respects, the level of deference to military tribunals under this decision is less than you would give in a habeas court to a State court judgment, and that seems inappropriate.

[The prepared statement of Mr. Collins appears as a submission for the record.]

Senator HATCH. Well, thank you so much. We really appreciate all of you. I am sorry we have to hold you over until 2:15, because I think there will be a lot of questions of this distinguished panel.

So, with that, we will recess until 2:15, when we will resume this hearing. We appreciate all of your and your patience.

[Whereupon, at 12:33 p.m., the Committee recessed, to reconvene at 2:15 p.m., this same day.]

AFTERNOON SESSION [2:15 p.m.]

Chairman SPECTER. We will resume our hearing about what should be done to comply with the decision of the Supreme Court of the United States in *Hamdan v. Rumsfeld*. I regret that I had to miss the opening statements, but Senator Leahy and I are ready to proceed with some questions.

Mr. Olson, let me begin with you and acknowledge personally again my sympathy for the loss of your wife on 9/11 on the plane that crashed into the Pentagon.

Mr. OLSON. Thank you, Mr. Chairman.

Chairman SPECTER. You have a unique perspective from many points of view, having been Solicitor General and very much involved in the work of Government and experienced in constitu-

tional law. How many cases have you argued now before the U.S. Supreme Court?

Mr. OLSON. We have to stretch our memory to remember those numbers, Senator, but I think it is 43.

Chairman SPECTER. Well, that is quite a record.

What do you think needs to be done to have a basic compliance with what the Supreme Court said in *Hamdan v. Rumsfeld*?

Mr. OLSON. Well, at a very minimum, what the administration seems to be urging is that Congress approve the procedures that the President articulated in the order setting up the military commissions that he did, in 2001 I guess it was. That would be the minimum requirement.

Chairman SPECTER. Do you think that would pass muster with what the Court had in mind on compliance with Article 3 of the Geneva Convention?

Mr. OLSON. I think it would. I do think that, to the extent that there are other provisions that are added with respect to specific aspects of the process, that the most flexibility possible given to the President is something that should be done because, as I say in my written testimony, the terrorists that we are opposing are extremely resourceful. They adapt their techniques to our defenses. Every time we set up some sort of a system, they work their way around it. They train their colleagues how to lie, to cheat, and to commit mayhem in ways that are very, very destructive to us. And they take advantage. They attempt in every way possible to take advantage to any legal system that can be created.

Therefore, I think it is important for the President to have the flexibility more than just to deviate where it is impracticable, which is one of the terms that is in the statute now, but to have some reasonable flexibility to adapt to the circumstances.

The provision to terrorists of highly classified, sensitive information makes no sense to me, and I think that—

Chairman SPECTER. Dean Koh, the applicability of Article 3 of the Geneva Convention was received with surprise in many quarters. There had been some contention over whether you needed a nation state, you needed uniforms, you need some regularization to apply the Geneva Conventions. How would you—and I know you favor the application of Article 3 of the Geneva Convention and think the Court acted in accordance with the intention of the provision. But how would you square—I am on Dean Koh now.

How would you, Dean Koh, analyze the applicability of Article 3 of the Geneva Convention in that context?

Mr. KOH. Well, Senator, in my oral remarks, I made two points about what Common Article 3 is not. It is not a provision that gives people prisoner-of-war status, and it is not about what they do. It is about what we do. It is a statement—and this is a quote from Will Taft, who is legal adviser, that there are certain minimum standards apply even to the detention of unprivileged belligerents. It says that they are not outside the law. It is a general principle of civilized society that inhumane treatment degrades the perpetrator as much as the victim.

So what was really said in 1949 when they were crafting the Geneva Conventions was there must be a core of minimum treatment that we are ready to give to every country in the world, and every

country in the world respects it except for the Island of Nauru. So I think that the real question is does Congress want to be in a position now of passing a law which is essentially saying that the United States wants not to be a part of this baseline minimum standard. And I think that would be very, very damaging for our own troops, for our country to say that of all the countries in the world who accept this baseline minimum standard, we do not.

Chairman SPECTER. Mr. Olson, how would you respond to Dean Koh? How would you satisfy the requirements of Article 3 of the Geneva Convention using the President's program if Congress were to legislate on the matter?

Mr. OLSON. Well, my position would be that it would be important for Congress to make clear that it agrees with the executive branch's interpretation of the Geneva Conventions, including Common Article 3, that it does not apply under these circumstances to terrorists who are not acting in connection with any State, not complying with any other provision of the—not working with a contracting party, and that provision applied, as most people understood it, I believe, to conflict that was not international in nature, which international terrorism certainly is, confined within a contracting party, which is not what we are dealing with here.

I think that if Congress made it clear that that interpretation of the Geneva Conventions and our participation in them, I think that that would carry important weight.

Chairman SPECTER. Well, my red light went on, so I will yield to Senator Leahy.

Senator LEAHY. Lieutenant Commander Swift, in Mr. Cobb's prepared testimony today, he argued, among other things, that special procedures are needed for a military commission in wartime to prevent sensitive information from being passed to detainees under attorney-client privilege or being passed from them. Do you have any comment about that?

Commander SWIFT. Well, sir, I certainly agree that in Mr. Hamdan's case, where I am representing him, there is a need to protect sensitive materials, but also in Mr. Hamdan's case, when that is given a blanket application, it can lead to basically the violation of fundamental rights in a trial. The example I can give is that I was down at Guantanamo Bay to tell Mr. Hamdan about his decision. For 2 days, first we told him; then I explained to him, along with Professor Katyal, our strategy going forward, all the possible things we might do or not do.

At the end of that meeting, he was taken back to his regular cell, and then his belongings were searched, and the only thing they took were his notes on the questions that he was to answer as the client on how we were to proceed. In other words, the Government seized the entire strategy we had going forward. And it was the only document they took. And I did not see how that could possibly implicate national strategy, although it does certainly implicate how we will conduct the trial.

Senator LEAHY. Also, Mr. Bradbury and Mr. Dell'Orto on the first panel talked about deficiencies they see in the UCMJ procedures and claim those are preventing them from moving forward today, without further delay, with courts-martial against those the President has designated for trial in Guantanamo Bay. Part of this

came after questions of mine pointing out the fact they have been down there for all these years and the Administration has not convicted anybody yet. I am not sure how that makes us better. What procedures are in place to ensure that those who have violated the law of war can be brought to justice under the UCMJ—and this sort of follows on my other question—while keeping classified information secret? And what is the military's record of applying the UCMJ to suspected war criminals?

Commander SWIFT. Is this question to me, sir?

Senator LEAHY. Yes.

Commander SWIFT. Yes, sir. Speaking in Mr. Hamdan's case, if he were taken to a court-martial, I am well aware that 505(b) would permit the same sort of substitutions that you see in Federal courts, where they could substitute in classified information, substitute proxies, all of the things necessary to protect classified information. Also, under Article 31 Bravo, I am well aware of the decision in *United States v. Lonetree* that says intelligence, information that was gathered under intelligence purposes is not subject to Article 31(b). So I would expect a court-martial to fully address the concerns that have been brought up here today, and we would then be litigating on an even and fair playing field where the truth is going to come out.

Senator LEAHY. In fact, Commander, haven't we had trials in this country for years where there has been classified information involved and it has been handled—the courts have worked it out in such a way to protect both the Government and the defense?

Commander SWIFT. Actually, I have participated in a few of those trials, sir. Our system is very well set up for the protection of classified information. The Uniform Code of Military Justice, unlike a Federal court, is permitted to be closed in a court-martial. And all of the members on the court-martial have security clearances. So you have a lot of flexibility, while still maintaining the accused's right to confront the evidence against them. It is a very good system.

Senator LEAHY. Dean Koh, Mr. Bradbury testified for the administration, the Justice Department witness this morning, he said the administration would abide by the Supreme Court's ruling that Common Article 3 applies to Guantanamo detainees—not a real big concession so far as the Supreme Court did rule that way and he is bound to follow it. But then in something very similar to some of the signing statements, some of the 700 signing statements we have seen, he suggested Common Article 3 was ambiguous and hard to interpret.

Do you find Common Article 3 that ambiguous or hard to interpret?

Mr. KOH. No, I do not. I should point out that the White House spokesman, Tony Snow, was asked a similar question and gave a similar answer. So this sounds like it is the official administration position. They do not know what "humiliating and degrading treatment" means. I think anyone who saw Abu Ghraib knows that is humiliating and degrading treatment.

I think it does mean that you might want to have a list of things, of tactics which are clearly in violation, which include, for example, waterboarding, leading people around with dog collars, threatening

them falsely with execution. Those are clearly violations of Common Article 3.

But you have to remember, Senator, that every country in the world applies Common Article 3, so there is a lot of understanding of what practice is violated or not, and I don't think other countries have found it difficult to apply.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Cornyn—oh, pardon me. Senator Graham was here first.

Senator GRAHAM. Thank you, Mr. Chairman. I want to again thank you for having these hearings. The more we talk about this, I think, the more we can understand our differences and work to get a good solution.

I guess my basic concern is shared by Mr. Olson. I have got a lot of concern, Dean, with all due respect, about how Common Article 3 can restrict our Nation's ability to defend ourselves when it comes to the treatment. When it comes to a regularly constituted court, I think we could fix that pretty quickly. I think we could come up with a military commission model that we all could be proud of. And the debate I got into with our representatives from the administration before is maybe form over substance.

Mr. Olson, my concern is basically that military commissions are spoken of in the UCMJ, so this is not an area where the Congress is silent. The Congress has said within the UCMJ specific things about military commissions.

What restrictions do you think Congress has put, if any, on forming a military commission?

Mr. OLSON. I listened to that colloquy this morning, and it struck me that maybe the point where there was ships passing—

Senator GRAHAM. Passing of the ships?

[Laughter.]

Mr. OLSON. It is that there have been military commissions from the beginning of our country, and it is not just our country; that they have been accepted in many instances by the U.S. Supreme Court. The Uniform Code of Military Justice acknowledges the existence of military commissions, and by specifying procedures for courts-martials, it does not, in my opinion, indicate that military commissions have to be conducted that way, that my understanding—and you may understand it better than I do because of your particular background—is that the Uniform Code of Military Justice is perfectly consistent with the existence and formation and operation of military commissions that operate under different procedures.

Senator GRAHAM. If I could interrupt, I think that is a very good summary of sort of where—military commissions are mentioned in the UCMJ for a purpose. It created another legal venue, believing that in some circumstances the UCMJ may not be the proper venue.

So we talk about a new creature called military commissions, and the reason we got to the law of Common Article 3 is the Court read the UCMJ, where it spoke of military commissions, and it says the body of law would be the law of armed conflict. Certainly within the body of law of armed conflict is the Geneva Convention.

It kind of went around in a circle to get to Common Article 3, and I think we could, if we chose, amend that statute and change it and define what the law of armed conflict was for military commission purposes and exclude the Geneva Convention if we chose to do that. I think we have that power.

The question is: Should we as a Nation—and, Scott—I am just going to call you “Scott,” because you used to be my boss in the Air Force. I never got to do that when we were on active duty. I can do it now.

[Laughter.]

Senator GRAHAM. Give me your opinion about how we create—what source document should we use after *Hamdan* to create a military commission? Should it be the UCMJ modified, or should we just give blessing to Military Order 1?

Mr. SILLIMAN. Certainly not the latter, Senator. One thing that I think we all need to understand with regard to the history of military commissions, the last commissions in this country were the *Kierin* case after World War II, and I think most people do not know that the Attorney General actually sent a second case involving German saboteurs into Federal court. But the UCMJ was enacted by Congress in 1950 to be effective in 1951, Senator, because of the concerns.

You remember the scathing dissent of Justices Rutledge and Murphy in the *Yamashita* case with regard to the very loose procedures that were used in that. It was a legitimate commission, but it came under caustic rebuke.

Now, I think what Congress was saying in enacting the UCMJ—and, as you point out, Senator, incorporating in both Articles 18 and 21 specific references to military commissions—is that it wanted to incorporate, and it said so in 36(b), court-martial proceedings as much as practicable.

Senator GRAHAM. Uniform as practicable.

Mr. SILLIMAN. Yes. So I would say, Senator, that we start with a high bar. We start with the UCMJ which, for 56 years, has been recognized and which the Supreme Court in effect said was fully compliant with Common Article 3—not that that is the test, but it complies. So I do believe that within minimal amendments to the Code, probably through Article 18 and specifically limited to war crimes, again, there has been no court-martial—I stand to be corrected here, but I don’t think a general court-martial has actually ever been implemented to prosecute a violation of law of war.

So as you said, Senator, we are starting and building a new system for the future. If we are going to do it, I think the baseline ought to be the UCMJ, certainly rather than just trying to reverse the Court’s decision in *Hamdan* by ratifying, as it were, the President’s military order.

Chairman SPECTER. Thank you, Senator Graham.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

I appreciate each of you being here today and offering your expertise to us. Mr. Olson, let me ask, in your testimony you note the danger of requiring the Government to disclose sensitive intelligence information to al Qaeda operatives that it seeks to pros-

ecute under this ruling. I am concerned because al Qaeda consumes any information that it can get its hands on to help it in its cause.

For example, al Qaeda has reviewed the military's field manual to help its associates resist interrogation. Former New York terrorism prosecutor Andy McCarthy has written how he complied with the court requirement to turn over information to suspected terrorists, and that list was later used as evidence in another terrorism trial when it was learned that the list had been passed by al Qaeda associates through its network and was discovered in the Sudan.

Can you explain how we can proceed in a way that does not turn over our secrets to the terrorists in a way that will empower them and potentially endanger the American people?

Mr. OLSON. Senator Cornyn, I think that that subject was addressed very well in Mr. Cobb's testimony with respect—am I correct?—to the lawyers, having cleared lawyers have the opportunity—to the extent that we have to go that far, to have cleared lawyers, lawyers that have been through the process to have access to the information, and that it need not then go to the terrorist under the circumstances where a determination has been made that it is extremely sensitive, source method type information that could be very, very damaging to the United States.

I think that could be done. I have stressed in my testimony that it would be very important to allow this uniformity as far as practicable as an illustration of that. Historically, the courts have given great deference to the judgments of the President who has the constitutional responsibility as Commander-in-Chief to defend this country against acts of war and acts of terrorism. The judgment, I hope, that if this Congress codifies in some way the military commission process and sets forth a specified set of rules, that there will be flexibility built into it so that the President in the exigent circumstances, when it is necessary, when it is practical, when it is appropriate, can deviate from those circumstances, and that it is understood in the legislation, not just in the legislative history, that deference will be given to the President's judgment with respect to that. He is the constitutional authority that must make snap, immediate decisions, and as I indicated in my testimony, to have those decisions second-guessed years later in the context of a terrorist bringing a commander to account or for a President's decisions to be micromanaged by a judiciary years later with respect to the correctness of those decisions makes no sense to me.

Senator CORNYN. Do you have reservations about if we were to adopt the framework of the UCMJ that it would create those problems you have just described?

Mr. OLSON. Absolutely, and I think the testimony this morning was very, very clear about that, by people that know a great deal more about it than I do. But the idea of *Miranda* warnings, *Brady* rules, and search warrants before someone knocks open a door, the idea that we have opened the door to judicial review of the status of a combatant from the moment he is taken into custody, which is the consequence of the *Rasul* and *Hamdan* decision, has grave consequences with respect to the decisions that our people have to make when their lives are imperiled on the ground in the midst of a war when people are blowing themselves up to kill them.

Senator CORNYN. Professor Silliman, I gather you think we can start with the framework of the UCMJ and carve out exceptions where the application of that to servicemembers is not practicable when applied to terrorists. Could you describe that?

Mr. SILLIMAN. Senator, I think we first need to understand that the scenario that was described would also say that when our own servicemen commit acts of rape and pillage, that there is a total vacuum of a law enforcement function, that is just not true, Senator. All we are talking about is taking an existing system where the members of our armed forces know well the restraints. And I am not talking about a *Miranda* type Article at 31(b). That is not my concern. But to suggest that the military somehow should have no matrix, no legal matrix outside the UCMJ at all to operate to fight terrorism, to me starts a very slippery slope. And I very much worried, sir, that we would then become much as those we call our enemy, and I think that is not the signal we need to send.

That is why I do stress that I think the bar that we set, that this Congress sets, and in conjunction with the administration, ought to be high and make exceptions where needed in the wisdom of this body. But don't start with a low bar. That is the wrong message to send, and it is not necessary.

Senator CORNYN. My time is up, but I would appreciate it if you would provide me and the Committee a list of those exceptions where you believe they would be warranted.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator SESSIONS.

Senator SESSIONS. Thank you.

We do need to figure out how to get a proper response to the Supreme Court's opinion and create a system which complies with that opinion. I am not one that thinks it is sent from heaven, but it is the law. So we will see if we can work for it, work with it.

I guess, Mr. Cobb, you were counsel at the Defense Department. Senator Graham and I were just talking about the UCMJ. That is prepared by the Department of Defense and either acted on or rejected by the Congress?

Mr. COBB. The Manual for Court-Martial.

Senator SESSIONS. The Manual for Court-Martial?

Mr. COBB. I believe that is correct, sir.

Senator SESSIONS. As you look at—well, let me ask, Mr. Olson, you were Solicitor General. You have represented the United States before the Supreme Court innumerable times and you speak for the entire Government before that Court. Why wouldn't we want the Department of Defense or the executive branch to prepare a new commission procedure and submit it to Congress and let us evaluate it for appropriateness? Would that be a good step?

Mr. OLSON. Well, that may be a very good idea. I cannot, as I sit here, think of any reasons why it would not be a good idea, because then to the extent that the Congress is not simply codifying what is already in existence, in a sense that the President set forth rules and procedures for the creation and implementation of military commissions, but to require—or to give the Defense Department and the administration time to go back and do it again and then submit it to Congress for approval by Congress is probably a

good idea. I just have to stress, though, that to the extent that it is too specific and too rigid and involves too much micromanagement by the courts—because I think that is something that needs to be done, too, that something has to be done about the habeas corpus statute, or you are going to have courts supervising the implementation of those procedures from the moment someone is taken into custody. And so I think that has to be a part of the package.

Senator SESSIONS. Well, I could not agree more. I am thinking about our difficulties with immigration. We in the Senate and this Committee have attempted to write laws to enforce the border when it seems to me that if the administration is serious about border enforcement, they have the people working at it every day. They have got prosecutors. They have got investigators. They have got agents. They ought to be telling us what they need and proposing to us legislation that would fix the border.

It strikes me, Mr. Cobb, that the military has got the responsibility to defend America, to detain dangerous criminals and not to release them, and to see that those who are unlawful combatants are appropriately tried. Shouldn't they have the responsibility—or wouldn't it be the appropriate way for us to operate for the Department of Defense to suggest how they would like to go?

Mr. COBB. Senator, I believe that is an excellent suggestion. The Department of Defense has spent nearly 4 years working on these very issues with respect to the creation of the military commissions, and they have even encountered some of the practical difficulties that you have in the stillborn trials that have been held so far. And so I think that asking the Department of Defense to come back with a new recommendation would be a very useful idea.

Senator SESSIONS. And I am thinking about the practicalities of it all. We get overconfident about how easy it is to prosecute cases. We assume that you have got a pretty good case and something is just going to all fall together and it is going to be successful and somebody will be convicted if they are guilty. But I have seen guilty people get acquitted. I have seen trials fall apart. I have seen judges say, "That is hearsay," or "The chain of custody is not sufficient," or "That item of evidence was seized unlawfully," exclude the evidence and the case fell apart right there. It is one thing if that is a marijuana dealer. It is another thing if it is a person who makes bombs, has a plan to kill Americans, has sworn to destroy the United States and actually been part of a movement that has declared war on the United States.

So I am troubled by it all. I know we must have and have always had the responsibility, morally and legally, to give people a fair trial. But, Mr. Olson, with regard to many of the rules that we have in our procedure of justice, the *Miranda* rule where you have to warn people before you ask them questions, the exclusionary rule that says if the constable erred, you cannot use the evidence against him even if it is a bloody knife that proves he was a murderer. Those kinds of things are not part of most developed nations' laws, as I understand it. Can't you have a fair and just system that does not provide every single protection in terms of right to counsel and these other issues I have mentioned?

Mr. OLSON. I agree that we can, but the idea—the thing that concerns me that I have been talking about is applying the Bill of Rights, as the Supreme Court has interpreted the Bill of Rights, in the context of a war where there is going to be judicial review of those decisions. One of the Supreme Court's decisions this term had to do with a knock-and-announce rule before you could go into a building. Will that work in Iraq? Do you have to knock and announce and wait for the bomb to go off?

Now, that is an extreme example, but where is the line to be drawn between the constitutional rights that the Supreme Court has articulated with respect to our citizens and the prosecution of crimes compared to the conduct of a war in wartime in the battlefield? And I think it is exceedingly important that we understand that that is a completely different environment and the people whose home we might be going into in Iraq because of weapons that are discovered there are not citizens of the United States and are not subject to the protections of our Constitution. They wish to destroy our Constitution.

Senator SESSIONS. Thank you.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Hatch.

Senator HATCH. Well, Mr. Olson, you describe the *Hamdan* decision as “an extremely cramped and unworkable interpretation” of the Authorization for the Use of Military Force that Congress passed when this war began. Similarly, as you describe, the Court found ambiguity in what I thought was crystal clear Detainee Treatment Act language regarding the Court's jurisdiction over these habeas corpus lawsuits.

What does this mean for how we respond to the Court's decision? Some might want to respond with legislation that amounts to a very particularized, detailed, specific regulatory approach. Do we still have the flexibility to acknowledge the constitutional prerogatives of the President as our Commander-in-Chief?

Mr. OLSON. I think it is exceedingly important that there has to be some sort of legislative response, there is no question about that, and I would recommend—this is just my view—that that legislative response acknowledge that during wartime the President must have flexibility, discretion to make decisions, of course, not in a lawless way, but flexibility to respond to circumstances. The Authorization for the Use of Military Force was couched in general language intentionally, I submit, because the Congress under those circumstances could not anticipate and could not prepare an itemized bill of particulars of every single use of authority or use of military force that was being authorized by that. So it speaks in terms of all necessary force to deal with the situation of terrorism.

Now, I understand and I agree with some people that say, yes, the White House might have taken that too far under certain circumstances. I am not an expert on that. Those have to be looked at individually. But the President does need the authority; and the only way that the Supreme Court is going to accept that, given what the decision in *Hamdan* has been, is for Congress to make it clear wherever it can, if there are to be procedures, fine; if there is to be a method by which a military commission is established, fine; but that this body reinforce what I think it said in the Author-

ization for Use of Military Force, that within those ranges, within the limitations, as understood in the *Youngstown Steel* case, that the President has the authority to move forward and exercise discretion.

Senator HATCH. Mr. Cobb, let me turn to you. In your testimony, you emphasize that we must maintain what you called a specialized law of war court that is different from domestic criminal courts or a court-martial. I would like you to respond to Professor Silliman's argument that the President should simply use already established court-martial proceedings under the Uniform Code of Military Justice rather than separately established or constituted military commissions. I believe Commander Smith came to the same conclusion on that. And you said that notwithstanding its possible surface appeal, this approach would have, in your words, "significant problems."

I would like you to expand on that a bit and perhaps respond to Professor Silliman's conclusion that we must, nonetheless, as he put it, set the bar high and take this step to restore our international credibility.

Mr. COBB. Well, Senator, that is an excellent question that really sums up a lot of what we have been discussing today, and I think that, you know, whatever you call the tribunal, the war crimes tribunal that we use to prosecute war crimes, it has to have certain key features. And if you change a court-martial into, you know, a new forum that has those key features, you are basically calling a rose by another name.

The court-martial system, if modified, I would argue is really a military commission system. If you keep the court-martial system as it is, you are going to have a number of problems in going forward. You are going to have problems with introduction of evidence. You are going to have problems with handling classified evidence. And you are going to wind up with much fewer prosecutions.

I am somewhat familiar with the evidence that we have with respect to the detainees at Guantanamo, and I think that if you ratchet up the level of procedural requirements so high, you will wind up having few, if any, war crimes prosecutions. I think that is to the detriment of us all because I think that there is an inherent value to having these prosecutions. It gives justice to the detainee, and it gives justice to the people of the United States who want to understand what has happened in this war on terrorism.

Senator HATCH. Mr. Chairman, could I just possibly ask one more question?

Chairman SPECTER. One more question. Proceed, Senator Hatch.

Senator HATCH. Okay. Mr. Collins, I would like to ask you this question. On the theme of reading the *Hamdan* decision for what it is rather than reading into it what we might want it to say, I would like you to expand on the point in your testimony that the Court did not find any constitutional violation. That is, the Court did not say that the Constitution compelled its conclusion that the procedures used in the military commissions created by President Bush were inadequate. As you pointed out, Justice Kennedy said in his concurring opinion that domestic statutes controlled the case.

Now, why is this point so important? Does it mean that since you emphasized this is indeed a very real war, the Court was not ques-

tioning the President's essential Executive authority as Commander-in-Chief to establish military tribunals? Does it give the Congress more flexibility with regard to how we respond to the Court's decision?

Mr. COLLINS. I think that it does. You know, we read the opinion, and it is 70-something pages, and it is hard to think that there were actually more issues in the case, but there were. The common Article 3 issue, the merits of that issue, was addressed in the last paragraph of the Government's brief, the carryover paragraph from page 49 to 50, because there were so many other issues in the case. There were quite a number of constitutional challenges that had been raised to commissions, and the Court did not accept any of those arguments but, rather, seemed to operate from the premise that this was validly considered to be a subject of military justice, and it was a question of what the procedures were, and it found violations of a purely statutory and treaty nature. But the treaty one is unusual in the sense that because they essentially said the treaty says that you have to have a properly authorized structure, it is one that can also be fulfilled by legislation.

So this is not a case where the legislation would seek to kind of override the treaty by statute, which is something you can do, but it is not something you need do here. A statutory fix will solve the problems identified by the Court's opinion.

Chairman SPECTER. Thank you, Senator Hatch.

Thank you all. We could continue this hearing—

Senator FEINSTEIN. Mr. Chairman, may I have just one chance?

Senator SPECTER. Senator Feinstein, you are recognized.

Senator FEINSTEIN. Thank you very much.

Lieutenant Commander Swift, I was very interested to hear your testimony, largely because you are really the only one that I know of that has actually represented someone in this situation. And if I had to state where I am today, it would be that we ought to take the Code of Military Justice, go through it very carefully, make decisions as to what is appropriate in this circumstance and what is not appropriate, and codify that and add a codification of the treatment level similar to what Secretary England just did in his missive to DOD.

My concern—and I want to ask you about this. I was at Guantanamo once with Secretary Rumsfeld and Senator Hutchison and I think Senator Inouye. It was early on. But I was struck by the isolation of the facility and how you put together any kind of defense, let's even say appropriate defense, how you get the information, how you are able to talk with witnesses. And I was wondering if you would comment on that.

If we were to do that with the Code of Military Justice and make decisions, Republicans and Democrats hopefully coming together, as to what would be an appropriate new bill, could that, regardless of what it was, be effectively carried out in the Guantanamo setting?

Commander SWIFT. There are two parts to your question, ma'am, and I will start with the first part.

I agree, in Mr. Hamdan's case we fought very hard to get him a fair trial, and we know the UCMJ represents that. One should look at the UCMJ, not only just what is written in the statutes,

but also what CAF, the Code of Armed Forces for the Military, has said and what each of the service courts have said. A lot of talk has been out there about, for instance, Article 31 Bravo, that it would somehow stop prosecutions. Yet CAF has said a great deal about 31 Bravo, and in the *United States v. Lonetree*—

Senator FEINSTEIN. Tell me what the 31 Bravo is.

Commander SWIFT. I am sorry, ma'am. That is the military equivalent to Miranda. That has been thrown around as a real problem. But what was said in that particular case was that, for instance, for intelligence-gathering purposes, then 31 Bravo would not apply. It would only apply to law enforcement.

So I think what all of that stands for is that it takes a very careful reading through, because not only is there the code, there are 50 years of interpretation of it. And that is why a court-martial would work immediately now, because we would know—we as military attorneys know what the rules are. I can start the trial now and go forward. And I think you raise another very good point, ma'am. It has been 5 years, at a minimum, for a lot of this. Witnesses are disappearing on both sides very quickly. If we wait, if we do not move forward and do not use courts-martial, and after more litigation we find ourselves right back here in 4 or 5 more years after we have litigated through a quick fix, then what are we going to end up with? Neither side will ever get a fair trial, and both Mr. Hamdan and the United States deserve one.

Senator FEINSTEIN. All right. Now, take Guantanamo. Assuming what you say was done, can it be effectively carried out in an isolated setting?

Commander SWIFT. It makes it much more difficult doing it away from the battlefield. It is going to require that we have access to the battlefields. Unfortunately, that is what has happened. Can it be done? Well, I think anything can be done if you put the resources into it. It probably would have been easier, at least in Mr. Hamdan's case, to do it in Afghanistan. We are not there now. I am seeking a fair trial, and if the Government gives me the resources to go through—and they have done that so far—then we will do the best we can. But I stress that we need to do it now, and by court-martial.

Senator FEINSTEIN. Just quickly—and I thank you because the time runs out—does anyone on the panel differ with that? And if so, how? Dr. Koh.

Mr. KOH. Well, I just had an important point to make about the prior comment that there is no constitutional issue. As a law dean, I should just say that is just a misstatement of law, and this Committee should care about it. To say that *Hamdan* is not a constitutional decision is like saying the steel seizure case is not a constitutional decision and only involved an interpretation of the Taft-Hartley Act. What we all know is that the steel seizure case turned on which category of Youngstown Sheet and Tube it fell into. Was it in the highest category in which the President's power is at its peak? Or is it in the lowest category because the President was acting in the face of and contrary to an existing statute of Congress?

And what the Supreme Court said in *Hamdan* by a majority is it is in the lowest category because they did not act consistently with the opinion. This is Footnote 23 of the majority opinion. Jus-

tice Kennedy's concurrence specifically mentions the steel seizure case, and Justice Thomas in his dissent also puts the case into the *Youngstown* framework, although he comes to a different conclusion.

So it is just wrong to say that this case is about statutes only. There is a constitutional dimension of this case, and were this court to legislate, it would have to be doing it in that framework as well.

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Mr. SILLIMAN. Mr. Chairman, may I—

Chairman SPECTER. You want to make an additional comment, Professor Silliman?

Mr. SILLIMAN. May I just add one brief comment? Military commissions and courts-martial from their very beginning were a product of Executive power under his Commander-in-Chief authority with the support and the assistance and enactment of legislation from the Congress. Now we face the same issue, that where we go from here, whether it be any of the options that any of us have discussed, must absolutely be a product, a joint product of the administration and the Congress. If either branch tries to do it by itself, it will not work, sir.

Chairman SPECTER. Thank you very much, Professor Silliman, and thank you all. As I had started to say a few moments ago, we could go on at some considerable length. We had previously scheduled the confirmation hearing of Mr. Haynes for 2:15, and we pushed that back to 3 o'clock, and we are a little late on that. But we very much appreciate your coming in, and this has been an extraordinary panel that has given us a very wide range of options to select from, starting with simply the congressional ratification of what the President has done, to a full range of rights almost equivalent to what goes in a Federal criminal trial. And we will be wrestling with the issues of the right to counsel and *Miranda* rights and access to classified information and exculpatory evidence, *Brady*, and the Uniform Code of Military Justice and Article 3 of the Geneva Convention. We will be working coordinately with the administration. And the Armed Services Committee and this Committee will be working jointly, and we will come up with a product.

It is very important that we do so promptly. There are many individuals involved, and we are under direction by the Supreme Court. This is really perhaps as much of a classical case of separation of powers as you could find, with the intervention of Articles I, II, and III all together. And it is very helpful to have professors and deans and practitioners and defense lawyers all at the table to give us advice. It has been very helpful.

We thank you, and that concludes our hearing.

[Whereupon, at 3:08 p.m., the Committee was adjourned.]

[Questions and answers and submissions follow.]

QUESTIONS AND ANSWERS



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 7, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on July 11, 2006, concerning the standards to be used by military commissions.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Committee on the Judiciary
United States Senate

Hearing on
“*Hamdan v. Rumsfeld*: Establishing a Constitutional Process”
July 11, 2006

Questions Submitted by
Senator Patrick J. Leahy
to
Steven G. Bradbury
Assistant Attorney General

Questions for Mr. Bradbury:

1. In response to a question I asked about procedures for trying detainees, you stated that “a good example to look to” for creating separate rules for military commissions would be the international criminal tribunals for the former Yugoslavia and for Rwanda. You characterized those rules as “regularly allow[ing] the use of hearsay evidence.” In fact, under Rule 92 *bis* of the rules for both tribunals, hearsay evidence in the form of a statement may be admitted only if the evidence “goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.” Indeed, the trial chamber trying Slobodan Milosevic emphasized that “regardless of how repetitive [hearsay] 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).

(A) Were you aware of this limitation on the use of hearsay evidence when you testified?

(B) Does the Administration support the inclusion of a hearsay rule modeled on Rule 92 *bis* in any military commissions legislation passed by Congress?

As I stated at the hearing, the international criminal tribunals for the former Yugoslavia and for Rwanda permit the admission of relevant evidence that the tribunal deems to have probative value, including hearsay evidence, as long as it is not substantially outweighed by the need for a fair trial. The rule to which you refer (Rule 92 *bis*) prohibits the submission of written witness statements to establish the guilt of the accused. This rule does not, however, create a blanket prohibition on the admission of hearsay evidence; instead it provides a narrow limitation on the ability of the prosecution to introduce certain forms of *written* evidence as a substitute for live witness testimony. Thus, although ICTY and ICTR do place some restrictions on the use of written hearsay, both tribunals broadly permit the introduction of reliable hearsay evidence that takes the form of oral testimony. It is worth noting that the rules of the International Criminal

Court similarly permit the introduction of hearsay evidence, whether in oral or written form, so long as it is probative and would not prejudice the fairness of the proceeding.

We believe Congress correctly chose not to distinguish between oral and written hearsay in the MCA because in some circumstances, written hearsay may not only be reliable, but may be the best evidence available to establish a particular fact. Under the MCA, the military judge will be able to admit probative hearsay statements unless the evidence is found to be unreliable under the circumstances. *See* 10 U.S.C. § 948r.

2. There has been much discussion about the need to have adequate procedures in place to protect classified information. The Classified Information Procedures Act (CIPA) was enacted in 1980 to deal with these situations in the domestic, criminal context. CIPA permits a court to authorize the Government to delete specified items of classified information and substitute a summary. Rule 505 of the Military Rules of Evidence provides parallel protections for use of such information in courts-martial.

(A) Have there been any federal terrorism cases that the Government has had to dismiss because of an adverse ruling under CIPA? If so, please provide the names of the cases.

(B) Have there been any federal terrorism cases in which, due to rulings under CIPA, evidence has not been admitted at trial and a defendant has subsequently been acquitted? If so, please provide the names of the cases.

(C) What specifically about the procedures of CIPA, or Rule 505 of the Military Rules of Evidence, is inadequate to keep classified information secret while trying detainees?

We believe that the MCA strikes an appropriate balance between the rights of the accused and the need to protect classified evidence from disclosure to the enemy. The new law grants the accused the right to be present for all trial proceedings. *See* 10 U.S.C. § 949d(e). Moreover, the accused or counsel will have access to all the evidence admitted before the trier of fact. *See id.* §§ 949a(b)(1)(A), 949d(f). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f)(2)(B).

The Administration did not support these procedures because of dissatisfaction with any particular judicial rulings under CIPA or Military Rule of Evidence 505. Rather, we supported these procedures because CIPA and Rule 505 are not principally aimed towards protecting classified information in the way it is likely to be used in military commission prosecutions. CIPA and Rule 505 often apply in cases where the accused himself has had access to the classified information, and the procedures simply permit the trial to go forward in public without the unnecessary disclosure of classified evidence. By contrast, the defendants in a military commission prosecution are not

individuals who have had security clearances. Much of the evidence gathered against them, however, is likely to be classified or to be derived from classified sources. While the MCA procedures bear some resemblance to CIPA and Rule 505, the procedures are considerably more robust, in order to allow the prosecution to introduce evidence derived from classified sources and to meet reasonable discovery obligations in ways that permit fair prosecutions while protecting our Nation's secrets from disclosure.

3. The Administration consistently calls every person who is locked up at Guantanamo Bay a terrorist. But many of the detainees at Guantanamo are members of the Taliban and not al Qaeda. In fact, one of the 10 detainees charged in a military commission, David Hicks, falls into that category. Mr. Hicks has been charged with attempted murder and aiding the enemy based on the fact that he was aiding the Taliban on the battlefield. Is it the Administration's position that members of the Taliban who resisted the Northern Alliance and the United States are war criminals? Is everyone who shot back at coalition forces in 2001 a terrorist?

Individuals detained at Guantanamo Bay are detained as enemy combatants, that is, as persons who took part in hostilities against the United States and its coalition partners. Anyone who "shot back" at coalition forces in 2001 would be properly classified as an enemy combatant and, pursuant to the well-established laws of war, may be detained as such for the duration of hostilities. The Supreme Court recognized as much in the *Hamdi* case. It is not necessarily the case that every enemy combatant be deemed a war criminal (or, for that matter, a "terrorist"). Indeed, privileged combatants who abide by the laws of war are generally entitled to immunity for their actions on the battlefield; although they could be detained for the duration of the conflict, they could not be prosecuted merely for shooting back at United States forces.

The members of the Taliban detained at Guantanamo are not lawful combatants, however. They neither distinguished themselves from the civilian population in Afghanistan nor did they conduct their operations in accordance with the laws and customs of war. Furthermore, they actively supported, and fought with, the al Qaeda terrorist organization. Therefore, members of the Taliban do not enjoy the immunity from prosecution afforded to lawful combatants. Where there is evidence tying individuals to specific offenses recognized under the law of war, including unlawful belligerent acts, they may be prosecuted for those offenses. The military commissions convened under the MCA will do just that.

4. In response to one of my questions you stated that, "in general," the Administration views courts-martial as inappropriate to use for detainees. Does the Administration believe it could convict Salim Hamdan or any of the other approximately 450 individuals currently being detained at Guantanamo – whom the Administration has characterized as "the worst of the worst" – in a court-martial? If so, why does it not proceed immediately? If not, why not?

As I testified at the hearing, the Department does not believe that courts-martial, which are typically used to try our own troops, are well suited for the trial of unlawful enemy combatants—including persons fighting against the United States on behalf of international terrorist organizations—who are not entitled to combatant immunity and who have committed violations of the laws of war. Courts-martial under the Uniform Code of Military Justice (“UCMJ”) include a variety of procedures—such as rigid prohibitions on the use of hearsay evidence, detailed pretrial procedures that are more protective of the accused than those used in civilian criminal proceedings, and strict requirements that *Miranda*-type warnings be given before the accused may be questioned—that would be inappropriate in the trial of unlawful enemy combatants during an ongoing armed conflict. Rather than bring such unlawful combatants before courts-martial, which were not designed with such persons in mind, the United States intends to try enemy combatants before the military commissions that Congress established under the MCA.

5. In response to a question from Senator Schumer, you indicated that the Office of Legal Counsel would review the *Hamdan* decision to determine how the Court’s view of the Authorization for Use of Military Force (AUMF) affects other Bush-Cheney policies and programs. But you further stated that there is no “particular formal process of review.”

(A) How many Administration policies and programs are justified, in whole or in part, on the AUMF? How many of these policies and programs are public?

(B) When do you expect your informal review process to be completed and will you advise this Committee of the results?

In enacting the AUMF, Congress authorized the President to use force and all of the incidents of force in the course of waging the global war against al Qaeda, the Taliban, and affiliated organizations. The President has relied upon that authority, as well as his own constitutional authority, in the course of waging the armed conflict across the globe over the past five years. In light of the many policies and programs that are incorporated into this effort, it is not feasible to identify a particular number of policies and programs carried out under the AUMF. As you are aware, the Administration has publicly relied upon the AUMF as support for the President’s authority to detain enemy combatants, to establish military commissions, and to conduct electronic surveillance against the enemy.

As I said at the hearing, the Department always attempts to take account of developments in the law as it assesses the legality of ongoing Executive Branch programs and activities. *Hamdan* was obviously a significant decision, and the MCA was a very significant piece of legislation. Both will have implications for various policies and practices employed by the Executive Branch. It would, however, be inappropriate in this setting to go into greater detail about confidential and privileged legal advice that the Department provides for the benefit of policymakers within the Executive Branch.

6. At a Senate Armed Services Committee hearing on July 13, 2006, Senator McCain said that we should not carve out exceptions to treaty obligations.

(A) Does the Administration share this position? If not, why not?

(B) Has any nation in the world that is a party to the Geneva Conventions ever passed a law that denies the application of Common Article 3 to any detainee captured as part of an armed conflict?

The Department of Justice agrees that the United States should not carve out exceptions to its obligations under the Geneva Conventions. As you know, the Administration worked closely with Senator McCain, as well as others in the Senate, in reaching agreement upon provisions in the MCA that reinforce and implement our international obligations by defining them with clarity and precision. Congress specifically recognized that these military commissions are "regularly constituted courts, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," in full satisfaction of our treaty obligations. *See* 10 U.S.C. § 948b(f).

Common Article 3 applies only to conflicts "not of an international character." There are, and have been, many international armed conflicts in which countries would not recognize Common Article 3 as the standard governing the treatment of detainees. I am not personally aware of any specific law passed by a foreign country to "deny the application of Common Article 3," but no treaty provision would require a nation to enact a law stating whether or not Common Article 3 applies in a particular conflict.

7. This Committee held hearings a few weeks after the President's Military Order was released in November 2001. At that time, both Senator Specter and I invited the Attorney General and the Administration to work with us to establish a good, effective and legitimate system for trying detainees held in Guantanamo Bay. We offered to remove all doubt about their legality, and we did this in a non-partisan manner. I said to the Attorney General: "To many, the constitutional requirement that military tribunals be authorized by Congress is clear. To others, it is not. To everyone, it should be beyond argument that such authorization, carefully drawn by both branches of Government, would be helpful in resolving this doubt." The response we received was that the President has all the power he needs. In retrospect, does the Administration regret its decision to act unilaterally and squander the last four-and-a-half years, during which not a single trial has been concluded? Please begin your response by answering either "Yes" or "No."

No. Hindsight may be 20/20, but the Administration made its legal judgment based upon the case law existing at the time. Indeed, in several cases arising out of World War II, the Supreme Court held that the President, acting as Commander in Chief, had the constitutional authority to establish military commissions for the trial of enemy combatants. The Court similarly recognized in those cases that Congress had specifically endorsed the President's authority in what is now codified as Article 21 of the UCMJ.

Relying on those decisions, and other legal authorities, the Administration established military commission procedures that we believed to be consistent with the requirements of the Constitution, the laws of the United States, and all applicable treaties. A unanimous panel of the Court of Appeals for the D.C. Circuit, which included now-Chief Justice Roberts, upheld these military commissions based upon the existing legal precedent.

The Supreme Court's decision in *Hamdan* similarly recognized the President's constitutional authority to establish military commissions. The Court did hold, however, in a closely divided vote, that the military commissions established pursuant to the President's order did not comply with certain provisions of the UCMJ. The MCA remedies those statutory issues and will allow for military commission trials of detainees who have engaged in terrorist activity or otherwise violated the laws of war to proceed in an expeditious manner.

8. You argued at the hearing that it would be inappropriate and impractical for military commissions to follow the procedures of courts martial. For example, you stated:

"When members of the U.S. Armed Forces are suspected of crimes, the UCMJ, in Article 31(b), provides that they must be informed of their Miranda rights, including the right to counsel, prior to any questioning. ... Granting terrorists prophylactic Miranda warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes. The very notion of our military personnel regularly reading captured enemy combatants Miranda warnings on the battlefield is nonsensical"

While I agree with you that Miranda warnings need not be provided on the battlefield, I do not read the UCMJ as actually requiring this. In fact, the Court of Military Appeals has held that the UCMJ requires a person to be Mirandized "only if he is a suspect at the time of the questioning and the questioning itself is part of an official law-enforcement investigation or disciplinary inquiry." (*U.S. v. Good*, CMA 1991). When someone is being interrogated for intelligence purposes, the Miranda warnings of UCMJ Article 31 are not required. (*U.S. v. Lonetree*, CMA 1992). In light of these and similar CMA decisions, how would Article 31(b) interfere with "the need to question detainees for intelligence purposes"?

Congress correctly determined that Article 31 of the UCMJ should not apply, directly or indirectly, to the trial of unlawful enemy combatants by military commissions. See 10 U.S.C. § 948b(d)(1)(B). With respect to your specific question, Article 31 requires members of our Armed Services to provide *Miranda*-type warnings before questioning any individual suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law-enforcement investigation. That right is broader than the right afforded to criminal defendants in the civilian system and should

not be applied to the questioning of captured terrorists. The Court of Military Appeals held in *Lonetree* that intelligence agents who were not members of our Armed Forces did not have to provide Article 31 warnings when conducting an interrogation wholly divorced from a military law-enforcement investigation. See *United States v. Lonetree*, 35 M.J. 396, 405 (C.M.A. 1992). But Article 31 may well apply to many situations in which members of our Armed Forces interrogate or interact with detainees suspected of having violated the laws of war. Our troops should not be required to guess whether the interrogation of a particular detainee is sufficiently investigatory to require that warnings be given. Nor should they be forced to choose between conducting effective interrogations to gather information vital to saving American lives or risking having confessions later deemed inadmissible for failure to provide adequate warnings under Article 31. For this reason, we support Congress's determination to provide expressly that Article 31 shall not apply to military commission proceedings.

9. You testified that the Combatant Status Review Tribunals (CSRTs) "are not required by international law." Does international law impose any obligation on the United States to ensure that people we capture in Afghanistan and imprison for years on end are, to use the Administration's term, enemy combatants?

International law generally leaves decisions about the detention of enemy combatants to the discretion of the parties to an armed conflict. We are aware of no rule of international law that would permit those detained as enemy combatants to insist upon a particular set of procedures for the determination of combatant status. That said, the United States has adopted the CSRT procedures to ensure that those detained are in fact enemy combatants. Congress in the Detainee Treatment Act of 2005 expressly recognized the use of CSRTs to make those determinations, and it provided for judicial review of CSRT determinations in the United States Court of Appeals for the District of Columbia Circuit.

10. According to a recent article in the *New Yorker*, in 2002 a series of meetings was held at the White House in which the deputy national security advisor warned that innocent people were being locked up in Guantanamo Bay. David Addington reportedly responded: "These are 'enemy combatants.' . . . They've all been through a screening process." What screening process was used at that time to determine that those detainees transferred to Guantanamo Bay were properly designated "enemy combatants"?

Since the beginning of this conflict, determinations about enemy combatant status have been made by military personnel who have knowledge about the activities of individuals detained during the course of hostilities. My understanding is that the screening process has been no different from what the United States military has employed in past conflicts, and it is fully consistent with the law of war. As for the exact procedures, however, I would refer you to the Department of Defense, which is in a better position to provide a response. The United States, of course, has no wish to detain individuals who are not enemy combatants and has always sought to make status

determinations in an appropriate and reliable manner, consistent with military imperatives.

Under current practice, the Department of Defense provides an unprecedented level of review to enemy combatants, including a review by the United States Court of Appeals for the District of Columbia Circuit. All detainees at Guantanamo Bay have received, or are in the process of receiving hearings before CSRTs. Congress recognized these procedures and provided for judicial review in the Detainee Treatment Act of 2005. In providing alien enemy combatants with an opportunity to challenge their detention in federal court, these procedures go considerably beyond what the United States has provided to detainees in prior conflicts.

11. Section 2441 of Title 18 makes it a war crime under U.S. law to violate Common Article 3 of the Geneva Conventions which, among other things, prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." What analysis has been done since the Authorization for Use of Military Force of section 2441 and its criminal prohibitions? What documents, legal memoranda and opinions of the applicability of this law have been produced? Has the President taken any action to immunize conduct that could be argued was in violation of Common Article 3 or section 2441?

As you note, Section 2441(c) of the Title 18 criminalizes violations of Common Article 3. The MCA amended that provision to specify with particularity the grave breaches of Common Article 3 that, if committed in the course of an armed conflict "not of an international character," would give rise to criminal liability. Before the Supreme Court's decision in *Hamdan*, it was the position of the Executive Branch, memorialized in a Memorandum issued by the President of the United States on February 7, 2002, that Common Article 3 did not apply to al Qaeda or Taliban detainees because the relevant conflict was "international" in scope. Based on that understanding, neither Common Article 3 nor Section 2441(c) would apply as a matter of law. At the same time, the President made clear in the February 2002 Memorandum that as a matter of policy, all detainees were to be treated humanely consistent with the values of this Nation and with the principles of Geneva. Beyond that, it would not be appropriate to discuss confidential and privileged legal advice provided by the Department for the benefit of policymakers within the Executive Branch.

Committee on the Judiciary
United States Senate

Hearing on
"Hamdan v. Rumsfeld: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Russell D. Feingold
to
Steven G. Bradbury
Assistant Attorney General

1. Please provide a complete list of each provision of the Uniform Code of Military Justice and the Manual for Courts-Martial that you believe should not apply in trials of Guantanamo detainees. For each individual provision that you object to, please explain:
 - a. Why you believe the provision should not apply, including an analysis of the text of the provision and the case law interpreting that provision; and
 - b. The specific change to the provision that you would propose and why the change is necessary.

As you know, since I testified, Congress has passed the Military Commissions Act of 2006 ("MCA"), which establishes statutory military commissions that track the Uniform Code of Military Justice ("UCMJ") in many respects, but depart where the provisions of the UCMJ would be inappropriate or impracticable for the trial of captured terrorists. The MCA provides that the UCMJ does not directly govern military commission prosecutions, *see* 10 U.S.C. § 948b(c), and it specifically identifies several articles as inapplicable, *see id.* § 948b(d). Other provisions of the MCA track the UCMJ where and to the extent that Congress deemed appropriate, and the Administration supports the judgment of Congress.

The MCA provides that the rules issued by the Secretary of Defense shall track those of the Manual for Courts-Martial insofar as he "considers practicable or consistent with military or intelligence activities," and such rules are consistent with the MCA. *Id.* § 949a(a). After consulting with the Department of Justice, the Department of Defense recently released a Manual for Military Commissions, which tracks the court-martial rules in most instances except where the departures are required by the MCA. With respect to those rules that the Secretary of Defense found to be impracticable or inconsistent with the Nation's military or intelligence activities, I would refer you to the Department of Defense, which is in a better position to respond.

2. The Administration has repeatedly taken the position that detainees should only have the ability to challenge the military commissions' structure and format in

post-trial review. The Supreme Court has now ruled that the Administration's military commissions as currently constituted are unlawful. If the Administration's position on post-trial review had been accepted, the Supreme Court's ruling would have been delayed still further, and any proceedings that had been completed would have had to begin again. In light of this history, if Congress determines that legislation is necessary to authorize a new form of military commission, would you support allowing for pre-trial, expedited review of any new military commission structure?

We continue to believe that a detainee, like a criminal defendant in the civilian justice system, should not challenge the military commission's structure until after a conviction, if they are convicted. We believe that the MCA remedies the questions of statutory interpretation that led the Supreme Court to hold that the military commissions in *Hamdan* were not properly authorized and that the procedures were subject to challenge before trial. After military commissions are convened and completed pursuant to the MCA, we believe that courts will be in a better position to review any challenge to commission procedures after a final judgment is reached in a concrete case, rather than by deciding facial challenges to commission procedures in the abstract.

3. Why have only ten individuals out of the several hundred detained at Guantanamo Bay been charged with crimes?

As the Supreme Court recognized in the *Hamdi* decision, the United States has the authority to detain all enemy combatants for the duration of the hostilities. In the first instance, the decision whether to charge an enemy combatant with a crime depends, however, on whether there is specific evidence that the individual committed a war crime. To date, that determination has been made for a relatively few individuals detained at Guantanamo Bay, but the conduct of those trials was delayed by the litigation that resulted in the *Hamdan* decision. Now that the MCA has established statutory military commissions, we would expect that a far greater number of detainees will be charged and tried by military commission.

4. You argued at the hearing that the hearsay rules for courts-martial may need to be changed in the context of prosecuting Guantanamo detainees, and that "a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact finder, and as long as it is not outweighed by undue prejudice."

- a. Do you agree that the rule governing the admission of hearsay evidence in these international criminal tribunals only allows hearsay evidence "which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment"?
- b. Given that you have expressed support for the international tribunal rules as a model for hearsay, would you support also including this exception in any proposed military commission rules allowing hearsay? If not, why not?

The international criminal tribunals for the former Yugoslavia and for Rwanda permit the admission of relevant evidence that the tribunal deems to have probative value, including hearsay evidence, as long as it is not substantially outweighed by the need for a fair trial. The rule to which you refer (Rule 92 *bis*) prohibits the submission of written witness statements to establish the guilt of the accused. This rule does not, however, create a blanket prohibition on the admission of hearsay evidence; instead it provides a narrow limitation on the admission of certain forms of *written* evidence as a substitute for live witness testimony. Thus, although the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do place some restrictions on the use of written evidence, which would include written hearsay, both tribunals broadly permit the introduction of reliable hearsay evidence that takes the form of oral testimony. It is worth noting that the rules of the International Criminal Court similarly permit the introduction of hearsay evidence, whether in oral or written form, so long as it is probative and would not prejudice the fairness of the proceeding.

We believe Congress correctly chose not to distinguish between oral and written hearsay in the MCA, because in some circumstances written hearsay may not only be reliable, but it may be the best evidence to establish a particular fact. Under the MCA, the military judge will admit probative hearsay statements unless he determines that they are not reliable under the circumstances.

5. **When I asked you at the hearing about the impact of the Supreme Court's decision in *Hamdan v. Rumsfeld* on the Administration's legal analysis of its NSA wiretapping program, you indicated that you are continuing to look at the opinion and would apprise me of any changes in your views. I am attaching a letter from a group of law professors arguing that the *Hamdan* decision "significantly weakens the Administration's legal footing" on the NSA program. In light of this letter, do you continue to believe that *Hamdan* does not affect your conclusion that the program is legal?**

We continue to believe that the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), does not alter the Administration's conclusion that the Terrorist Surveillance Program that the President has established to monitor the international communications of terrorists is fully consistent with the Constitution and federal law.

The Supreme Court in *Hamdan* held that the President's military commission order conflicted with the UCMJ. Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the President's order, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President's inherent constitutional

authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the statute. *See id.* at 2777 n.29.

The legal positions of the Executive Branch during this armed conflict have not been merely claims of inherent executive power. By enacting the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (“Force Resolution”), Congress confirmed the President’s authority to “use all necessary and appropriate force” against al Qaeda. Accordingly, the Administration has taken the position that the Force Resolution authorizes a number of measures undertaken to protect the Nation’s security and to defeat the forces of al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for instance, the Supreme Court confirmed that the Force Resolution authorizes the President to employ the “fundamental incidents” to military force, *id.* at 519 (plurality opinion), which includes the authority to detain enemy combatants for the duration of hostilities—a measure to disable them from returning to battle. *Id.*; *see also id.* at 587 (Thomas, J., dissenting). The Court further held that the Force Resolution satisfies a statute that prohibits the detention of U.S. citizens except “pursuant to an Act of Congress.” *Id.* at 517; *see also* 18 U.S.C. § 4001.

The Administration similarly has relied upon the Force Resolution as a basis for monitoring the communications of al Qaeda terrorists as part of the Terrorist Surveillance Program. As explained in the Department of Justice’s January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (“*Legal Authorities*”), conducting electronic surveillance against the enemy in a time of armed conflict is a “fundamental incident” to military force and thus, under the Supreme Court’s analysis in *Hamdi*, is included within the statutory authorization provided by the Force Resolution. The Department’s paper also explains that, to the extent that the Foreign Intelligence Surveillance Act (FISA) creates any ambiguity as to whether the Force Resolution includes the authority to intercept the international communications of members of al Qaeda, the canon of constitutional avoidance resolves that ambiguity in favor of the President’s authority. This is because long-standing judicial and historical precedent suggests that conducting such electronic surveillance during a time of war is a constitutional power of the President with which Congress may not interfere.

The Court’s decision in *Hamdan* does not undermine the Justice Department’s analysis of the Terrorist Surveillance Program. *Hamdan* did conclude that the Force Resolution did not “expand or alter” the existing statutory limits upon military commissions set forth in the UCMJ. 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper was *not* that the Force Resolution altered, amended, or repealed any part of a federal statute. Rather, it was that the Force Resolution satisfied section 109 of FISA, which expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance “except as authorized by statute”); *see also Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. *See id.* at 22-23

& n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi*. There, five Justices concluded that the Force Resolution “clearly and unmistakably authorized detention,” as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department’s analysis of the Terrorist Surveillance Program in the *Legal Authorities* paper. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the Armed Forces in wartime. By contrast, Congress in FISA left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA’s declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). And, indeed, FISA was directed in the main at routine foreign intelligence surveillance occurring outside the extraordinary circumstances of war. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which is directed at the U.S. military, an organization whose purpose is to prepare for and to fight our Nation’s wars. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President’s constitutional authority in the particular context of electronic surveillance of international communications. *See Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The Force Resolution therefore should be read in light of this traditional understanding.

Second, in contrast to Congress’s regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to “define and punish . . . Offenses against the Law of Nations,” U.S. Const. art. I., § 8, cl. 10, and to “make Rules for the Government and Regulation of the land and naval forces,” *id.* cl. 14. Because of these explicit textual grants, Congress’s authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President’s authority to collect foreign intelligence necessary to protect the Nation. *See*

Legal Authorities at 30-34. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns. See 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). The Court recognized that each power vested in the President "includes all authorities essential to its due exercise." *Id.* As explained in detail in the *Legal Authorities* paper, signals intelligence is a fundamental and traditional component of conducting military campaigns. Thus, under the reasoning approved by *Hamdan*, the Terrorist Surveillance Program—which the President has determined is essential to protecting the Nation and to waging the armed conflict against al Qaeda—falls squarely within the President's constitutional authority. Nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have decided the issue that the President has the constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. See, e.g., *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan's* quotation of Chief Justice Chase's opinion in *Ex Parte Milligan*.

Committee on the Judiciary
United States Senate

Hearing on
"Hamdan v. Rumsfeld: Establishing a Constitutional Process"
July 11, 2006

Questions Submitted by
Senator Dianne Feinstein
to
Steven G. Bradbury
Assistant Attorney General

1. In response to one of my questions, you indicated that the United States currently detains about 1,000 enemy combatants. Only about 450 of those, however, are at Guantanamo. Can you confirm these numbers, and also whether that includes detainees in Iraq? Does this figure of 1,000 include persons held by the CIA, DIA or other intelligence agencies?

Principal Deputy General Counsel Daniel Dell'Orto provided the response at the hearing to which your question refers. Accordingly, we would refer you to the Department of Defense, which is in a better position to provide a response.

2. If the United States creates exceptions to Common Article 3 of the Geneva Conventions, or declares that certain protections it provides are not enforceable in our courts or military commissions, what limitations, if any, will exist on other countries' abilities to create exceptions of their own to Common Article 3, or to the Geneva Conventions generally, when trying our own officials and troops in their courts or military commissions?

The MCA reflects the continuing commitment of the United States to its international obligations under Common Article 3 of the Geneva Conventions. As I stated during my testimony, some of the provisions of Common Article 3 are undeniably vague. Congress thus appropriately provided clear definitions of many of those terms and reinforced the President's authority to provide additional clarity by issuing interpretive orders. Clarifying and implementing a treaty through domestic statute is a routine international practice, and we are confident that the MCA is fully compliant with United States obligations under international law. We would similarly expect that other States Parties to the Conventions fully comply with their obligations under international law.

The United States will continue to comply with the Geneva Conventions. The MCA simply ratifies the Government's longstanding position that the Conventions are not themselves directly enforceable by private parties in the courts or tribunals of the United States. The Supreme Court has long observed that "a treaty is primarily a

compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Head Money Cases*, 112 U.S. 580, 598 (1884). The Restatement of Foreign Relations Law similarly reaffirms this basic understanding of treaty law: “International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private right of action in domestic courts.” Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987).

Consistent with this established principle of treaty law, the Geneva Conventions place no obligations on their Parties to make the Conventions directly enforceable in their domestic courts or other tribunals. Indeed, the text of the Geneva Conventions themselves presumes that their enforcement will be left to relations between States Parties, rather than to the judicial authorities within any particular state. Article 8 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, for example, states that the Convention “shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.” Article 10 further authorizes States Parties to entrust enforcement to an international organization. Article 132 provides a procedure for addressing alleged violations of the Conventions, a process that is begun at the request of a High Contracting Party and that is to be conducted “in a manner to be decided between the interested Parties.” Furthermore, Article 129 of the Convention requires that only certain “grave breaches” of the Convention must be subject to judicially enforceable penal sanctions; even there, however, the involvement of courts comes not as a result of the actions of private parties, but instead after the initiation of criminal proceedings pursuant to the State Party’s criminal law.

Following these established principles, the Supreme Court held that the Geneva Convention of 1929 was not judicially enforceable. *See Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950). The United States has long believed that the 1949 Geneva Conventions are indistinguishable in this respect. The Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), held that Common Article 3 of the Geneva Conventions was statutorily incorporated as part of the “law of war” referred to in Article 26 of the Uniform Code of Military Justice (“UCMJ”). *Id.* at 1794. But the Court did not hold that absent Article 26 the Geneva Conventions would have been judicially enforceable on their own. *Id.*

Finally, it is worth noting that many States Parties to the treaties do not enforce their treaty obligations, under the Geneva Conventions or otherwise, through their domestic courts. The United States has never suggested that the decision to enforce the Conventions through the relations between States, rather than through a State Party’s domestic courts, somehow amounts to a violation of the treaty. Given this international practice, the Administration believes that Congress’s decision in the MCA to endorse the longstanding position of the United States and to prohibit private parties from enforcing the Geneva Conventions against the United States in civil actions or military commission trials will affect neither the obligations of the United States under those Conventions nor

the ability of the United States to require its treaty partners to adhere to their parallel obligations.

3. What international consequences do you foresee, if any, if Congress were to place new limitations on the applicability or enforceability of Common Article 3 of the Geneva Conventions?

As described in the answer to Question 2, the Geneva Conventions place no obligations on Parties to make the Conventions directly enforceable in their domestic courts or other tribunals. Accordingly, the fact that the MCA specifically provides that parties may not invoke the Geneva Conventions against the United States or its agents in civil actions and military commission trials, *see* MCA § 5(a); 10 U.S.C. § 948b(g), is unlikely to draw credible objections from other States Parties to the Geneva Conventions.

4. Is it your understanding that the UCMJ was intended to cover non-POWs? From the time when the UCMJ was enacted until 2001, were UCMJ protections ever denied to prisoners, or placed into a separate category any particular type of enemy? During the Vietnam War, did the United States give the protections of the Geneva Conventions to the Viet Cong, even though they did not follow the laws of war? If so, why would similar procedures not suffice in the al Qaeda context?

The UCMJ was enacted to govern the conduct of the members of the Armed Services and certain other personnel closely connected with the operations of the military. *See* 10 U.S.C. § 802. Although prisoners of war are subject to the UCMJ, *id.* § 802(a)(9), unlawful enemy combatants, who do not merit prisoner of war status, are not. To be sure, provisions in the UCMJ that prescribe rules of conduct for U.S. military personnel may benefit enemy combatants with whom those personnel come in contact. Similarly, the Supreme Court in *Hamdan* interpreted Articles 21 and 36 of the UCMJ to impose limitations on the procedures for military commissions convened to try unlawful enemy combatants. By enacting the MCA, Congress reaffirmed that unlawful enemy combatants should not be tried by courts-martial, but rather should be tried by military commissions established under chapter 47A.

The MCA's treatment of unlawful enemy combatants is entirely consistent with the law of war. Under Articles 99-108 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, prisoners of war must generally be tried in the same manner "as in the case of members of the armed forces of the Detaining Power." The United States has complied with this treaty obligation by granting to prisoners of war the full protections of the UCMJ, the code that would govern the trial of a member of the United States armed forces. The Third Geneva Convention extends this special privilege only to prisoners of war—that is, those persons who meet the criteria of Article 4 of the Third Geneva Convention—not to other enemy combatants. Thus, not extending the full procedures and protections of the UCMJ to unlawful enemy combatants is consistent with the international legal obligations of the United States under the Geneva Conventions. And, even under the Supreme Court's interpretation of Articles 21 and 36 of the UCMJ, the United States need not extend the full protections of the UCMJ to enemy combatants who are not prisoners of war. The United States may deviate from those procedures to

the extent it finds them impracticable and to the extent that alternative procedures comply with the laws of war.

As a matter of policy, rather than legal obligation, the United States extended the protections of the Third Geneva Conventions for prisoners of war to members of the Viet Cong captured in that conflict. The Viet Cong presented difficult classification questions under Article 4 of the Third Geneva Convention. The Viet Cong was an organized military force. They were "commanded by a person responsible for his subordinates"; though secretive, they did wear uniforms "with a fixed distinctive sign"; and they often carried arms openly. The Viet Cong did not show much respect for the laws of war, but whether this disregard rose to the systematic level necessary to disqualify them from prisoner of war status under Article 4.A.(2)(d) was a difficult question, the resolution of which was avoided by the United States policy decision.

The status of a terrorist organization such as al Qaeda presents no such difficult questions under Article 4. Al Qaeda is nothing like an organized military force, and its commanders take no responsibility for the actions of al Qaeda agents. Al Qaeda members wear no uniforms. And from the beginning of this conflict, al Qaeda's primary offensive tactic has been to commit acts of terrorism and murder against civilians. Whether al Qaeda conducts its "operations in accordance with the laws and customs of war" is thus not a thorny question. In this context, the protections of the Third Geneva Convention, many of which depend on the existence of a command structure and the vestiges of an organized military force, would be completely inapposite if applied to al Qaeda. Terrorists who demonstrate no respect for the laws of war should not, and cannot, claim the protections afforded to lawful combatants.

5. In his written testimony, Lt. Commander Swift spent much of his time outlining abuses that have occurred during the military commissions. In addition, he has provided emails from some military prosecutors that discussed serious allegations of misconduct. Has there been any investigation into these charges? If so, what has been done? Please also produce a copy of any report or investigation into these allegations.

With respect to this question, we would refer you to the Department of Defense, which is in a better position to provide a response.

6. Is the "war on terror" different than a conventional war? What do you consider a triggering moment or event that would allow the United States to declare that the "war on terror" has come to an end? If this war on terror continues for decades, can our Government hold the individuals detained in Guantanamo without charges for 10 years, 20 years, 50 years, or even indefinitely?

The United States is currently in an armed conflict with al Qaeda and affiliated terrorist organizations. That armed conflict is different from a conventional war insofar as the United States is fighting a vicious, dispersed enemy with no respect for the laws of war and an acute desire to kill American civilians. As in any war, it is difficult to predict

when the armed conflict will end, which will be a determination based on all relevant factors. The President is committed to achieving this objective and, as it is crucial to the protection of the American people, to doing so as quickly as possible. Nevertheless, the President has pledged to the American people that he will take every action available to him under law, for as long as is necessary, to defeat this vicious enemy and to defend the Nation.

Under the law of war, the United States may detain al Qaeda enemy combatants for the duration of hostilities. Nevertheless, the United States has voluntarily taken measures to release persons from custody who no longer pose a substantial threat to the United States, including through annual Administrative Review Board proceedings to reevaluate the status of each detainee in light of any new information. In addition, the United States has undertaken extraordinary measures to repatriate enemy combatants to their home countries. Detaining dangerous enemy combatants is crucial to protecting American troops and civilians in this continuing armed conflict. On at least a dozen occasions, enemy combatants released by the United States have returned to the field of battle, only to take up arms once again against American forces. Accordingly, for the safety of United States citizens, it is important that enemy combatants be prevented from returning to the conflict until al Qaeda no longer poses a threat to the United States.

**Committee on the Judiciary
United States Senate**

**Hearing on
“*Hamdan v. Rumsfeld*: Establishing a Constitutional Process”
July 11, 2006**

**Questions Submitted by
Senator Edward M. Kennedy
to
Steven G. Bradbury
Assistant Attorney General**

Questions for Steven Bradbury

Fundamental due process safeguards must exist to identify the guilty and protect the innocent. What is your position on whether rules of procedure provide (or should provide) for each of the following safeguards for trials of detainees? In your response, please address each of these ten safeguards individually:

- **an independent and impartial tribunal**
- **the presumption of innocence**
- **proof “beyond a reasonable doubt”**
- **open and public trials, with exceptions only for demonstrable reasons of national security or public safety**
- **representation by independent and effective counsel**
- **the right to examine and challenge evidence offered by the prosecution**
- **the right to present evidence of innocence**
- **the right to cross-examine adverse witnesses and to offer witnesses**
- **fixed, reasonable rules of evidence**
- **fair appellate review of convictions and sentences**

The Department of Justice agrees that military commissions conducted by the United States must provide the accused with full and fair trials. We reach this conclusion not because the constitutional guarantees provided to our Nation’s citizens necessarily apply to the trials of unlawful enemy combatants, but because our Nation’s commitment to the rule of law demands no less. We believe that the MCA will provide full and fair trials, while preserving the flexibility required by the circumstances surrounding the capture and detention of unlawful enemy combatants. In particular, we believe that these procedures will provide for every one of the safeguards that you have identified above.

Committee on the Judiciary
United States Senate

Hearing on
“*Hamdan v. Rumsfeld*: Establishing a Constitutional Process”
July 11, 2006

Questions Submitted by
Senator Arlen Specter
to
Steven G. Bradbury
Assistant Attorney General

1. What does *Hamdan* mean for the President’s other claims of inherent executive power, such as activities of the National Security Agency that have recently come to light?

The Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), held that the President’s military commission order conflicted with the Uniform Code of Military Justice (“UCMJ”). Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the President’s order, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President’s inherent constitutional authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the statute. *See id.* at 2777 n.29.

The legal positions of the Executive Branch during this armed conflict have not been merely “claims of inherent executive power.” By enacting the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (“Force Resolution”), Congress confirmed the President’s authority to “use all necessary and appropriate force” against al Qaeda. Accordingly, the Administration has taken the position that the Force Resolution authorizes a number of measures undertaken to protect the Nation’s security and to defeat the forces of al Qaeda. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for instance, the Supreme Court confirmed that the Force Resolution authorizes the President to employ the “fundamental incidents” to military force, *id.* at 519 (plurality opinion), which includes the authority to detain enemy combatants for the duration of hostilities—a measure to disable them from returning to battle. *Id.*; *see also id.* at 587 (Thomas, J., dissenting). The Court further held that the AUMF satisfies a statute that prohibits the detention of U.S. citizens “except as authorized by statute.” *Id.*; *see also* 18 U.S.C. § 4001.

The Administration similarly has relied upon the Force Resolution as a basis for monitoring the communications of al Qaeda terrorists as part of the Terrorist Surveillance Program. As explained in the Department of Justice's January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("Legal Authorities"), conducting electronic surveillance against the enemy in a time of armed conflict is a "fundamental incident" to military force and thus, under the Supreme Court's analysis in *Hamdi*, is included within the statutory authorization provided by the Force Resolution. The Department's paper also explains that, to the extent that FISA creates any ambiguity as to whether the Force Resolution includes the authority to intercept the international communications of members of al Qaeda, the canon of constitutional avoidance resolves that ambiguity in favor of the President's authority. This is because long-standing judicial and historical precedent suggests that conducting such electronic surveillance during a time of war is a constitutional power of the President with which Congress may not interfere.

The Court's decision in *Hamdan* does not undermine the Justice Department's analysis of the Terrorist Surveillance Program. *Hamdan* did conclude that the Force Resolution did not "expand or alter" the existing statutory limits upon military commissions set forth in the UCMJ. 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper was *not* that the Force Resolution altered, amended, or repealed any part of a federal statute. Rather, it was that the Force Resolution satisfied section 109 of FISA, which expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. See 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); see also *Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. See *id.* at 22-23 & n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi*. There, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department's analysis of the Terrorist Surveillance Program in the *Legal Authorities* paper. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the

Armed Forces during wartime. By contrast, Congress in FISA left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). And, indeed, FISA was directed in the main at routine foreign intelligence surveillance occurring outside the extraordinary circumstances of war. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which is directed at the U.S. military, an organization whose purpose is to prepare for and to fight our Nation's wars. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of electronic surveillance of international communications. *See Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The Force Resolution therefore should be read in light of this traditional understanding.

Second, in contrast to Congress's regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Because of these explicit textual grants, Congress's authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation. *See Legal Authorities* at 30-34. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns. *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). The Court recognized that each power vested in the President "includes all authorities essential to its due exercise." *Id.* As explained in detail in the *Legal Authorities* paper, signals intelligence is a fundamental and traditional component of conducting military campaigns. Thus, under the reasoning approved by *Hamdan*, the Terrorist Surveillance Program—which the President has determined is essential to protecting the Nation and to waging the armed conflict against al Qaeda—falls squarely within the President's constitutional authority. Nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have decided the issue that the President has the constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan*'s quotation of Chief Justice Chase's opinion in *Ex Parte Milligan*.

2. The Supreme Court found in *Hamdan* that the government failed to demonstrate that there were circumstances which made courts-martial rules impracticable for use in these military commissions. Could you give us some examples, generally speaking, of what might be acceptable circumstances?

The Supreme Court in *Hamdan* held that the President's military commission order did not explicitly address the impracticability of the UCMJ, or rules for courts-martial promulgated thereunder, for use in military commissions. According to the Court, Article 36 of the UCMJ, 10 U.S.C. § 836, required a specific finding that court-martial procedures were impracticable and the Court faulted the President's military commission order for the absence of specific findings. *See* 126 S. Ct. at 2792. To be clear, the Court did not hold that such a finding was impossible. *Id.* at 2792-93. Indeed, the President's order was based on a review of court-martial procedures, and a determination that many specific rules—designed primarily for the trial of our own troops charged with criminal offenses—were not practicable for the trial of hardened terrorists, captured on the battlefields thousands of miles from the United States.

Congress recognized in enacting the Military Commissions Act of 2006 ("MCA") that many court-martial rules would be impracticable for military commissions. For example, because many terrorists were captured on the battlefield, hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. Therefore, the MCA recognizes that the hearsay rule applicable in courts-martial shall not apply to military commissions. *See* 10 U.S.C. § 949a(b)(2)(E). The MCA also specifically provides that several other provisions of the UCMJ shall be inapplicable, *see id.* § 948b(d), and that the rules issued by the Secretary of Defense shall track those of courts-martial only insofar as he "considers practicable or consistent with military or intelligence activities," *id.* 949a(a). The MCA thus tracks the UCMJ in many respects, but Congress correctly determined that the UCMJ could not apply in toto for military commissions.

3. On June 29, 2006, while speaking at a public news conference, President Bush said he planned to work with Congress to "find a way forward," and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny. Can you provide some examples of how you would like to see legislation "revamp" the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet the goals of the administration?

As President Bush indicated, the Administration worked closely with Congress over the past several months in developing a statutory system of military commissions. The MCA reflects the product of those efforts. Commissions convened under the MCA will depart from the preexisting procedures in a number of ways. For instance, the presiding officer of the new commission will be a military judge, who will not be a voting member of the commission, and who will exercise the traditional authority of a

judge to make final rulings at trial on law and evidence. In addition, the minimum number of commission members will be increased from three to five, as under the UCMJ, and there will be twelve members of the commission in cases in which the death penalty is sought. Finally, the MCA provides for a more formalized appellate process, granting every defendant convicted by a military commission an appeal as of right to the Court of Military Commission Review and the Court of Appeals for the D.C. Circuit. We are confident that the law will provide for the full and fair trials of unlawful enemy combatants, which will fully withstand judicial scrutiny.

- 4. Justice Thomas's dissent suggests that the conduct allegedly done by Mr. Hamdan could be described as more than just "conspiracy" because Mr. Hamdan also allegedly violated the "law of war" by his "membership in a war-criminal enterprise." It also seems to me that since Mr. Hamdan allegedly transported weapons and al Qaeda operatives, including bin Laden himself, prior to his capture, and that Mr. Hamdan was on the loose after the Authorization for the Use of Military Force was enacted (the date which the Court said the war began), it is likely that Mr. Hamdan assisted al Qaeda while the war was in progress. Has the administration considered simply rewriting the charge against Mr. Hamdan in such a way that it clearly alleges a violation of the "law of war"?**

The Administration, in preparing for the trial by military commission of Hamdan and other alien enemy combatants, carefully considered the charges that could be brought against them under the law of war and Military Commission Instruction No. 2. Now that Congress has enacted the MCA, military prosecutors will determine what charges under the new law are consistent with the evidence.

With respect to the offense of conspiracy, the Constitution grants Congress the constitutional authority to "define and punish ... Offences against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10. In the MCA, Congress exercised this authority and determined that conspiracy constitutes a substantive offense under the law of war, triable by military commission. See 10 U.S.C. § 950v(28). This legislative determination should remove any doubt over whether the offense is properly triable by military commission. For the reasons stated by Justice Thomas in his opinion in *Hamdan*, we believe that this view is supported by historical practice and by authoritative commentators on the law of war. Justice Stevens's determination that conspiracy is not an offense under the law of war did not receive the agreement of a fifth justice and thus does not constitute the opinion of the Court.

- 5. How many detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Can you provide us with a complete list of the charges pending against those detainees?**

Under the previous military commission system, ten detainees held at Guantanamo had been charged with conspiracy for purposes of their trials by military commissions. Three of those detainees are also charged with other offenses. David

Matthew Hicks also had been charged with attempted murder by an unprivileged belligerent and aiding the enemy. Omar Ahmed Khadr also had been charged with murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. Abdul Zahir also had been charged with attacking civilians and aiding the enemy. Now that Congress has enacted the MCA, the Department of Defense will review the evidence against those individuals and others detained at Guantanamo Bay and make new charging decisions based upon the standards and offenses detailed in the new Act.



The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has

Letter to Chairman Leahy and Senator Specter
January 17, 2007
Page 2

determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Gonzales", with a stylized flourish at the end.

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith

1402 Meadowsweet Drive
Sandy Spring, MD 20860

August 4, 2006

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to testify before the Senate Judiciary Committee during your July 11, 2006 hearing on "*Hamdan v. Rumsfeld*: Establishing a Constitutional Process." I found the hearing to be highly enlightening and hope that it will establish a sound basis for new legislation on military commissions.

Enclosed please find my responses to the written questions you sent to me.

Please let me know if I may be of additional assistance as you consider this important legislative initiative.

Sincerely,

Paul W. Cobb, Jr.

Attachment as stated

Response to Questions Submitted by Senator Arlen Specter
 For Paul W. Cobb, Jr.
Hamdan v. Rumsfeld: Establishing a Constitutional Process

1. “You say in your written testimony that ‘rigid application of evidentiary rules that have been developed for prosecuting domestic crimes would foreclose most if not all war crimes prosecutions in the war with al Qaeda.’ How can we reconcile these issues with the existing UCMJ and the *Hamdan* decision?”

Neither the Uniform Code of Military Justice (“UCMJ”) nor the *Hamdan* decision requires war crimes prosecutions to use the same evidentiary rules that we have developed for prosecuting domestic crimes.

With rare exception, the evidentiary rules in the UCMJ and the Manual for Courts-Martial apply by their terms only to courts-martial, not to military commissions. As a matter of policy, it would make little sense to apply to war crimes proceedings the same rules developed for prosecutions of ordinary criminal law violations by U.S. armed forces personnel. Using the same rules would graft concepts such as chain of custody and custodial warnings onto on-going military operations. The result of such a one-size-fits-all policy would be to constrain severely if not eliminate entirely the ability to prosecute war crimes.

Moreover, *Hamdan* does not immutably require the use of the same procedures that courts-martial use. *Hamdan* interprets 10 U.S.C. § 836 to require a “practicability” determination prior to any deviation from courts-martial procedures. Congress may of course change this requirement. And *Hamdan* interprets Common Article 3 of the Geneva Conventions to require that war crimes prosecutions be carried out by “regularly constituted” courts. Justice Kennedy’s concurrence makes clear that Congress may by statute create a “regularly constituted” military commission. He further notes that Common Article 3 does not “necessarily require[] that the accused have the right to be present at all stages of a criminal trial.”

Some may argue that using the same procedural rules as courts-martial for war crimes prosecutions increases the likelihood that captured U.S. military personnel would be prosecuted under rules that the U.S. would consider fair. I believe, however, that military commission procedures substantially similar to those developed pursuant to the November 13, 2001 President’s Military Order would provide an objectively fair trial. We should be so lucky that our enemies in the current conflict would adopt such procedures.

2. “You say that ‘there is no reason to start from scratch and throw the baby out with the bath water’ with respect to the existing military commission system. How do you view my proposed legislation?”

The “Unprivileged Combatant Act” appropriately builds on the groundwork previously established by military commissions. It contains almost all of the five key war crimes court features, discussed in my written testimony, that are critical to successful war crimes prosecutions. The Act provides statutory authorization for the Department of Defense to conduct military commissions; it contains a broadly inclusive evidentiary standard; it restricts the dissemination of classified information to individuals with clearances; and it mandates clearances for defense counsel. The legislation does not, however, expressly require defense counsel. Because war crimes prosecutions are likely to be procedurally complex, and because there is no other way to guarantee defense access to all classified information, I believe it is necessary to require defendants to have defense counsel.

The Act also increases the independence of military commissions by requiring that military judges preside over military commissions and by providing for appellate review by the United States Court of Appeals for the Armed Forces. By codifying the Military Commission Instruction on the elements of war crimes, it eliminates uncertainty as to which crimes military commissions may try. While the legislation may need some adjustments – including to take into account the specific holdings of *Hamdan* and to refine the procedures for long-term detention of enemy combatants – I believe it is an excellent first step towards a legislative response to *Hamdan*.

3. “If Congress wanted to ratify the Administration’s position that ‘conspiracy’ is in fact a crime of war for which detainees can be tried and convicted, do you believe the Supreme Court would uphold such legislation?”

Based on the Supreme Court’s decision in *Hamdan*, there is strong legal support for Congressional authority to identify conspiracy as a war crime. The Court noted that Congress has Constitutional authority to “define and punish ... Offences against the Law of Nations.” It further cited provisions of title 10 that make spying and aiding the enemy, which are not typically considered war crimes, triable by military commission. While it is of course impossible to predict how the Supreme Court would rule on any particular issue, I believe that legislation making conspiracy to commit war crimes triable by military commission would likely pass Constitutional muster.

Responses to Questions for Daniel Collins
from Senator Arlen Specter, Chairman

Hamdan v. Rumsfeld: Establishing a Constitutional Process
(July 11, 2006 Hearing before the Senate Committee on the Judiciary)

- Q1. Based on your reading of the *Hamdan* case, what findings should Congress include so as to establish the impracticability of allowing detainees to be tried by courts-martial, or by procedures identical to courts-martial? In particular, how should we limit the detainee's access to classified information which still providing a fair trial?

Answer:

As I read the *Hamdan* decision, Congress has authority to provide a sufficient legislative basis for a viable military commission system without the need to include any findings as to the "impracticability" of trying unlawful combatants in courts-martial. Indeed, I would recommend that the Congress adopt legislation to *eliminate* the uniformity-insofar-as-practicable standard of *Hamdan*.

As I emphasized in my testimony, the Court's invalidation of the existing military commission structure notably did *not* rest upon any finding of a constitutional violation. Instead, the Court concluded that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures *violate both the UCMJ and the Geneva Conventions*." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006) (emphasis added). Specifically, the Court concluded that (1) under Article 36 of the UCMJ, military commissions procedure must conform to that of courts-martial "insofar as practicable," 10 U.S.C. § 836(b), and the procedures established to try Hamdan did not satisfy this standard, 126 S. Ct. at 2788-93; and (2) in order to qualify as a "regularly constituted" court within the meaning of Common Article 3 of the Geneva Conventions, the structure and regulation of military commissions may deviate from the statutory benchmark set by courts-martial "only if some practical need explains [the] deviations from court-martial practice," and "no such need has been demonstrated here." 126 S. Ct. at 2796-97 (quoting *id.* at 2804 (Kennedy, J., concurring)).

Accordingly, to the extent that the *Hamdan* Court imposed a requirement that deviations from court-martial structure and procedure must be supported by a showing of impracticability, it imposed that requirement on the *Executive's* ability to act within the *existing* framework established by statute and treaty. The *Hamdan* decision, however, does not identify any such constraints upon Congress's authority.

On the contrary, it is clear that Congress has the authority to eliminate the *statutory* uniformity-insofar-as-practicable standard of Article 36(b), and that it has the constitutional power to repeal that aspect of the statute without having to make any "findings." Congress likewise has ample authority to eliminate the "practical need" standard that the Court derived from Common Article 3. As I explained in my testimony, the *Hamdan* Court held that a military commission could not be said to be "regularly constituted" if, without adequate "practical need," it deviated from the benchmark set by the "courts-martial established by *congressional statutes*."

126 S. Ct. at 2797; *see also id.* at 2804 (Kennedy, J., concurring). Because Congress created this benchmark, Congress can modify it: Congress can, by statute, establish that military commissions have “express congressional authorization” and are “regularly constituted.” *Cf. id.* at 2804 (Kennedy, J., concurring) (quoting Common Article 3). In any event, as a matter of domestic law, Congress has the authority, by statute, to override any such restriction imposed by treaty. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (“an Act of Congress ... is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null”) (quoting *Reid v. Covert*, 354 U.S. 1, 18, (1957) (plurality opinion)).

Hamdan argued in his merits brief that, under the Constitution, the President lacks inherent authority to establish military commissions. Brief for Petitioner at 11-13. Likewise, a significant number of the *amicus curiae* briefs filed in support of Hamdan argued that the President’s military commissions were unconstitutional in several respects. *See, e.g.*, Brief of Law Professors at 4-7 (arguing that President lacks any inherent authority to establish military commissions outside the theatre of war); Brief of Human Rights First, *et al.*, at 12-13 (arguing that, to the extent the commissions rely on evidence obtained by unlawful coercion, the commissions are not within the President’s inherent authority and would violate the Fifth Amendment); *id.* at 19 (arguing that Guantánamo detainees are entitled to certain constitutional due process rights); Brief of Jack Rakove, *et al.* (arguing generally for a limited conception of the President’s inherent authority in this area); Brief of the American Jewish Committee, *et al.*, at 25-30 (arguing that “right to confrontation” extends to military commissions at Guantánamo); Brief of the Cato Institute at 5-11 (arguing that the constitutional right to jury trial applies here). In *Hamdan*, the Court did not adopt any of these arguments. The Court expressly *declined* to address whether the President has inherent authority to “convene military commissions ‘without the sanction of Congress,’” 126 S. Ct. at 2774 (citation omitted), and its opinion does not address (much less adopt) any of these other claimed constitutional violations. The Court, as I have explained, rested its invalidation of the existing military commissions solely on the ground that they violated the UCMJ and Common Article 3. *See* 126 S. Ct. at 2759; *see also id.* at 2799 (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”) (Breyer, J., concurring) (emphases added).

The Court noted that the Government properly had not claimed that it may “disregard limitations” that Congress has, in the proper exercise of its constitutional authority, placed on the ability to use military commissions in these circumstances, *see id.* at 2774 n.23 (emphasis added), but this predicate holding does not thereby convert the purely statutory and treaty violations found by the Court into constitutional violations. And, more to the point, it says nothing at all about whether, and to what extent, the Constitution may constrain Congress’s ability to authorize military commissions. *Hamdan* did not address any such issues. In response to my assertion at the hearing that “the Court did not accept” any of the “constitutional challenges that had been raised to commissions,” Dean Koh took strong exception and argued that “[t]here is a constitutional dimension of this case, and were this [Congress] to legislate, it would have to be doing it in that [*Youngstown*] framework as well.” To the extent that this latter comment was intended to suggest that the *Hamdan* Court identified constitutional constraints on Congress’s authority in this area, it seems to me to be mistaken.

Accordingly, nothing in *Hamdan* requires that Congress retain the uniformity-insofar-as-practical standard that the Court derived from Article 36 of the UCMJ and from Common Article 3 (as construed against the backdrop of what is currently “regularly constituted” in legislation). As I have argued, Congress should *reject* that standard, because its vague and uncertain nature can only invite more litigation and thereby diminish the practical utility of military commissions as a viable option. Because Congress should reject the “impracticability” standard, it would not be appropriate for Congress to undertake to make findings that attempt to satisfy and apply that standard. Congress should reject this framework, rather than attempt to work within it. Indeed, if the task were to determine what deviations from UCMJ structure and procedure are justified by a practical need, then there would be no real need for legislation: *Hamdan* permits the Executive, using existing authorities, to attempt to go forward with military commissions that conform to that standard. The uncertainty and practical difficulty involved provide good reasons why the Executive should not do that, but those reasons seem equally to suggest that Congress should not go that route either.

Having said that, there remains a *policy* judgment as to the extent to which Congress may wish to extend certain minimal procedural protections to military commissions (regardless of whether, as applied to alien enemy combatants held overseas, the Constitution would require this). With respect to the subject that you have specifically raised — access to classified information — I would recommend considerable caution about attempting to legislate specific and detailed standards. Thus, while it might be appropriate affirmatively to authorize commissions to restrict the accused’s pretrial and trial access to classified information, and to permit a commission to receive into evidence classified information not provided personally to the accused where such evidence has been provided to defense counsel and the commission concludes that the evidence can be received without depriving the accused of a fundamentally fair trial, Congress should not attempt further to define, in advance, the precise contours of how this difficult issue should be resolved.

Q2. Even though *Hamdan* did not specifically address the issue of tribunals and the process by which DOD is detaining enemy combatants, do you believe Congress should address these procedures if and when it legislates?

Answer:

In my view, the resolution of this issue adopted by Congress in the Detainee Treatment Act of 2005 (DTA) was appropriate. My only suggestion on this score is that, in light of the Court’s conclusions about the applicability of the DTA, Congress should revise the applicable judicial review provisions *both* with respect to Combatant Status Review Tribunals, and with respect to military commissions, in order to ensure that *premature* judicial intervention in such proceedings is eliminated except to the extent the Constitution may otherwise require.

- Q3. What does *Hamdan* mean for the President's other claims of inherent executive power, such as the NSA situation?

Answer:

As explained at length in my response to Q.1, the Court in *Hamdan* declined to decide whether the President had inherent authority to establish military commissions in the absence of congressional sanction; it was sufficient to conclude that the statutory limitations that Congress had placed on the use of military commissions (whose constitutionality the Government did not challenge) did not permit the commissions to go forward in their present form. 126 S. Ct. at 2774 & n.23. Accordingly, *Hamdan* does not shed any meaningful light on the scope of inherent executive authority in other contexts and involving other statutory frameworks. Nor does *Hamdan* say anything that meaningfully addresses (one way or the other) whether the September 18, 2001 Authorization for Use of Military Force (AUMF) brings into play Executive intelligence gathering authority and whether it does so in a manner that might bring the exercise of that authority within the "except as authorized by statute" language of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1809(a).

- Q4. Five Justices held that the Uniform Code of Military Justice incorporates Article 3 of Geneva convention. Could Congress simply amend the Uniform Code of Military Justice to make clear that it does not incorporate Article 3 of the Geneva Convention? Or is the Geneva Convention itself judicially enforceable?

Answer:

The Court in *Hamdan* did not hold that the Geneva Convention was, of its own force, judicially enforceable. On the contrary, the Court expressly assumed *arguendo* that the scheme established by the 1949 Geneva Conventions "would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right." 126 S. Ct. at 2794. The Court merely held that (1) the Convention's provisions "are, as the Government does not dispute, part of the law of war"; and (2) "compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Id.* (citing 10 U.S.C. § 821). As I have explained above, Congress has the authority, as a matter of domestic law, to authorize the use of military commissions without regard to the provisions of Common Article 3. *Cf. Breard v. Greene*, 523 U.S. at 376. If Congress chooses to do so, it should use language that is sufficiently explicit to remove any doubt as to its intent.

Dell'Orto Responses to Answers

Senator Leahy:

1. Were senior officials from the Pentagon, including the Judge Advocate Generals, consulted with respect to the President's Military Order of November 13, 2001, regarding military commissions?

I cannot address what consultations may have occurred with respect to the formulation of the President's Military Order of November 13, 2001.

2. According to DoD's own numbers, of the approximately 760 people who have been held at GTMO, 310 have been transferred to other countries and another 120 are awaiting transfer. How many of those who have been released from GTMO have reappeared on the battlefield? Is it possible that the unreliability of CSRTs is putting our armed service members at risk?

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

The question confuses the purpose of the CSRTs and ARBs. Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Each detainee had the opportunity to contest such designation. In addition, the detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB). The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release. The recommendation of the ARB panel is provided to the Designated Civilian Official (DCO), who then makes a determination as to whether a particular enemy combatant should continue to be detained, be transferred, or released.

3. In response to a question from Senator Feinstein, you stated that the detainee population in the war on terror is approximately 1,000. You further stated that about 450 are being held at Guantanamo Bay.

(A) Where are the other 550 held, and how many of them are being held by the Department of Defense?

ANSWER: The Department of Defense also detains detainees at its Theater Internment Facility at Bagram, Afghanistan. The Department of Defense has approximately 500 detainees under its control at this facility. Note that these numbers are in constant flux as new detainees are seized and some detainees are released from U.S. control. Additionally, in September 2005, the Department of Defense provided this information to the Senate Armed Services Committee and the House Armed Services Committee in compliance with the Ronald Reagan National Defense Authorization Act of Fiscal Year 2005, section 1093(c)(2)(C). The aggregate summary of the number of persons detained by the Department of Defense as enemy prisoners of war, civilian internees, and unlawful combatants was provided in a classified annex.

(B) Of those detainees not held by the Department of Defense, does the Administration acknowledge that Common Article 3 of the Geneva Conventions applies to them and they are being treated accordingly? If the Administration does not acknowledge that Common Article 3 applies to detainees held by agencies other than the Department of Defense, on what basis does it disagree?

ANSWER: I represent the Department of Defense and cannot speak on behalf of the Administration. Regarding detainees under Department of Defense control, the Supreme Court has resolved the question of its applicability to the conflict with al Qaeda. Detainees under Department of Defense control will continue to be treated humanely and in compliance with the provisions of the Detainee Treatment Act of 2005 and Common Article 3.

4. You testified on July 11 that Congress should simply "ratify" the military commission procedures established by the Bush-Cheney Administration and struck down by the Supreme Court. Two days later, at a Senate Armed Services Committee hearing, MG Scott C. Black, Rear Admiral James E. McPherson, MG Jack L. Rives, and BG Kevin M. Soundkulher (sic) all testified that these procedures should not be ratified by Congress.

(A) What is the Administration's official position on this question?

ANSWER: I am not in a position to speak for the Administration. I can, however, address the views of the Department of Defense. I stated numerous times in my testimony that the most *expeditious* way of moving forward would be to essentially ratify the military commissions process that is already in place (p. 25 and 26). I also stated that we should take a look at the commission procedures as they're laid out, and to the extent that Congress believes that they demonstrate what the president has set out as the standard -- that is, a full and fair trial - those procedures should be ratified (p. 51). However, I made it very clear in my testimony that this Department stood ready to work with Congress to assess the best way forward in addressing these critical matters (p. 6). And in fact, the Military Commissions Act of 2006, which the Department supports, is the product of that collaborative effort.

(B) Please identify any specific facts, arguments, or opinions offered by these officers at the Armed Services hearing with which you disagree.

ANSWER: As indicated above, I did not state that Congress should simply “ratify” the military commission procedures; I said that it would be the most expeditious way forward. However, I do not believe the views expressed by the Judge Advocates General are inconsistent with my testimony. Everyone agreed that we needed to review the procedures and determine which procedures met the standards and which needed to be modified. Even amongst the Judge Advocates General, there were varying views on the best way to undertake that task. Major General Black stated that it would be a monumental task to start with the Uniform Code of Military Justice (“UCMJ”) as a baseline and modify it; he suggested starting with the current commissions process and incorporating aspects of other sources. (p. 54) Brigadier General Sandkuhler testified that the outcome should be a balance between current commission procedures and the “gold standard” of the UCMJ and that whichever method Congress chooses “require[s] detailed examination.” (p. 11) Rear Admiral McPherson stated that where we end up is more important than where we start. (p. 36) Finally, Major General Rives indicated that the UCMJ provides a great structural starting point, as it is a tremendous system and model. (p. 11) Everyone agreed that regardless of where you start in creating the new process, you will end up somewhere in the middle, and the Military Commissions Act of 2006 is such a moderate product.

5. A recent New York Times article called attention to the infiltration of neo-Nazis in the military. A Defense Department investigator was quoted as saying that recruiters know they are allowing white supremacists to join the armed forces, but the pressure on recruiters is so great due to the unpopularity of the war in Iraq that recruiters let them in. That is alarming by itself, but what concerned me even more was that this Defense Department investigator says that even when he provided evidence on the presence of extremists--320 in the past year from one investigator--commanders will not remove them. What is the Department of Defense doing to prevent extremists from entering the military in the first place, and why are they not being removed when they are discovered?

ANSWER: The Department of Defense policy regarding participation by military personnel in extremist groups is as follows and has remained the same for ten years: Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organizations that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with military service, and is, therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action, against military personnel who actively participate in such groups. Functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers, such as counseling, reprimands, orders, and performance

evaluations to deter such activities. The Military Departments are charged with ensuring that this policy on prohibited activities is included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate Service training programs.

I am unaware of any changes in either recruiting or separation policy or practice since September 11, 2001, regarding members of extremist groups.

Senator Feinstein:

1. In response to one of my questions, you indicated that the United States currently detains about 1,000 enemy combatants. Only about 450 of those, however, are at Guantanamo. Can you confirm these numbers, and also whether that includes detainees in Iraq? Does this figure of 1,000 include persons held by the CIA, DIA, or other intelligence agencies?

ANSWER: See my response to Senator Leahy's question 3. Additionally, these numbers included detainees under Department of Defense control in Afghanistan and at Guantanamo Bay, Cuba, and not Iraq.

2. If the United States creates exceptions to Common Article 3 of the Geneva Conventions, or declares that certain protections it provides are not enforceable in our courts or military commissions, what limitations, if any, will exist on other countries' abilities to create exceptions to their own to Common Article 3, or the Geneva Conventions generally, when trying their own officials and troops in their courts or military commissions?

ANSWER: Reciprocity in practices among States who are parties to the same treaty is an important consideration. The Geneva Conventions require States parties, among other things, to take the necessary steps to ensure compliance with their obligations. Such compliance is a matter of state action.

The United States implements its obligations under the Geneva Conventions in a variety of ways, both statute and policy based. For example, the War Crimes Act, 18 U.S.C. § 2441, makes a grave breach of the Geneva Conventions a criminal offense. But neither the conventions nor U.S. statutes create rights for individuals to seek to enforce U.S. Geneva Convention provisions in U.S. courts.

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

3. What international consequences do you foresee, if any, if Congress were to place new limitations on the applicability or enforceability of Common Article 3 of the Geneva Conventions.

ANSWER: The standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and those standards should be defined clearly by U.S. law, consistent with our international obligations. The Military Commissions Act of

2006 defines Common Article 3 of the Geneva Conventions; it does not create new limitations on its applicability or enforceability.

4. Is it your understanding that the UCMJ was intended to cover non-POWs? From the time when the UCMJ was enacted until 2001, was UCMJ protections ever denied to prisoners, or placed into a separate category any particular type of enemy? During the Vietnam War, did the United States give the protections of the Geneva Conventions to the Viet Cong, even though they did not follow the laws of war? If so, why would similar procedures not suffice in the al Qaeda context?

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

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

The attack of civilian objects and the death of almost 3,000 innocent civilians on September 11, 2001; the illegal attack of other civilian objects, such as United Nations and International Committee of the Red Cross facilities in Iraq; and the subsequent kidnapping, torture and murder of innocent U.S. and foreign civilians, such as the May 11, 2004, beheading of Nicholas Berg, provides no expectation of even limited application of the law of war by al Qaeda.

5. In his written testimony, Lt. Commander Swift spent much of his time outlining abuses that have occurred during the military commissions. In addition, he has provided emails from some military prosecutors that discussed serious allegations of misconduct. Has there been any investigation into these charges? If so, what has been done? Please also produce a copy of any report or investigation into these allegations.

ANSWER: The Department of Defense Inspector General conducted an investigation into the allegations contained in the e-mails mentioned and completed that investigation in April 2004. The investigation did not substantiate any of the explicit or implied criminal allegations contained in the e-mails. Further, the investigation found no evidence of suppression or destruction of evidence. Following an operational assessment of the Office of the Chief Prosecutor, changes were made in personnel assigned and supervisory responsibilities. A redacted copy of the Department of Defense Inspector General's report is located at:

http://www.dodig.osd.mil/fo/foia/ERR/r_REDACTED-MILCOM-ROIonly.pdf

6. Is this “war on terror” different than a conventional war? What do you consider a triggering moment or event that would allow the United States to declare that the “war on terror” has come to an end? If this war on terror continues for decades, can our Government hold individuals detained at Guantanamo without charges for 10 years?, 20 years, 50 years?, even indefinitely?

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

The law in regard to this matter is the law of war. It is certainly our hope that hostilities will not continue for decades, but the law permits detaining enemy combatants until the cessation of hostilities.

Senator Kennedy:

1. After your discussions with Marion Bowman, did you discuss these abuse allegations with Mr. Haynes? What actions did he take in response to the FBI allegations? Did Mr. Haynes discuss these matters with the Army's Criminal Investigation Command? Did he direct the Army not to investigate these allegations?

ANSWER: I did not meet with the FBI General Counsel or any attorney from that office. My recollection is that I had a telephone conversation with Marion Bowman from the FBI Office of General Counsel in the summer of 2003. During that telephone call, I ascertained that the time frame of the concerns being expressed was prior to January 2003, the month during which the Secretary of Defense responded to Mr. Haynes' reports about concerns brought to his attention by an official within the Department of Defense by suspending a number of the interrogation techniques being employed with respect to one detainee at Guantanamo. Mr. Bowman did not report specific techniques or detainees to me or report any concerns about techniques employed after January 15, 2003. I asked him to provide me with any details or additional information if he later learned of any. I do not recall discussing this telephone call with Mr. Haynes. In the absence of further specifics relating to the concerns expressed and given the time frame of the interrogations that appeared to be the source of the FBI concerns, there was nothing more to be done since the Secretary had taken clear action in January 2003 to limit the types of lawful techniques to be used at Guantanamo and again in April 2003 to direct a new set of techniques for use at Guantanamo that also were well within the law and based on a solid policy foundation.

2. Did Mr. Haynes approve the techniques to which the FBI objected? Specifically, did he approve the practices listed below (address each practice individually): DoD interrogators impersonating FBI agents? Sexual humiliation? Intense isolation for over three months?

ANSWER: See answer above.

As stated above, I do not recall discussing this phone call with Mr. Haynes.

Additionally, the General Counsel of the Department of Defense does not approve interrogation techniques. The interrogation techniques authorized by the Secretary of Defense on December 2, 2002, and whose authorization was rescinded on January 13, 2003, did not include the interrogation techniques listed in your question.

3. Please provide us with a copy of the May 30, 2003 electronic communication that Marion Bowman discussed with you.

ANSWER: I am not aware of such an electronic communication.

Naval Criminal Investigative Service Reports of Abuse

Alberto Mora, the Navy General Counsel, met with you on January 13, 2003, to discuss Naval Criminal Investigative Service reports of abuse at Guantanamo, including dressing

detainees in female underwear, use of stress positions, and coercive psychological procedures. He relayed to both you and Mr. Haynes that such techniques were unlawful and contrary to American values.

1. Mr. Mora expressed great concern over a December 2, 2002 memorandum in which Secretary Rumsfeld approved these harsh techniques. Were you involved in the drafting of that memorandum? Did you and Mr. Haynes discuss why the Department of Defense General Counsel was the principal drafter of these memos, instead of referring the request for harsh techniques to the Army JAG or the Legal Advisor to the Chairman of the Joint Chiefs?

ANSWER: The Commander of U.S. Southern Command forwarded Major General Dunlavey's request to the Chairman of the Joint Chiefs of Staff. I do not recall consulting with the Judge Advocates General on the request, nor do I know whether the Chairman's Legal Counsel consulted with them or their offices, but as an operational matter raised by a Combatant Commander, it would not have called for consultation with the Judge Advocates General. I did participate in the drafting of the November 27, 2002 memorandum.

2. Did you ever discuss Alberto Mora's allegations with Mr. Haynes? Did you have any reservations over the use of these techniques?

ANSWER: I believe Mr. Mora did not provide his views regarding the December 2, 2002, memo until approximately three weeks after the Secretary's approval of the use of additional interrogation techniques.

Mr. Haynes' action memo dated November 27, 2002, reflects that he discussed the Commander, U.S. Southern Command's request with the Deputy Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy before recommending that only a subset of the requested techniques be approved.

I did discuss Mr. Mora's concerns with Mr. Haynes. Our discussion contributed to Mr. Haynes' decision to inform the Secretary of Defense of the reports from Guantanamo of concerns about the method of interrogating one detainee.

Senator Kyl:

1. If the United States were forced to conduct war-crimes trials of Al Qaeda detainees under the UCMJ, what is the general default statute of limitations (i.e., other than for murder and rape) that would apply? What implications does this have for prosecution of those who organized and plotted the September 11 attacks?

ANSWER: Offenses under the Uniform Code of Military Justice ("UCMJ") that are not punishable by death have a five-year statute of limitations. The general statute of limitations is found at 10 U.S.C. 843(b)(1), which states:

Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

The UCMJ provides for several exceptions to this rule, some related to the unavailability of the accused and an exception related to the exigencies of a time of war.

10 U.S.C. 843(e) states that:

For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

The statute of limitations may make such prosecutions problematic. Either the statute of limitations would run or, if the wartime certification were used, we would not be able to prosecute those individuals until after the cessation of hostilities, which may be a long time from now.

2. It is my understanding that, under the UCMJ, the right to counsel and the right to be informed of one's rights attaches even earlier than it does in the civilian criminal-justice system. Please describe the UCMJ rules governing this area. Assuming that Al Qaeda detainees are "in custody" once they are captured by U.S. forces, and assuming that they are automatically under suspicion of criminal activity as soon as they are captured simply by the fact that they are members of a terrorist, criminal organization, what implications does application of the UCMJ have for the ability of military prosecutors to use statements obtained from these detainees since the time of their capture? What implications does application of the UCMJ have for the ability of prosecutors to introduce evidence obtained as a result of information elicited from such statements?

ANSWER: Article 31 of the UCMJ requires members of our Armed Services to provide *Miranda*-type warnings before questioning any individual subject to the UCMJ suspected of criminal wrongdoing, whenever that questioning may be deemed to be part of an official law-

enforcement investigation. These rights are broader than the rights afforded to criminal defendants in the civilian system. Indeed, unlike civilian *Miranda* rights warnings, military Article 31, UCMJ, rights warnings are required regardless of whether the suspect is in law enforcement custody. In addition, when the suspect is placed in custody and is to be questioned by law enforcement or other persons subject to the UCMJ, the suspect is entitled to be advised that he or she may consult with counsel and have such counsel present during the interrogation or questioning. When counsel is requested, counsel must be present before any subsequent custodial interrogation may proceed. The failure to provide a required rights warning, regardless of whether the statement is obtained for law enforcement or intelligence purposes, generally precludes the use of those statements as evidence, and may preclude the use of any additional evidence or information derived from those unwarned statements.

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

3. Under Article 505, military prosecutors can protect classified information used in a court-martial by providing the defendant with a "suitable substitute" for the classified information. As a practical matter, how frequently (in general) is Article 505 invoked in courts-martial of U.S. soldiers, and how frequently (in general) can we expect it to be invoked in trials of Al Qaeda war criminals? Would any difference that exists pose practical problems for the military's ability to conduct trials of Al Qaeda war criminals? Also, if the military is unable to provide the Al Qaeda war criminal with a "suitable substitute" for the classified information that still protects American intelligence sources and methods, what would be the result for the prosecution of the individual? And if it were necessary to routinely use such "suitable substitutes" in order to try Al Qaeda war criminals, what risk is there that the information in the substitutes, even if it poses no risk of disclosure of U.S. sources and methods in an individual case, might nevertheless over the course of many trials provide Al Qaeda with a picture of U.S. intelligence operations that would undermine U.S. intelligence-gathering activities?

ANSWER: I understand that relatively few courts-martial include classified information as evidence requiring the application of Military Rule of Evidence (MRE) 505. We believe that a much higher percentage of trials of members of Al Qaeda would include classified information. In every case under the UCMJ where classified information is involved, the government must assess the risk to national security from providing that information, or an unclassified substitute, to the accused. That assessment includes not only the risk in an individual case, but also the risk to national security from release in multiple cases. If the risk from disclosure outweighs the

benefit of successful prosecution, the government would either pursue charges that do not include the at-risk classified information (if any) or not pursue prosecution at all.

4. What evidence authentication procedures and chain-of-custody requirements apply under the UCMJ? Were the UCMJ used to prosecute Al Qaeda war criminals, would U.S. soldiers be required to follow such procedures when capturing Al Qaeda members on the battlefield? Have such procedures been used when capturing and collecting information about Al Qaeda members on the battlefield whom the United States now plans to try for war crimes? If not, what is the implication of the failure to follow such procedures for America's ability to try these Al Qaeda members under the UCMJ?

ANSWER: Evidence authentication procedures and chain-of-custody requirements under the UCMJ are very similar to those in civilian criminal courts. For evidence to be admissible, it must be shown to be what it purports to be and must be relevant and necessary to an issue at a trial. When evidence is fungible (not readily identifiable visually), the party seeking to introduce the evidence must show that the evidence it seeks to introduce is the same evidence obtained at a given time and place; the party normally does this by calling witnesses showing an unbroken chain of custody over the evidence.

Currently, U.S. soldiers do not follow evidence authentication procedures and chain-of-custody requirements when conducting combat operations on the battlefield. Longstanding Department of Defense policy is that doing so is incompatible with conducting combat operations. Military police and members of the Defense Criminal Investigative Agencies are present on the battlefield and, if soldiers conducting combat operations discover information regarding serious criminal conduct, may follow up on that discovery applying appropriate evidentiary rules. But when the initial search, seizure or detention is made, soldiers apply combat, not evidentiary, procedures.

The implication of the failure to follow evidentiary procedures by soldiers conducting combat operations depends upon the facts of each individual case. In a given case it may be possible, for example, for a documents/weapon/equipment seized by a soldier to be admitted at trial because the soldier could identify it by some clear characteristic and also testify that it is in the same condition at trial as it was when seized. But that possibility is, obviously, slim; the more likely result is that the seized evidence would not be admissible.

Senator Schumer:

1. Mr. Bradbury testified that it is part of his job to review the legality of Administration programs. However, the ordinary review the Administration conducted over the military commission program did not prevent the Supreme Court from rebuking the Administration's policies on the war on terror. Could you explain more fully why the Administration has demonstrated resistance toward a formal and extensive review of the Administration's counter-terror programs?

ANSWER: I am not in a position to know the Administration's position on a request for a formal and extensive review of the Administration's counter-terror programs.

2. Please identify any individuals in the Department of Justice, the Department of Defense, and any other agencies, to the extent you know, who are reviewing the legal justification for the President's various programs on the war on terror.

ANSWER: I cannot address the work of the Department of Justice or of other federal agencies. With respect to the Department of Defense, attorneys in a variety of legal positions within the Department review the operations of the Department to assess whether they comport with the law.

3. Please detail to what extent you believe the holding of *Hamdi* has survived the holding of *Hamdan*.

ANSWER: Although I defer to DOJ on the details of this issue, we believe the Supreme Court's decision in *Hamdan* has no effect on the Court's ruling in *Hamdi*. *Hamdan* expressly recognized that the President's authority to detain Hamdan was not at issue. As the Court held in *Hamdi*, the President continues to have the authority to detain enemy combatants for the duration of the hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms.

4. On July 10, the Department of Justice responded to my request for an update of the Administration's legal justification with a letter that said, essentially, Hamdan changes nothing. However, commentators on both sides of the aisle vigorously disagree with that analysis... Given these arguments, first, do you stand by your July 10th letter? Second, how confident are you that the Supreme Court would uphold the legality and constitutionality of the program if it had an opportunity to address this issue?

ANSWER: I defer to DOJ to respond to the question.

Senator Feingold:

1. Please provide a complete list of each provision of the Uniform Code of Military Justice and the Manual for Courts-Martial that you believe should not apply in trials of Guantanamo detainees. For each individual provision that you object to, please explain:

- a. Why you believe the provision should not apply, including an analysis of the text of the provision and the case law interpreting that provision; and
- b. The specific change to the provision that you would propose and why the change is necessary.

ANSWER: The Military Commissions Act of 2006 provides the appropriate process for trying Guantanamo detainees in front of military commissions.

The Manual for Military Commissions, submitted to Congress on January 18, 2007, comports with the Military Commissions Act of 2006. The Manual provides a comprehensive set of rules that address the pre-trial, trial, and post-trial process associated with military commissions and the rules of evidence to be applied in those commissions. In addition, the Manual lists the crimes triable by military commissions and the elements of the crimes. In many respects, the Manual for Military Commissions mirrors the Manual for Courts-Martial. In those aspects in which they differ, that difference is often attributable to the express guidance provided by the Military Commissions Act of 2006. Explorations as to the differences often are provided in the Manual for Military Commissions provisions.

2. ...if Congress determines that legislation is necessary to authorize a new form of military commission, would you support allowing for pre-trial, expedited review of any new military commission structure?

ANSWER: Congress and the Executive Branch have worked together to create the Military Commissions Act of 2006. I support appropriate judicial review of the act. I also note that United States federal courts are prohibited from rendering advisory opinions.

06-07-11 Hamden Hearing

Dell'Orto Response to Schumer QFR #5

Q5. Please address, in writing, each argument put forward in the aforementioned letter by the group of constitutional law professors challenging the Department of Justice's assertion that Hamdan does not weaken the Administration's legal justification for warrantless surveillance.

DoD Response:

Q #5 requests DOJ address, in writing, each argument by a group of constitutional law professors challenging DOJ's assertion that Hamdan does not weaken the Administration's legal justification for warrantless surveillance.

Mr. Dell'Orto did not submit an answer to this question because our office believes this question did not solicit an answer from Mr. Dell'Orto. If Q# 5 was intended to solicit an answer from Mr. Dell'Orto, then Mr. Dell'Orto defers to DOJ.

Senator Specter:

1.a. In your opinion, can a detainee be afforded a “full and fair trial” while the DoD protects classified and sensitive information?

ANSWER: Yes. In principle, by setting clear, defined limitations on when an accused can be excluded from viewing certain classified material, we may ensure a “full and fair trial” while protecting classified information. The Military Commissions Act of 2006 (“MCA”) goes further and provides that the accused will have access to all the evidence admitted before the trier of fact. *See* 10 U.S.C. § 949a(b)(1)(A). Moreover, subject to limited exceptions, the accused shall have the right to be present for all trial proceedings. *See id.* § 949a(b)(1)(B); *id.* § 949d(e). At the same time, the MCA contains robust protections to ensure that the United States can prosecute captured terrorists without compromising highly sensitive intelligence sources and methods. *See id.* § 949d(f). I believe the MCA strikes an appropriate balance between the rights of the accused and interests of our national security.

2.a. In light of the Supreme Court’s ruling in *Hamdan*, do you still believe that military commissions are the best procedure for determining the guilt or innocence of a detainee?

ANSWER: Yes. The *Hamdan* ruling does not indicate that military commissions per se are an inappropriate means of trying detainees. The Court, through the *Hamdan* ruling, indicated that Congress and the Executive Branch should work together to address the matters raised, including what would be appropriate procedures governing military commissions. The Military Commissions Act of 2006 represents the product of that joint effort.

2.b. Can you provide circumstances why the procedures for military courts-martial and federal courts would be impracticable?

ANSWER: There are numerous provisions within the Uniform Code of Military Justice and Manual for Courts-Martial (“UCMJ”) that are impracticable for the purposes of trying Guantanamo detainees. Below are two examples.

Article 31 of the UCMJ, privilege of the accused against self-incrimination, is incompatible with the trials that need to be conducted. Military operations generally necessitate battlefield and near battlefield interrogations to obtain intelligence. If a warning is required, the trial impact of any failure to provide such warning could be extremely burdensome and could result in the exclusion of statements taken during lawful interrogations used in military intelligence operations. In addition, this right against self-incrimination attaches at an extremely early stage of the process, earlier than even in the civilian system, and is accompanied by a right to counsel at those earliest of stages.

Article 46 of the UCMJ, equal opportunity to obtain witnesses and other evidence, would also be impracticable to apply to the trials of these detainees. Under Article 46, defendants have greater access to witnesses than under the federal rules, and when conducting trials away from the site of the offense, as would be the case here, that is problematic.

These are just a few examples of the ways in which certain courts-martial procedures are impracticable as a means of trying the detainees at Guantanamo.

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

3. Can you provide some examples of how you would like to see legislation “revamp” the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet the goals of the administration?

ANSWER: The Military Commissions Act of 2006 meets the goals of the administration and we expect it and the military commissions conducted under it to withstand judicial scrutiny.

**Answers to written questions from Senator Arlen Specter:
 “*Hamdan v. Rumsfeld*: Establishing a Constitutional Process,”
 Senate Judiciary Committee, July 11, 2006**

**Dean Harold Hongju Koh
 Yale Law School
 July 4, 2008**

1. My testimony (attached) did not assert that suspected terrorists should be afforded the same rights as our own servicemen. My point, like that of the majority in *Hamdan*, was simply that “By enacting the UCMJ, the Court reasoned, Congress had authorized the president to use commissions, but had specified that, *wherever practicable*, the executive must follow the same procedural rules in military commissions as are applied in ordinary courts-martial.” Koh testimony at p. 3 (emphasis added)

2. If the combatants mentioned in your question were actively fighting U.S. forces, and captured by U.S. military officers on the field of battle, presumably those U.S. military officers could give sworn testimony that would comply with the Federal Rules of Evidence, explaining on what basis they chose to detain the detained combatants.

3. As I noted in my testimony at pp. 7-9 (attached), the Supreme Court’s reasoning in *Hamdan* clearly undermines the Administration’s claim of inherent executive power as a sufficient legal basis for the NSA’s sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents.

4. If Congress amended the UCMJ to exclude Common Article 3 of the Geneva Convention, Congress would be enacting domestic law that would place the U.S. in violation of our international legal obligations under the Geneva Convention. In *Hamdan*, the Court effectively treated Common Article 3 of the Geneva Conventions as judicially enforceable. As I noted in my testimony (attached) at p. 4,

Applying the law of war, a majority of the [*Hamdan*] Court denied the Government’s claim that individuals could never enforce the Geneva Conventions in U.S. court, reasoning that Hamdan’s proposed trial violated Common Article 3 of those Conventions, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” By so saying, the majority both took note of the treaty’s intention to be applied universally, not selectively, and confirmed that Congress had effectively “internalized” Common Article 3 into domestic law when it enacted the UCMJ.

5. Congress should address the authority and process by which the DOD may detain enemy combatants if and when it legislates.

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The Honorable Arlen Specter
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Hamdan v. Rumsfeld*: Establishing a Constitutional Process

Dear Senator Specter:

Thank you again for the opportunity to testify before the Committee on July 11 regarding the very important issues confronting Congress in the wake of *Hamdan v. Rumsfeld*. My responses to your written questions are set forth below.

1. If Congress wanted to ratify the Administration's position that "conspiracy" is in fact a crime of war for which detainees can be tried and convicted, do you believe the Supreme Court would uphold such legislation?

In *Hamdan*, Justice Stevens—speaking only for himself and three other Justices—suggested that the crime of conspiracy cannot lawfully be tried before a military commission because, in his estimation, conspiracy is not a violation of the common law of war. Because this portion of Justice Stevens's opinion did not command a majority of the Court, it is not binding on the President or Congress. Moreover, even if Justice Stevens's opinion were binding, Congress has the constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, and may rely upon this authority to designate conspiracy a war crime subject to trial before a military commission. Indeed, Justice Stevens repeatedly emphasized that Congress had not explicitly endorsed the Executive's decision to try conspiracy as a war crime and that his conclusion that conspiracy cannot be tried before a military commission was premised solely on the contours of the common law of war. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. _ (2006) (slip op. at 34 n.30). If Congress were to designate conspiracy a war crime for which detainees can be tried and convicted, it is likely that the Supreme Court would uphold that determination as a valid exercise of Congress's constitutional prerogatives.

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GIBSON, DUNN & CRUTCHER LLP

The Honorable Arlen Specter
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2. What does *Hamdan* mean for the President's other claims of inherent executive power, such as activities of the National Security Agency that have recently come to light?

The President's inherent Commander-in-Chief powers were not at issue in *Hamdan*. The Court concluded that the President's military commissions were inconsistent with the restrictions imposed by Congress in the Uniform Code of Military Justice. The Court did not pass on the merits of the argument that, notwithstanding such congressional limitations, the President retains the inherent constitutional authority to operate military commissions. *Hamdan*, 548 U.S. at ___ (slip op. at 29 n.23). The Court has therefore not addressed the scope of the President's inherent power as Commander-in-Chief to take measures to protect Americans against al Qaeda and other international terrorist organizations. The Framers imbued the President with broad constitutional authority to act swiftly and decisively to defend the Nation against military threats. See, e.g., *The Federalist No. 70*, at 471 (Alexander Hamilton) (J. Cooke ed., 1961); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy"). This authority is undiminished by *Hamdan*.

3. On June 29, 2006, while speaking at a public news conference, President Bush said he planned to work with Congress to "find a way forward," and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny. Can you provide some examples of how you would like to see legislation "revamp" the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet the goals of the administration?

I submit that this question is more appropriately addressed by the Administration. However, I believe that it is of paramount importance that Congress preserve the President's discretion to utilize those military commission procedures that he determines, in his capacity as Commander-in-Chief, to be the most effective means of trying members of al Qaeda and other international terrorist organizations. If Congress were to prescribe specific commission procedures from which the President may not deviate, the President would be unable to react with the requisite vigor and dispatch to the rapidly changing conditions of the Nation's conflict with stateless terrorists. At a minimum, then, I would recommend that Congress endorse the existing military commission structure, based on two centuries of experience and evolution, as embodied in the President's Military Order of November 13, 2001 (which would bring the commissions into compliance with the Uniform Code of Military Justice), and confirm the President's determination that the Geneva Conventions do not apply to conflicts with stateless terrorist organizations.

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4. How many detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Can you provide us with a complete list of the charges against those detainees?

I do not have access to the information necessary to answer this question.

* * *

I hope that these responses will be helpful to the Committee as it crafts a legislative response to the *Hamdan* decision. Please do not hesitate to contact me if I can provide the Committee with any additional assistance.

Very Truly Yours,



Theodore B. Olson

TBO/hv

Senator Arlen Specter
Questions for Scott Silliman

Hamdan v. Rumsfeld: Establishing a Constitutional Process

1. In your written statement, you say that “If the Congress passes a law which merely gives legislative sanction to the prior system for military commissions—putting everything back in place the way it was—there is no assurance that it would pass judicial muster.” Why do you believe that to be the case?

The Supreme Court in *Hamdan* said that the President’s system for military commissions ran afoul of two provisions of the UCMJ, Articles 21 and 36. The Court construed the phrase “law of war” in Article 21 as including Common Article 3 of the Geneva Conventions which requires the use of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. Therefore, whatever military commission system is used must satisfy that provision of Common Article 3. The United States has signed, but not ratified, the 1977 Additional Protocol I to the Geneva Conventions, but a number of the provisions of that Protocol are accepted by the State Department as customary international law. One of those, Article 75, delineates what are “commonly recognized principles of regular judicial procedure” in a regularly constituted court, one of which is the right to “be tried in his presence”. Because the President’s military commission procedure allows for the accused and his civilian attorney to be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceedings which is closed by order of the Presiding officer, I believe such an exclusion from trial would invite further judicial challenges predicated on non-fulfillment of Common Article 3. I do not know what the courts would do in deciding such challenges, and that is why I said there was no “assurance” of the system passing judicial muster.

2. In your written statement, you say that the minimal level of due process rights given in commissions fails to satisfy “commonly recognized international legal standards.” But aren’t these standards purely theoretical concepts which are not actually followed by countries in the real world? And aren’t many of the nations criticizing us for not following such standards themselves guilty of doing far worse?

As mentioned above, the standards set out in Article 75 of Additional Protocol I are not purely theoretical and, as customary international law, are binding upon us regardless of whether some countries do not adhere to them. Under the concept of *jus cogens*, there can be no derogation; not so with customary international law.

3. In your written testimony, you say that "evidence acquired through coercive interrogation techniques should not be admissible." What is your definition of a coercive interrogation? Is it:
- waterboarding
 - forcing a detainee to stand for long periods of time, or
 - even playing loud music?

I believe that Army Field Manual 34-52 on Intelligence Interrogation, a manual which was predicated upon compliance with the Geneva Conventions, provides the best guidance because it sets forth those approved techniques which are non-coercive. Thus, under that set of criteria, waterboarding would be coercive; but requiring a detainee to stand for several hours would generally not be coercive unless the required period of time was excessive and the environment was manipulated so as to cause the detainee physical distress (not mere discomfort). The playing of loud music would not be coercive unless it was of such a high decibel level as to create physical damage to the ears. Simply put, if you follow the list of approved techniques in FM 34-52, you are, by definition, using non-coercive techniques.

4. Based on your reading of the Hamdan case, what findings should Congress include so as to establish the impracticability of allowing detainees to be tried by court-martials, or by procedures identical to court-martials? In particular, how should we limit the detainee's access to classified information?

Remembering that Article 18 of the UCMJ recognizes that violations of the law of war may be prosecuted by either courts-martial or military commissions convened under the Code but following court-martial procedures (except where any of those procedures are justified as impracticable), either forum is available for the purpose of prosecuting those at Guantanamo Bay. I have, however, recently been persuaded that the latter may actually provide more flexibility with regard to military necessity and yet still comply with Common Article 3. For example, in the fluid battlefield environment, I do question the propriety of the Article 31(b) requirement for an advice of rights upon suspicion of an offense, even though that requirement has been interpreted in military courts as only applying to those acting in an official capacity (e.g. commanders, law enforcement personnel, CID, etc.). Another example might be the requirement for general courts-martial that they must be preceded by an Article 32 investigation, or a waiver thereof. As to a detainee's access to classified information, Military Rules of Evidence 505 and 506 basically mirror the Classified Information Procedures Act with regard to an accused wanting to introduce classified information *in his defense*. These rules might have to be amended to allow for the

safeguarding and use of classified or other sensitive government information to prove guilt, while still ensuring access by qualified members of the defense team who hold the requisite security clearance. It must be noted, however, that these rules are contained in the Manual for Courts-Martial, an executive order promulgated by the President, so any amendment would require no legislative action, only a change to the Manual.

5. What does *Hamdan* mean for the President's other claims of inherent executive power, such as the NSA situation?

Because I interpret the Supreme Court's ruling in *Hamdan* to be restricted to military commissions, with the Court's invocation of a Common Article 3 standard applying only within the context of the phrase "law of war" as mentioned in Article 21 of the UCMJ, I do not believe that the Court dealt with or challenged any other application of executive power in the War on Terrorism. There may be implications for how the courts might rule on challenges to other programs, especially with regard to the Court's treatment of the breadth of the scope of the AUMF, but those are issues for another day. Simply put, *Hamdan* is an opinion much like *Little v. Barreme*, decided some 200 years earlier, where the Court said that when the President acts pursuant to his constitutional authority as commander in chief, he is necessarily constrained by any limits which Congress has imposed when it has legislated in that area. The Court in *Hamdan* did not say that the President lacks constitutional authority to act in times of armed conflict. It said only that, assuming that authority exists, it is limited by Articles 21 and 36(b) of the UCMJ.

Questions from Senator Edward M. Kennedy, following the Judiciary Committee hearing on July 11, 2006, "*Hamdan v. Rumsfeld*: Establishing a Constitutional Process"

Questions for Scott Silliman

1. For some time, you have written about the existing structures to hold trials for detainees. As you know, the Supreme Court recognized in *Hamdan v. Rumsfeld* that courts-martial under the Uniform Code of Military Justice could be used to prosecute detainees at Guantanamo Bay. Half a century ago, Congress created this military trial system, and it has stood the test of time. Are there any existing legal barriers that would prevent the President from starting such trials immediately?

There are no existing legal barriers to using courts-martial for those who we have detained who are being charged with violations of the law of war. Since the enactment of the UCMJ in 1950, however, there has never been a court-martial used for this purpose; but it could be done under the existing legislation. Interestingly, if those in detention at Guantanamo Bay were classified as POWs, Articles 84 and 102 of the Third Geneva Convention of 1949 would require us to use courts-martial or, in the alternative, trial in federal court to prosecute them.

2. There is some concern that the court-martial system could prevent the government from obtaining convictions. Under such a process, the government has a higher standard for admissibility of evidence. Does the government's assertion that the court-martial system is too risky for obtaining convictions have merit? Are there advantages of proceeding with the court-martial system even if the government may have a higher burden?

Using the existing Manual for Court-Martial standard for the admissibility of evidence, which is virtually identical to that in the federal rules, would probably preclude some types of evidence (unsworn statements, hearsay, or statements made under coercive interrogation techniques) from being entered into evidence against an accused. If there was no other available evidence to prove the guilt of an accused, that might result in an acquittal or a case not even being brought. However, the number of potential trials is small, perhaps no more than 20 or so, and we would gain more than we would lose by using a system deemed fair in the eyes of the international community. To construct a system simply to guarantee a 100% conviction rate would be, in my opinion, unwise.

One must recognize that the UCMJ also authorizes military commissions as having concurrent jurisdiction with general courts-martial to prosecute violations of the law of war (Cf. Articles 18 and 21, UCMJ). This type of statutorily recognized commission, as opposed to the one established by the President in 2001, must necessarily use the same rules of procedure as

courts-martial *unless deemed impracticable* (Article 36(b), UCMJ, as interpreted by the Supreme Court in *Hamdan*). If there was agreement that there needed to be a slightly less rigid standard for the admissibility of evidence, while still retaining some measure of authenticity, that could be done under Article 36 with a definite articulation by the President justifying the deviation. Thus, there could be a UCMJ type of military commission which would, except for a less rigid standard for admitting evidence, basically mirror a court-martial in its rules and procedures. I believe that either a court-martial, the same type of trial we use for members of our own armed services, or a military commission convened under the Code as I have described above, would be met with approval by the global community and would also be clearly in compliance with Common Article 3 of the Geneva Conventions.

Senate Judiciary Committee
Hearing on “*Hamdan v. Rumsfeld*: Establishing a Constitutional Process”
Tuesday, July 11, 2006

Questions Submitted by U.S. Senator Russell D. Feingold
To Professor Silliman and Lieutenant Commander Swift

1. Mr. Dell’Orto argued in his testimony that the court-martial system contains a number of added protections not present in civilian courts. For example, he expressed concern that the UCMJ provides for “a thorough and impartial investigation open to the public and the media,” rather than an indictment by a grand jury. Are you concerned about the application of this provision to trials of Guantanamo detainees?

The investigation referred to by Mr. Dell’Orto is an Article 32 investigation which is the equivalent of a grand jury investigation, but which does provide greater rights to an accused who is a member of the military than his civilian counterpart. For example, the accused and his counsel are entitled to be present and may contest the government’s offered evidence and, if they choose, present evidence of their own in defense of the charges which have been preferred. Although an Article 32 investigation is ordinarily open to the public and the media, it may be closed in the discretion of either the commander who convened the investigation or the investigating officer (See Manual for Courts-Martial, R.C.M. 405(h)(3)). Thus, although I join others who suggest that an Article 32 investigation might not be an essential part of any system used to prosecute those who we hold in detention at Guantanamo Bay, the current Manual provisions do provide for the safeguarding of classified or other sensitive government information by closing the hearing to all but the accused, his counsel, and other essential government personnel.

2. The possible “*Miranda*” rights of Guantanamo Bay detainees were discussed at length during the hearing. Mr. Dell’Orto even argued that the courts-martial rules “would obligate the soldier on the field ... to advise that detainee of his rights if he believed that detainee to have committed a crime.” Is this a valid concern when an individual is detained for intelligence purposes or as part of armed hostilities, as was the case for the Guantanamo Bay detainees?

We must be careful to separate issues regarding military operations from questions of the admissibility of evidence in a judicial forum. For example, most of the individuals captured in Afghanistan or Iraq, and thereafter detained at Guantanamo Bay and elsewhere, are being held because they were determined to be *unlawful combatants*, a status which denies them protection as prisoners of war under the Third Geneva Convention. Simply being an unlawful combatant is not, in and of itself, a violation of the law of war. Violating the law of war requires some overt act contrary to that body of law which was committed within the context of a recognized armed

conflict. Thus, with regard to the Article 31(b) requirement for an advice of rights upon suspicion of an offense, that would seldom be required upon initial capture. Further, that requirement has been interpreted in military courts as applying only to those acting in an official capacity (e.g. commanders, law enforcement personnel, CID, etc.), rather than just anyone who might suspect that an offense was committed. Also, choices often have to be made as to whether it is more important to detain an individual for purposes of acquiring needed intelligence (where one does not worry about evidentiary standards and advice of rights because there is no intent to go to trial) or whether it is clear from the beginning that there will be a prosecution and that any statements taken must necessarily be under circumstances which comply with Article 31 so that they can be used against the accused. Since perhaps up to 95% of those we have detained at Guantanamo Bay will never be prosecuted, and they have been held solely for intelligence purposes, invoking Article 31(b) as a “major problem”, in my opinion, merely confuses the issue.

3. Mr. Bradbury argued that the UCMJ “require[s] that prosecutors share classified information with the accused if the information will be introduced as evidence at trial.” Is this accurate? Are the UCMJ rules dealing with the discovery of classified information adequate for proceeding with trials of the Guantanamo detainees?

The UCMJ itself does not speak directly to the issue. The rules governing introduction of classified information into evidence are found in Military Rules of Evidence (MRE) 505 and 506 which basically mirror the provisions of the Classified Information Procedures Act and which govern use of classified information when requested by the accused for use in his defense. Since the MREs are part of the Manual for Court-Martial, an executive order promulgated by the President and not Congress, specific rules could be adopted by amending the Manual so as to provide for safeguarding critical classified information while still ensuring some measure of authenticity and at least a minimal level of access by the accused to evidence to be used against him. Perhaps the use of unclassified summaries specifically approved by the military judge might be one option, but there may be others which could deal with this issue. Alternatively, rather than formally amending the military rules of evidence for courts-martial, this issue might be an appropriate rationale for using the available alternate type of forum under the UCMJ, a military commission referred to under Articles 18 and 21, which would still follow court-martial procedures except where there is an specific articulated justification for deviating from those rules (Cf. Article 36(b) as interpreted by the Supreme Court in *Hamdan*). A demonstrated need to safeguard highly sensitive classified evidence might justify such a deviation.

4. Mr. Bradbury's written testimony states: "Court-martial rules require that the chain of custody for evidence be preserved, and that all documents admitted be painstakingly authenticated. But it is extremely difficult during an armed conflict to gather evidence in a way that meets strict criminal procedure requirements, whether collected on the battlefield, during military intelligence operations, or during interrogations of detainees." Do you agree? Does the UCMJ appropriately account for battlefield realities?

I do not agree that court-martial rules (actually the military rules of evidence) pose an insurmountable problem when evidence is gathered during armed conflict. The UCMJ and the Manual for Courts-Martial were meant to be portable and to facilitate trials anywhere in the world under any circumstances. There have been many cases where members of our armed forces have been prosecuted by court-martial for crimes committed on or near the battlefield, and chain of custody issues have neither precluded sending the case to trial or, where the weight of the evidence supports it, a conviction. Even if there are breaks in the chain of custody of a piece of evidence to be offered at trial, those breaks only affect the weight of the evidence, not its admissibility.

5. Do you think that the court-martial rules for admission of hearsay evidence would need to be revised for trials of Guantanamo Bay detainees? Do the hearsay rules used by the International Criminal Tribunals for the former Yugoslavia and Rwanda provide a good model?

Although there are 24 exceptions to the general prohibition on the use of hearsay evidence in courts-martial, the argument has been made that, in some instances, a need might exist for the finders of fact to consider some essential piece of otherwise relevant and material evidence, albeit hearsay and not covered by one of the exceptions. As mentioned in my answer to question 3, above, this might suggest the propriety of using a military commission under Articles 18 and 21, with virtually identical rules and procedures as those used in a court-martial save where there is a essential and justified need to deviate. This type of military commission would be different from the President's military commission system which was struck down by the Supreme Court.

With regard to hearsay rules under the ICTY or ICTR, those more flexible rules are part of an integral evidentiary system which has other safeguards to guarantee authenticity. Further, trial is those tribunals is before judges alone who are well versed in the fine points of the admissibility of evidence. Therefore, we must be exceedingly cautious in simply borrowing, out of context, an evidentiary rule from an international tribunal.

6. Concerns were expressed at the hearing about the right of the accused under the UCMJ to be present at the trial, to call his own witnesses, and to cross-examine government witnesses. Possible disadvantages mentioned include disclosure of classified information, and possible disruption of military operations by requiring individuals from the battlefield to appear at trial. How would these UCMJ provisions function in a trial of a Guantanamo detainee? Do you believe these concerns are valid?

Again, as mentioned in my answer to question 4, above, there have been courts-martial conducted in the past which have required the presence of witnesses being brought back to testify from distant places where this country is engaged in armed conflict. In this age of high speed and readily available air transport, be it military or commercial, I do not agree that such a situation would disrupt military operations, especially considering the relatively few number of trials to be conducted. I do believe, however, that consistent with Article 75 of the 1977 Additional Protocol I to the Geneva Conventions, an article which has been accepted as customary international law to which we are bound, an accused has a right to be present during trial proceedings unless he becomes disruptive. Finally, with regard to disclosure of classified information, see my answer to question 3, above.

7. Mr. Bradbury argued that the military commission system authorized by the President had an important safeguard – that a military commission is required to determine if any evidence substitutions or removal of the accused from the proceedings would “call into question the fundamental fairness of the proceedings.” Is this an effective safeguard?

No, I do not believe it is. The term “fundamental fairness” has to be measured against some matrix, some fixed and readily ascertainable standard. The Supreme Court said that the standard to be used with regard to military commissions is Common Article 3 of the Geneva Conventions. As noted in my answer to question 6, above, that standard is given further definition by looking to the provisions of Article 75 of Additional Protocol I which is customary international law. Article 75(4)(e) requires that “anyone charged with an offense shall have the right to be tried in his presence”. Therefore, if a commission determined that it would not affect the “fundamental fairness of the proceedings” to have the accused removed from his own trial, for reasons other than being disruptive, such a determination would be, in my judgment, in conflict with the Protocol and could not stand.

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**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620**

August 9, 2006

The Honorable Arlen Specter, Chairman
United States Senate, Committee on the Judiciary
Attention: Mr. Barr Huefner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Per your request, the attached answers are submitted to the Committee on the Judiciary's written questions.

Very respectfully,

A handwritten signature in black ink, appearing to read "Charles D. Swift".

LCDR CHARLES D. SWIFT
Detailed Defense Counsel
U.S. v. HAMDAN



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Questions from Senator Patrick Leahy

1. After reviewing the transcript from the July 11 hearing, are there any legal or factual assertions made by Mr. Bradbury or Mr. Dell'Orto with respect to the UCMJ, the operation of courts-martial or the operation of military commissions with which you disagree?

Sir, I disagree with the assertions made that: (1) Article 31(b) would prevent intelligence gathering; (2) the UCMJ requires soldiers to obtain warrants on the battlefield; (3) courts-martial would require the disclosure of classified information and jeopardize national security; (4) hearsay testimony is admitted in all cases by the Yugoslavian and Rwandan tribunals; and (5) chain of custody requirements are overly burdensome and could not be complied with by soldiers on the field. My co-counsel, Professor Katyal, in his written testimony to the Senate Armed Services Committee provided a detailed analysis of why Mr. Bradbury and Mr. Dell'Orto were incorrect in each of these assertions.

- *Miranda Warnings.* Article 31(b) of the UCMJ does contain a heightened *Miranda* requirement. But our nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." *See, e.g., United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990). They are not required when questioning is conducted for "operational" reasons. *Id.* at 389. The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.
- *Hearsay.* The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including Military Rule of Evidence 807's residual hearsay exception, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

In his testimony before both the Senate Armed Services Committee and the House Armed Services Committee, Assistant Attorney General Bradbury said that both the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) allowed hearsay evidence. For example, he told the Senate Armed Services Committee that "a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact-finder, and as long as it is not outweighed by undue prejudice."

As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate - an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY's and ICTR's rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan 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).¹

- *Warrants*. Under Military Rule of Evidence 315(e)(4), evidence obtained during a search in a foreign country will be admissible even if it is seized without a warrant. Additionally, under Mil. R. Evid. 314(g)(4) if the Constitution does not require a warrant then the court-martial will not require one either.
- *Protection of Witnesses*. Mil. R. Evid. 507 allows protection of identity of witnesses.
- *Chain of Custody*. Mil. R. Evid. 901-903 deal with the admission of documents – and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9-4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. *Id.* Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S.

¹ "There is also a brand new Rule 92bis providing for the admission of a witness's written statement, so long as it does not go to proof of the conduct or acts of the accused." Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int'l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution v. Galic*, "There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in that rule." *Prosecutor v. Galic*, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

The Appeals Chamber also emphasized that "the purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms, and a party is not permitted to tender a written statement given by a prospective witness to an investigator of the Office of the Prosecutor under Rule 89(C) in order to avoid the stringency of Rule 92 bis." *Id.* (footnote omitted).

1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, *supra*, at 9-8; see also *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. See, e.g., *United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993); *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).

Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. See *Prosecutor v. Mucic*, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at <http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm>. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber III Final Decision of the Admissibility of Intercepted Communications in the case of (June 14, 2004) available at <http://www.un.org/icty/milosevic/triale/decision-e/040614.htm>.

- *Classified Evidence*. A court-martial, unlike a civilian trial, can take place with a "jury" composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid. 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and necessary" classified information to the prosecution's or accused's case can be made available. Mil. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505's procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused's request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).

The military rules of evidence already provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d). And courts-martial also grant broad privileges for withholding information when it is "detrimental to the public interest." Mil. R. Evid. 506(a).

TOTAL P.04

Questions from Senator Russell D. Feingold

1. Mr. Dell'Orto argued in his testimony that the court-martial system contains a number of added protections not present in civilian courts. For example, he expressed concern that the UCMJ provides for "a thorough and impartial investigation open to the public and the media," rather than an indictment by a grand jury. Are you concerned about the application of this provision to trials of Guantanamo detainees?

Sir, I am not concerned about the application of Article 32 of the Uniform Code of Military Justice. First, the dangers of opening such an investigation to the public and media are not actually present. There is ample precedent for closing an Article 32 investigation to the public and media when national security considerations are at stake. Second, such an investigation is not going to disrupt other combat operations. The government is only required to call or produce witnesses if they are reasonably available. When witnesses are reasonably available, it benefits the government to call them since their testimony is subject to cross-examination and if the witnesses are later unavailable, it may be used in a subsequent non-capital trial pursuant to Article 49 of the UCMJ. Finally, the independent investigation does not only comments on whether there is sufficient evidence for a trial, it also considers whether the evidence is likely to be admissible. Such comments would be particularly valuable here because under the law of war the government can wait until the conflict is over before being obligated to hold a war crimes trial. Thus, the Article 32 Hearing provides an opportunity for independent advice as to whether such a trial is likely to require the disclosure of classified or sensitive information that might jeopardize U.S. operations and therefore should be delayed until it can be held without such jeopardy. Also, an Article 32 addresses the adequacy of charges. Given that a plurality of the Supreme Court struck down the charge against Mr. Hamdan, the immediate value of independent advice concerning the adequacy of charges is readily apparent. Additionally, many a court-martial case has been resolved by a plea bargain because the defense saw the strength of the government's case at the Article 32 investigation.

2. The possible "*Miranda*" rights of Guantanamo Bay detainees were discussed at length during the hearing. Mr. Dell'Orto even argued that the courts-martial rules "would obligate the soldier on the field... to advise that detainee of his rights if he believed that detainee to have committed a crime." Is this a valid concern when an individual is detained for intelligence purposes or as part of armed hostilities, as was the case for the Guantanamo Bay detainees?

Sir, the question of Miranda Warnings was addressed by my co-counsel, Professor Neal Katyal in his written testimony to the Senate Judiciary. I am in complete concurrence with his answer and provide it here.

Miranda Warnings. Article 31(b) of the UCMJ does contain a heightened *Miranda* requirement. But our nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Military appellate courts have repeatedly held Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." See, e.g., *United States v. Loukas*, 29 M.J.

385, 387 (C.M.A. 1990). They are not required when questioning is conducted for “operational” reasons. *Id.* at 389. The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.

3. Mr. Bradbury argued that the UCMJ “require[s] that prosecutors share classified information with the accused if the information will be introduced as evidence at trial.” Is this accurate? Are the UCMJ rules dealing with the discovery of classified information adequate for proceeding with trials of the Guantanamo detainees?

Sir, Mr. Bradbury’s answer is incomplete. While the UCMJ requires that the accused see all evidence against him, that does not mean that the prosecution is necessarily obligated to turn over classified evidence. The question of classified evidence was also addressed by Professor Katyal in his written testimony and I am again in complete agreement with it and provide it here.

Classified Evidence. A court-martial, unlike a civilian trial, can take place with a “jury” composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure “reasonably could be expected” to harm national security prior to the accused or his lawyer being made privy to the classified information. Only “relevant and necessary” classified information to the prosecution’s or accused’s case can be made available. Mil. R. Evid. 505(i).

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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). And courts-martial also grant broad privileges for withholding information when it is “detrimental to the public interest.” Mil. R. Evid. 506(a).

4. Mr. Bradbury’s written testimony states: “Court-martial rules require that the chain of custody for evidence be preserved, and that all documents admitted be painstakingly authenticated. But it is extremely difficult during an armed conflict to gather evidence in a way that meets strict criminal procedure requirements, whether collected on the battlefield, during

military intelligence operations, or during interrogations of detainees." Do you agree? Does the UCMJ appropriately account for battlefield realities?

The UCMJ was designed for use on the battlefield. Military Rules of Evidence 901 to 903 dealing with the authentication of evidence are actually quite flexible and permit the Military Judge great leeway so long as he finds there is sufficient reason to believe that the evidence is what its proponent purports it to be. The reasoning put forth by Mr. Bradbury would necessarily mean that the evidence supporting crimes and alleged crimes committed by U.S. servicemen on the battlefields of Iraq and Afghanistan could not be introduced because of lack of authentication. The experience, of course, of battlefield trials to date is a testament to the flexibility of the fairness of the courts-martial system. Indeed, from 2003 through June 2006, the Army alone tried 373 courts-martial in Iraq and Afghanistan. During the same period, of course, there was not a single successful prosecution by military commission. The UCMJ is demonstrably suited to operation on the battlefield. Professor Katyal addressed this question in detail and I provide his answer below.

Chain of Custody. Mil. R. Evid. 901-903 deal with the admission of documents -- and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9-4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. *Id.* Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S. 1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, *supra*, at 9-8; *see also United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. *See, e.g., United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993); *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).

Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. *See Prosecutor v. Mucic*, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at <http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm>. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. *See Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber III Final Decision of the Admissibility of

Intercepted Communications in the case of (June 14, 2004) *available at*
<http://www.un.org/icty/milosevic/trials/decision-e/040614.htm>.

5. Do you think that the court-martial rules for admission of hearsay evidence would need to be revised for trials of Guantanamo Bay detainees? Do the hearsay rules used by the International Criminal Tribunals for the former Yugoslavia and Rwanda provide a good model?

No Sir. The present hearsay rules were developed to permit the admission of hearsay evidence under circumstances where it has been found by Congress in the Federal Rules of Evidence and by the President and the Military Rules of Evidence to be reliable. These rules give broad authority to admit evidence and normally do not pose undue restrictions on the prosecution of crime. The flexibility of the rules of evidence is [flexibility . . . is demonstrated] are demonstrated in the example given by Mr. Bradbury. Mr. Bradbury suggested that hearsay would prevent the introduction of evidence gained through intelligence monitoring. Actually, such evidence is likely to be admitted as either a *present sense impression*, M.R.E. 803 (1); *excited utterance*, M.R.E. 803 (2); or *then-existing mental, emotional, or physical condition*, M.R.E. 803(3). Additionally, such statements if made by the accused or others working with the accused are admissions by party opponents and not considered hearsay at all, and even if they were made by someone independent of the accused, they might still be admissible if the declarant is unavailable, i.e. killed or at large, as a *statement against penal interest* M.R.E. 804 b(3). Indeed, were Mr. Bradbury's assertions that hearsay rules would prevent the introduction of intercepted communications true, the government would not be able to introduce wiretaps and other evidence it routinely collects in support of a criminal prosecution because such evidence would also be hearsay. In point of fact, as Professor Katyal points out in his written testimony, "The hearsay rules, including Military Rule of Evidence 807's residual hearsay exception, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared."

If Congress chooses to amend hearsay rules, then the Yugoslavian and Rwanda tribunals' rules of evidence are the absolute minimum that should be used. Contrary to Assistant Attorney General Bradbury's testimony, these rules do not permit the blanket admission of hearsay evidence. Professor Katyal's testimony below details what the Yugoslavian and Rwandan tribunals actually permit:

As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate - an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY's and ICTR's rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan 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).¹

6. Concerns were expressed at the hearing about the right of the accused under the UCMJ to be present at the trial, to call his own witnesses, and to cross-examine government witnesses. Possible disadvantages mentioned include disclosure of classified information, and possible disruption of military operations by requiring individuals from the battlefield to appear at trial. How would these UCMJ provisions function in a trial of a Guantanamo detainee? Do you believe these concerns are valid?

Sir, the right to be present at trial, call witnesses in your defense, and cross-examine government witnesses are the bedrock due process principles on which our system of justice has been built. They are equally reflected in the laws of war as illustrated by the Yugoslavian and Rwandan tribunals. To compromise these rights is to compromise the trial. Providing these rights, however, does not mean combat operations have to cease. Trials in the military are routinely scheduled around the deployments of military service members. Where the coordination of all witnesses is not possible, the taking of testimony by deposition is permitted in all non-capital cases under Article 49 the UCMJ. If there is inconvenience to the government here, it is of its own making, by choosing to transport the detainees to a location remote from the battlefield and choosing to hold trials years after they were initially detained. The government has created a situation where it might be inconvenient and expensive to call some of the relevant witnesses. But justice cannot be sacrificed for convenience, especially where the hardships are created by the government's own actions.

7. Mr. Bradbury argued that the military commission system authorized by the President had an important safeguard – that a military commission is required to determine if any evidence substitutions or removal of the accused from the proceedings would “call into question the fundamental fairness of the proceedings.” Is this an effective safeguard?

No Sir, it is not because the standard is totally completely subjective. Our system of justice has always considered that the right of the accused to be present and see the evidence

¹ “There is also a brand new Rule 92bis providing for the admission of a witness's written statement, so long as it does not go to proof of the conduct or acts of the accused.” Patricia M. Wald, To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int'l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution v. Galic*, “There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in that rule.” *Prosecutor v. Galic*, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

The Appeals Chamber also emphasized that “the purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms, and a party is not permitted to tender a written statement given by a prospective witness to an investigator of the Office of the Prosecutor under Rule 89(C) in order to avoid the stringency of Rule 92 bis.” *Id.* (footnote omitted).

against him is a component is required of the fundamental fairness of any proceeding. To write a rule that steps outside of the fundamental tenets of justice is not only cynical, it opens the doors to the most unhappy and repudiated examples of Anglo-Saxon jurisprudence, the Star Chamber and the trial of Sir Walter Raleigh. These trials were the result of political decisions and justified as necessary to preserve national security. As Justice Scalia had observed; "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

Oliver Wendell Holmes taught us that "the life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* 1 (1881). Experience in the commission system has taught us that the presiding judicial officer cannot be entrusted to make sound decisions on the admissibility of evidence based on an amorphous probativeness standard. For example, Army Colonel Peter Brownback, the Chief Presiding Officer of the Military Commission system, was questioned during voir dire about whether he would admit evidence obtained by torture. He responded, "If you're asking me to say I'm going to exclude evidence that was obtained by someone sticking a red hot poker in someone's eye, well, the prosecution is going to have the burden of presenting it. It doesn't sound likely that I would let it in, but I'm not going to promise because I don't know. I just don't know." Record, *United States v. al Bahlul* at 225, Case No. 04003 (March). A military commission system should not leave a military judge guessing as to whether to admit evidence obtained by such barbaric processes. A fair military commission system would clearly preclude a military judge from doing so.

TOTAL P.07

Questions from Senator Edward M. Kennedy

1. Do you think that use of courts-martial can meet the standards the Supreme Court set in *Hamdan v. Rumsfeld* for detainee trials? Is there any reasonable barrier that prevents the Administration from moving forward this way? What are the practical benefits of using the court-martial system to try detainees?

Sir, the Supreme Court's decision in *Hamdan* unquestionably permits the use of courts-martial to try recognized war crimes in conjunction with the attacks of 9/11 and subsequent hostilities by al Qaeda.

The barriers to using courts-martial put forth by Assistant Attorney General Bradbury and DoD Deputy General Counsel Dell'Orto are either over-hyped or non-existent. My co-counsel, Professor Neal Katyal, set forth in his written testimony a careful analysis of the supposed barriers cited by the Administration. (Below) None of them would prevent a fair trial in Mr. Hamdan's case. Using a court-martial is a guarantee of justice now. Using anything less than a court-martial will unquestionably lead to further litigation, the delay of accountability of the crimes committed by al Qaeda members and perhaps the ultimate denial of justice to the victims of 9/11.

Professor Katyal's written testimony regarding the use of courts-martial:

a. Courts-Martial Have Tremendous Flexibility and International Respect

The existing court-martial system is already designed to handle terrorism cases.¹ We've had courts-martial on the battlefields of Afghanistan and Iraq. The "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. The UCMJ, in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today.

In *Curry v. Secretary of the Army*, 595 F.2d 873 (CA DC 1979), the D.C. Circuit rejected a constitutional challenge by a U.S. servicemember to certain structural aspects of the UCMJ. Noting that the UCMJ was designed to work in peace time and in war time, the court stated:

Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.

¹ Cf. *Hamdan* (slip op. at 49 n.41) ("That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught 'plotting terrorist atrocities like the bombing of the Khobar Towers.'")

593 F.2d at 877. And when drafting the Code, its principal author, Edmund Morgan, emphasized that it struck a flexible balance between fairness for defendants and operation within a military scheme¹.

It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian court was impractical.... We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice. We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.

H.R. 2498 at 605-06 (1949) (Statement of Prof. Edmund Morgan). Those who have practiced within the military law system understand this well. As F. Lee Bailey once put it:

The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal. I suppose that if I were guilty and hoping to deceive a court into an acquittal or create a reasonable doubt in the face of muddled evidence, I would be fearful of a military court because their accuracy in coming to the "correct" result (in fact and not simply a legally correct result, which means only a fair trial, and not that guilty men are found guilty or that innocent men are acquitted) has a far better accuracy rate than any civilian court has ever approached.²

I have listened over the past week to testimony by various Administration officials, who now say what they have not been saying for the past four years, that courts-martial are unable to try these cases. I would strongly urge the committee to inquire, in detail (and perhaps in closed proceedings) about the 10 current indictments and why they think a court-martial cannot handle them. I know of no reason why a court-martial would be unable to handle a trial like that of Salim Hamdan, should an al Qaeda member be captured today. Indeed, the impracticability determination required by Section 836 would best stand up in court after empirical evidence is generated showing that current court-martial rules cannot be applied.

The Administration witnesses thus far have listed a parade of horrors that supposedly follow from the UCMJ. But, in the four days since this Committee has invited me to testify, I have learned based on just a quick examination that each is considerably overstated:

- *Miranda Warnings*. Article 31(b) of the UCMJ does contain a heightened *Miranda* requirement. But our nation's highest military court has held that an interrogation for purposes of intelligence gathering was not subject to this requirement, and that evidence obtained without a 31(b) warning can be admitted into a court-martial proceeding. *United States v. Lonetree*, 35 M.J. 396 (C.M.A.

² F. Lee Bailey, *For the Defense* 38 (1976).

1992). Military appellate courts have repeatedly held Article 31(b) warnings are required only for "a law-enforcement or disciplinary investigation." See, e.g., *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990). They are not required when questioning is conducted for "operational" reasons. *Id.* at 389. The notion that soldiers in the field would be required to give Article 31(b) warnings to potential enemy combatants whom they encounter or detain is simply not true. Nor would U.S. personnel interrogating potential enemy combatants for intelligence purposes be required to provide Article 31(b) rights.

- *Hearsay*. The 800 series of the Military Rules of Evidence generally track the Federal Rules of Evidence, though the military's business records exception is far broader than the civilian rule, expressly allowing the admission of such records as "forensic laboratory reports" and "chain of custody documents." The hearsay rules, including Military Rule of Evidence 807's residual hearsay exception, are actually quite flexible. They are designed to promote accuracy by allowing in forms of hearsay that are reliable and excluding forms of hearsay that are unreliable. These rules should be embraced, not feared.

In his testimony before both the Senate Armed Services Committee and the House Armed Services Committee, Assistant Attorney General Bradbury said that both the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) allowed hearsay evidence. For example, he told the Senate Armed Services Committee that "a good example to look to is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact-finder, and as long as it is not outweighed by undue prejudice."

As I understand it, however, the rules of both ICTY and ICTR include an important and major restriction to the rule allowing hearsay to the point of making it virtually irrelevant for the current military commissions debate - an exception that Acting Assistant Attorney General Bradbury did not mention. Under Rule 92 bis of both ICTY's and ICTR's rules, the trial chamber may choose to admit "a written statement in lieu of oral testimony" unless such a statement would prove "acts and conduct of the accused as charged in the indictment." The trial chamber trying Slobodan 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).³

³ "There is also a brand new Rule 92bis providing for the admission of a witness's written statement, so long as it does not go to proof of the conduct or acts of the accused." Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 Harv. Int'l L.J. 535, 548 (2001). As the Appeals Chamber made clear in *Prosecution v. Galic*, "There is a clear distinction to be drawn between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 bis (A) excludes from the procedure laid down in that rule." Prosecutor v. Galic, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C)).

- *Warrants.* Under Military Rule of Evidence 315(e)(4), evidence obtained during a search in a foreign country will be admissible even if it is seized without a warrant. Additionally, under Mil. R. Evid. 314(g)(4) if the Constitution does not require a warrant then the court-martial will not require one either.
- *Protection of Witnesses.* Mil. R. Evid. 507 allows protection of identity of witnesses.
- *Chain of Custody.* Mil. R. Evid. 901-903 deal with the admission of documents – and these rules make introduction of evidence easy, not difficult. The proponent of evidence can use various methods to authenticate it and is not tied to any rigid step-by-step authentication techniques. Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 9-4 (5th ed. 2003). Military Rule of Evidence 901 requires only a showing of authenticity through either direct or circumstantial evidence. *Id.* Under the identical Federal Rule 901(a), "There is no single way to authenticate evidence. In particular, the direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S. 1084 (1995). Additionally, "[m]ere breaks or gaps in the chain [of custody] affect only the weight of the evidence, and not its admissibility." Saltzburg, *supra*, at 9-8; *see also United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985) (noting the trial judge has broad discretion in ruling on chain of custody matters and that all that is required is that it be reasonably certain that the "exhibit has not been changed in any important aspect."). Military courts will dispense with any requirement for a chain of custody for items that are unique in appearance. *See, e.g., United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993); *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).

Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY), even though it is structured without a judge and jury, uses an authentication rule similar to Military Rule of Evidence 901. *See Prosecutor v. Mucic*, Trial Chamber Decision on the Motion of the Prosecution for the Admissibility of Evidence (Jan. 19, 1998) available at <http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm>. The ICTY considers the issue of authentication so important that in some cases the court employs its own experts in determining the authenticity of evidence. *See Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber III Final Decision of the Admissibility of Intercepted Communications in the case of (June 14,

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2004) available at <http://www.un.org/icty/milosevic/trialc/decision-e/040614.htm>.

- *Classified Evidence.* A court-martial, unlike a civilian trial, can take place with a “jury” composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid. 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure “reasonably could be expected” to harm national security prior to the accused or his lawyer being made privy to the classified information. Only “relevant and necessary” classified information to the prosecution’s or accused’s case can be made available. Mil. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505’s procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused’s request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).

The military rules of evidence already provide alternatives to disclosure of classified information, which include: redaction of the classified information; substitution of an unclassified description or summary of the classified information; substitution of a statement admitting the relevant facts the classified information would tend to prove; or full withholding of disclosure. Mil. R. Evid. 505(d). And courts-martial also grant broad privileges for withholding information when it is “detrimental to the public interest.” Mil. R. Evid. 506(a).

The most troubling thing about the testimony that Administration officials have provided over the past week is that they have read the UCMJ in the most selective, condemning manner possible. Their reading is in considerable tension with the way they have been reading other statutes for the past four years, including the 1978 Foreign Intelligence Surveillance Act and the 2001 Authorization for the Use of Military Force. In those settings, they have emphasized the flexibility and open-endedness of statutes, and supplemented their readings with caselaw interpreting the provisions. But here, they are reading the statutes the way Earl Warren on steroids would have read them – as somehow hamstringing their ability to bring cases and reading them in the most restrictive way possible. Nothing they have said thus far justifies this skepticism. And before this body accepts such skepticism, it should have some empirical evidence showing that courts-martial cannot try these cases, instead of a rather questionable projection by a prosecuting branch.

2. How could the Uniform Code of Military Justice be implemented for trials of detainees in the war on terror? More specifically, given our shared concern about preventing future terrorist attacks, how should Congress appropriately address Uniform Code of Military Justice Article 31(b), which you described as the “military equivalent to Miranda,” and the protection of classified information? Are there cases interpreting the Uniform Code of Military Justice that shed light on these issues? If so, how are these cases applicable to trials of detainees?

The Uniform Code of Military Justice requires no change to be used at present to try war crimes. Specific concerns regarding Article 31(b) and the protection of classified information are addressed by either case law or the Military Rules of Evidence. Regarding Article 31(b), as detailed in Professor Katyal's testimony above, the Court of Appeals for the Armed Forces has previously found in *United States v. Lonetree* and *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), that Article 31(b) does not require an accused to be advised of his rights when the interrogation is conducted for either intelligence or operational reasons. Thus, Assistant Attorney General Bradbury's concern regarding the protection of intelligence gathering has already been addressed and answered as part of the jurisprudence of military justice. Additionally, M.R.E. 505 preserves and protects classified information in much the same way as CIPA. In fact, as Professor Katyal's testimony above details, M.R.E. 505 is actually a more broad and flexible protection for classified information and certainly workable here.

3. In discussing the use of classified information in the trials of Guantanamo detainees, Paul Cobb testified, "[T]here are going to be rare but important instances when the defendant cannot be given personal access" to the classified evidence used in their trials. In your experience as a defense lawyer in the military commissions at Guantanamo, is it "rare" for evidence to be withheld from a defendant? Does withholding evidence from the defendant impede the goal of offering detainees the basic protections of a full and fair trial? If so, how?

My experience has been that withholding classified information from Mr. Hamdan has been the rule, not the exception. The government has not permitted Mr. Hamdan to view or be present when any potentially classified information has been either provided in discovery or presented at trial. This includes statements allegedly made by Mr. Hamdan and the questioning of the members for his trial regarding their roles in Afghanistan and his movement to Guantanamo. The disadvantage is clear immediately. When presented with an alleged oral statement of the accused, the first thing that any defense counsel does is ask the accused if they made the statement, whether the statement accurately reflects what the accused said, and under what conditions was the statement made. Without this basic knowledge that the accused alone possesses, there is simply no way to confront the government witness or contradict the report of interrogation that the government is seeking to introduce.

It has also been my experience that classified information is rarely, if ever, crucial to the prosecution of a commission case is consistent with court-martial practice as well. As Senator Graham observed at the August 2, 2006 Senate Armed Services Committee hearing, "I have been in hundreds of military trials. And I can assure you the situation where [classified information is] the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million."

TOTAL P.07

Questions from Senator Arlen Specter

1. In your written testimony, you state that because the military prosecution has no obligation to give the defense counsel exculpatory evidence in the possession of other government agencies, one former military commission prosecutor told you that "government agencies intended to deliberately exploit this gap in discovery obligations to keep the defense from obtaining exculpatory evidence." You also say that you have been told that "the military panel will be handpicked and will not acquit these detainees." Is it your contention that the Defense Department wants to convict innocent persons?

Sir, my testimony relied on statements made by one of the commission prosecutors, copies of which have been provided to this committee regarding the fairness of the commissions. No Sir. It is not. My objection to the commission system generally is that the system presumes the guilt of those tried before it. I believe that this stems principally from the conviction of the Executive Branch that all those in Guantanamo are in the President's words "All bad men" and that of the Secretary of Defense that they are "the worst of the worst." The commission system does not provide an adequate opportunity to challenge these beliefs. This is not the fault of the military prosecutors, but rather the decision to abandon the time tested principles of military law set out in the Uniform Code of Military Justice.

2. In your written testimony, you are critical of the military prosecution's use of classified/protected information, and its exclusion of the defendant from some parts of the trial. Do you believe that every piece of evidence used against a detainee must be available to the defendant? Do you believe that he should never be excluded from his trial? Aren't you worried that military secrets, such as the identity of the local person cooperating the American military could get out and damage us or an innocent party?

Sir, I believe that the ability of the accused to see and confront the evidence against him is the bedrock principle of our system of justice. I am not alone in this belief, as Admiral McDonald, the Judge Advocate General of the Navy, recently testified before you." As Rear Admiral McPherson, then the Judge Advocate General of the Navy, testified at the July 13, 2006 Senate Armed Services Committee hearing, "Common Article 3 requires that the individual have access to and the opportunity to review the evidence presented against them."

Equally, I believe a non-disruptive accused must be present during his trial. The exclusion of such an accused has no precedence, save the notorious Star Chamber, in the history of Anglo-Saxon jurisprudence. As Major General Rives, the Judge Advocate General of the Air Force, testified at the August 2, 2006 hearing, "[I]t does not comport with my ideas of due process for an attorney to have information he can -- defense counsel to have information he cannot share with his client." Every senior military lawyer who testified at that hearing agreed with Senator Graham that "it would be bad for this country to have a procedure where the trier of fact, the military jury could look at evidence to base their verdict upon that's never shared with the defendant." We need not fear the consequences of applying this bedrock principle at military commissions. At an August 2, 2006 Senate Armed Services Committee hearing, Senator Graham observed, "So the question may become for our nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue

don't do the trial. Just keep him. Because it could come back to haunt us. And I have been in hundreds of military trials. And I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million."

I am not persuaded that adhering to our fundamental values will compromise our national security. Our system for courts-martial is sufficiently flexible to protect for both the identity of witnesses and our national security without prejudicing the accused's fundamental right to a fair trial. My position is best supported by my co-counsel Professor Neal Katyal's written testimony before the Senate Arms Services Committee. Professor Katyal testified in part as follows:

A court-martial, unlike a civilian trial, can take place with a "jury" composed of individuals who possess security clearances. Existing rules permit courts-martial to be closed to the public and press. Mil. R. Evid 505(j); R.C.M. 806. If the accused at any stage of a trial seeks classified information, the government may ask for an *in camera* (closed) proceeding to discuss the use of the information in trial. Mil. R. Evid. 505(i). During this session, the military judge hears arguments from both sides on whether disclosure "reasonably could be expected" to harm national security prior to the accused or his lawyer being made privy to the classified information. Only "relevant and necessary" classified information to the prosecution's or accused's case can be made available. Mil. R. Evid. 505(i).

In one court-martial espionage case tried under Mil. R. Evid. 505's procedures, the military judge allowed an intelligence agent to testify under a pseudonym and his real name was never disclosed to the defense. The Court of Military Appeals upheld that procedure and the United States Supreme Court denied the accused's request to review that decision. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), *cert. denied*, 507 U.S. 1017 (1993).

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3. Lt. Cmdr. Swift, you are testifying in favor of giving detainees all rights currently enjoyed by American citizens tried under courts martial or in civil courts.

a. Does according a so-called non-state actor the same rights and privileges as a citizen of a sovereign state have the potential of encouraging --- or at least not discouraging --- individuals from joining terrorist organizations?

Sir, I understand your question to mean belligerent forces of a sovereign state rather than simply citizens of a sovereign state as all of the persons detained in Guantanamo Bay are citizens

of a sovereign state. In the rhetoric surrounding the military commissions and the extension of fundamental protections of a fair trial to Mr. Hamdan and others has neglected a basic concept. Members of nation states enjoy military combatant immunity under which they cannot be tried for their acts of violence against another nation state unless these acts amount war crimes e.g willfully targeting civilian target, denying a prisoner a fair trial before punishment etc. This stands in stark contrast with members of a rebel or other non-state actor force, who enjoy no combatant immunity and may be tried for all acts of violence against the citizens of a sovereign state that they attacked. Maintaining the same principles to try either group for their unlawful acts of violence however, is essential to both the conduct and perception of fair proceedings. The failure to do so will inevitably paint the nation states conducting the trial as a force of oppression rather than justice.

4. An Amicus brief filed by your current post, the Office of Chief Defense Counsel, Office of Military Commissions on behalf of your client, notes, "Unlike the court-martial system, which Congress designed and which the Executive Branch implements, both the military commission system's procedures and substantive law were created and implemented solely by the Executive Branch."

a. If Congress designs a system for military commissions, would it satisfy your office's concerns with the constitutionality of the commission implemented to try your client?

Sir, I cannot speak for the Office of Chief Defense Counsel as a whole. On behalf of Mr. Hamdan, I would urge the Committee to take stake of the cautionary note sounded by Justice Kennedy. Outside of general claims of impossibility in dire predictions, the Executive Branch has not offered a cogent reason for proceeding with courts-martial. The Supreme Court noted that no justification had been put forward for departing from the normal rules. A close examination of the UCMJ, the Rules for Courts-Martial, the Military Rules of Evidence, and the Court of Appeals for the Armed Forces reveals that none of the concerns voiced by Mr. Del'Orto and Mr. Cobb are actually grounded in law.

TOTAL P.04



SUBMISSIONS FOR THE RECORD
Department of Justice

STATEMENT

OF

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

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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

PRESENTED ON

JULY 11, 2006

**STATEMENT OF
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ACTING ASSISTANT ATTORNEY GENERAL
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IN *HAMDAN* v. *RUMSFELD***

JULY 11, 2006

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

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

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

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

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

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

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

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

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

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

Courts-Martial and Military Commissions

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

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

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

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

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

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

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

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

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

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

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

The Court's Jurisdiction Under the DTA

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

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

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

Common Article 3 of the Geneva Conventions

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

Thank you, Mr. Chairman.

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**STATEMENT OF PAUL W. "WHIT" COBB, JR.
FORMER DEPUTY GENERAL COUNSEL (LEGAL COUNSEL) OF THE
DEPARTMENT OF DEFENSE
BEFORE THE SENATE JUDICIARY COMMITTEE
JULY 11, 2006**

I. Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to address the topic of today's hearing, "*Hamdan v. Rumsfeld*: Establishing a Constitutional Process." I hope that my perspective as a participant in setting up military commissions and drafting the military commission procedures at issue in *Hamdan* will assist the Committee as it considers legislation in the aftermath of the Supreme Court's decision. As a former government official, I am appearing in my personal capacity, and the opinions expressed are solely my own. I will address *Hamdan* briefly and then turn to the procedural features of war crimes courts that are essential to justice in the broadest sense of the word.¹

II. *Hamdan v. Rumsfeld*

I cannot add much to what others have said about the flaws in the *Hamdan* decision, including the three dissenting Justices. I would, however, point out that the Court majority, in its drive to decide the issues in this case, ignored significant decisions made by both the Congress and the President.

Fortunately, the *Hamdan* majority's rationale is tied to the text of two provisions of title 10, and the separate opinions written by Justices Kennedy and Breyer expressly invite additional legislation. For example, Justice Kennedy made clear in his partial concurrence that "domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so."

Any legislation must be crystal clear and comprehensive, because the Supreme Court has been quite assertive in granting hitherto unknown rights to unprivileged belligerents, even at the cost of preventing any practical modality of trial for members of al Qaeda who have sworn to wage war against the United States, its government, and its civilians. For perhaps the first time in our nation's history, the *Hamdan* majority overturned the

¹ While I use the terms "war crimes" and "law of war" interchangeably, war crimes are, strictly speaking, a subset of violations of the law of war. For example, spying is not a war crime but may be triable as a violation of the law of war.

President's decisions as to enemy combatants in the middle of a war. Just two summers ago, a similar majority overturned long-standing Supreme Court precedent to grant enemy combatants detained by the military overseas the right to bring habeas petitions, in the *Rasul* decision. Of course, last year's Detainee Treatment Act was an attempt, now rendered largely moot by *Hamdan*, to rein in some of the avalanche of litigation invited by the *Rasul* decision.

III. Necessary Features of a War Crimes Court

The silver lining of *Hamdan* is that it gives the Congress and the Executive an opportunity to work together to specify further the procedures for war crimes prosecutions of detainees. Although the possible permutations of fora that could be authorized by legislation are limited only by the imagination, there are at least five features of any law of war court that are necessary for success.

Specialized Court. First, it is critical to have a specialized law of war court. As I will explain, war crimes court procedures need to differ in a few, significant ways from the procedures that have grown up around our domestic criminal courts, including courts-martial. Because of these differences, it would be inappropriate to shoe-horn war crimes trials into domestic criminal courts. The ingrained habits of the domestic criminal courts would have a natural tendency to work against the unique features that war crimes prosecutions in the war with al Qaeda require. Conversely, there could be a tendency for specialized procedures adapted to war crimes prosecutions to be adopted inappropriately in domestic criminal proceedings. Also, there is a long history in this country of creating specialized courts that are adapted to the subject matter of the cases they will hear. Among others, we have specialized courts for bankruptcy, courts for government contracts disputes, courts for family issues, traffic courts, and small claims courts. Creating a specialized court for violations of the law of war is consistent with this history. Indeed, war crimes have always been prosecuted in the United States in specialized courts, not in courts of general criminal jurisdiction.

While trying war crimes by court-martial may have some surface appeal, there are significant problems with this approach. The *Hamdan* Court itself acknowledged that the court-martial system and military commissions have significantly different functions. The court-martial has been designed to protect United States armed forces personnel in their trials for ordinary offenses, where the success of any particular prosecution is not likely to be tied to the future safety of our country. Also, the use of courts-martial would require drastic modifications. The Uniform Code of Military Justice ("UCMJ") does not contain definitions of war crimes or their elements. The UCMJ requires that courts-

martial be convened by the accused's chain of command, which is not applicable for al Qaeda members. And the UCMJ requires that courts-martial panels be drawn from personnel in the service member's unit, which again is not applicable for al Qaeda members. Moreover, it could be much more difficult to try war crimes in courts-martial than even in federal courts. Retired Major General Michael Nardotti, former Judge Advocate General of the Army, in his December 2001 testimony before the Subcommittee on Administrative Oversight and the Courts of this Committee, discussed some of the hurdles that may bar effective prosecutions in courts-martial, exceeding even the requirements of federal district courts. A defendant under the UCMJ must be given "police warnings" when he is suspected, not merely when he is in custody, a requirement that goes even beyond the Supreme Court's *Miranda* decision. There are stricter speedy trial requirements and broader pre-trial access to evidence than in the federal criminal code. And there is a right to participate in the pre-trial investigation and charging process.

I would add that there is a restrictive bar to hearsay evidence in courts-martial. And there is no ability to limit access by an alleged al Qaeda defendant to classified information concerning the sources and methods used in acquiring evidence against him. Modifying our highly refined court-martial system to work in the context of war crimes trials would thus be quite complex and could have many unintended consequences.

Military Court. Second, the law of war court should be a function of the armed forces of the United States. The military has the subject matter expertise in the law of war to carry out this function. It has custody of the detainees who would be prosecuted and the resources to protect the security of the proceedings. Also, looking to history, the military has always been the arm of government that has carried out our war crimes prosecutions in the past.

Inclusive Rules of Evidence. Third, the law of war court needs to have broadly inclusive rules of evidence that permit a wide variety of information to be heard by the factfinder, whose job it is to then weigh the evidence according to its credibility. The evidence that the government has available to it in the war with al Qaeda is not always going to have the indicia of reliability that we would expect in our domestic criminal court proceedings. For example, the evidence may be hearsay, it may not have been held in a clear chain of custody, it may include custodial statements from individuals who were not given *Miranda* warnings, and some of the individuals who gave statements may not be available. The admissibility of a broader range of evidence has been accepted in the international war crimes courts, such as the International Criminal Tribunal for the former Yugoslavia, as well as in civil law countries. I do not, however, suggest that the

crucial question of the “sufficiency” of evidence for a conviction should ever be altered. We could not and should not alter the requirement of “proof beyond a reasonable doubt.” But admitting a broader range of evidence, for careful consideration by the factfinder, does not change either of these guarantees of an accurate verdict.

Some may argue that this broader range of evidence should not be admitted. Yet rigid application of evidentiary rules that have been developed for prosecuting domestic crimes would foreclose most if not all war crimes prosecutions in the war with al Qaeda. This is a case where the perfect is the enemy of the good. Surely it is better to have some war crimes prosecutions, and the justice that it would bring to both the accused and the people of the United States, than simply to detain all enemy combatants for the duration of the conflict.

Protection of Classified Information. Fourth, it is crucial to have enhanced provisions for the protection of classified information. A defendant’s cleared counsel should be given access to all information pertinent to the trial. But there may be some rare but important instances where the defendant cannot be given personal access, because it might put in jeopardy another person’s life, or shut down crucial methods of monitoring al Qaeda’s ongoing offensive operations. The exclusion of the detainee (but not the detainee’s cleared counsel) from access to selected portions of information would be permitted only where the presiding officer rules that this is both *necessary* and *consistent with a full and fair trial*.

Unlike most prior war crimes trials, which took place after the conflict ended, the war crimes prosecutions under discussion may take place while the war with al Qaeda continues. This involves not a nation-state but a furtive organization that has few if any fixed bases or other physical assets. Information we are able to obtain about al Qaeda is thus a principal weapon in the war and typically must be kept classified to have value. Because of its ubiquity, classified information is likely to come into play in any war crimes prosecution. There is also the problem of “greymail.” Even if the prosecution brings a case based only on unclassified information, the accused may well attempt to gain access to highly sensitive classified information by calling witnesses or seeking documents in an attempt to derail the prosecution.

Exposing such information to an accused al Qaeda member in the course of a war crimes prosecution, even in a closed proceeding, would present great risks to the national security. The accused, unlike his counsel, would have little motivation to keep such information secret after the proceedings. It is no answer to say that the accused could be subject to post-conviction communications monitoring. First, the accused may not be

convicted, for any number of reasons. Second, we would not want to have to keep a convicted detainee in complete isolation. Third, communications monitoring may not be effective, as we have seen in the case of attorney Lynne Stewart, who was convicted of helping the jailed terrorist known as the blind Sheikh pass information to his followers. Detainees may attempt to misuse the attorney-client privilege to defeat monitoring, both pre-and post-conviction, as we have seen in the recently reported efforts by detainees at Guantanamo Bay to label information as attorney-client privileged in order to pass sensitive information to each other.

Some will argue that it is impossible to have a perfect trial unless the accused personally has access to all evidence, including classified information. But the accused's cleared counsel would have access to all information presented at trial. If there is a problem in preparing for cross-examination, counsel can inform the presiding judge. The presiding judge would have to assess whether a full and fair trial is possible, in light of the nature of the particular evidence presented at a particular trial. Certainly, as we have seen over the last several years of litigation in federal court, the Judge Advocates General have a tradition of fiercely independent judgment. Sitting as judges presiding over a trial, they will exercise the same tradition of integrity.

The Nuremberg Tribunal permitted trials in absentia, and most courts permit defendants to be removed for misconduct (witness the number of times Zacarias Moussaoui was removed from his trial). Again, the perfect is the enemy of the good, and broad access by the accused to classified information is likely to prevent many war crimes prosecutions even from being brought, because of the security risks involved. Is it better to have fewer, if any, war crimes prosecutions and the same procedures for access to information that we are accustomed to in our domestic criminal courts, or is it better to have more war crimes prosecutions along with have specialized procedures that take into account the nature of the war with al Qaeda, the crimes committed, and the available evidence? I would argue the latter.

Cleared, Mandatory Counsel. Fifth, consistent with the need to limit access to classified information is the need for the procedures to specify that the accused be represented by counsel who can be cleared to the highest level of classified information presented at trial. The accused should not have the right to self-representation. War crimes trials will involve a complicated military justice procedural environment, and it will be difficult to guarantee a full and fair trial without counsel. In addition, self-representation would defeat protections for classified information.

To summarize, an effective war crimes court in the war with al Qaeda should have at least the following five qualities:

1. it should be a specialized court, distinct from other courts;
2. it should be a military court;
3. it should have broadly inclusive evidentiary rules;
4. it should have special procedures for the protection of classified information; and
5. it should require that the accused be represented by cleared defense counsel.

IV. Legislative Recommendations

We are obviously not writing on a blank slate, and there is an existing forum that has all of the above qualities – the military commissions that were established prior to the Supreme Court’s ruling in *Hamdan*. The President’s Military Order, Military Commission Order No. 1, and the implementing Military Commission Instructions set up a comprehensive system for the conduct of military commission proceedings, from the definition of crimes to the processing of appeals. They already take into account the practical issues that Justice Kennedy emphasized in his partial concurrence. The Department of Defense has spent nearly five years creating and refining the system.

The Congress may of course modify through legislation any particulars of the existing military commission process. It may be advisable to revisit certain structural issues, such as the appointment of military judges and the appellate process, to address concerns about independence. It will be critical for any new legislation to clarify the Detainee Treatment Act to prevent premature habeas petitions and to include a requirement for detainees to exhaust their remedies within DoD before seeking habeas relief. Given the Supreme Court’s desire for unequivocal legislative statements in this area, I would recommend specific statutory authorization for the crimes and elements to be tried by military commission, perhaps by codifying Military Commission Instruction No. 2, “Crimes and Elements for Trials by Military Commission.” Among other things, a statutory imprimatur would address the authority of military commissions to try conspiracy. As part of any codification of military commission procedures, I recommend modifying Article 21 and Article 36 of the UCMJ to make clear that the military commission procedures established by Congress are not subject to challenge on the grounds that they differ from procedures that may be required for courts-martial or that they are allegedly inconsistent with the laws of war. Congress should also consider addressing the procedures by which unprivileged belligerents are held in long-term detention, perhaps by codifying, with any necessary modifications, the Combatant Status Review Tribunal and Administrative Review Board processes at Guantanamo Bay.

In fact, the “Unprivileged Combatant Act,” introduced by the Chairman on June 29 and referred to the Senate Armed Services Committee, contains almost all of the five key war crimes court features I have discussed. It provides statutory authorization for the Department of Defense to conduct military commissions; it contains a broadly inclusive evidentiary standard; it restricts the dissemination of classified information to individuals with clearances; and it mandates clearances for defense counsel (but does not expressly require defense counsel). Among other things, it also requires that military judges preside over military commissions, provides for appellate review by the United States Court of Appeals for the Armed Forces, and codifies the Military Commission Instruction on the elements of war crimes. While the legislation may need some adjustments – including to take into account the specific holdings of *Hamdan* and to refine the procedures for long-term detention of enemy combatants – I believe it is an excellent first step towards a legislative response to *Hamdan*.

V. Conclusion

The Supreme Court’s decision in *Hamdan* gives the Congress and the Executive Branch the opportunity to work together to create a more solid legislative basis for war crimes trials in the war with al Qaeda. Critical aspects of any war crimes trial procedure include a specialized, military court; broad admissibility of evidence; strengthened protection for classified information used in trials; and mandatory, cleared counsel for defendants. The existing military commission system, with appropriate modifications by Congress, is ideally suited to trying law of war violations in the war with al Qaeda. There is no reason to start from scratch and throw the baby out with the bath water.

Mr. Chairman and Members of the Committee, I would be delighted to answer your questions.

**Testimony of Daniel P. Collins
before the Senate Committee on the Judiciary
July 11, 2006**

Chairman Specter, Senator Leahy, and Members of the Committee, I am grateful for the opportunity to testify before you today. The extent to which the use of military commissions remains available as a tool for prosecuting terrorists and other unlawful combatants in the ongoing War on Terror is an important issue that warrants this Committee's prompt attention. The Supreme Court's recent decision in *Hamdan v. Rumsfeld*, 548 U.S. ___, slip op. (Jun. 29, 2006), casts considerable doubt on the continued practical utility of such commissions, and I thank the Committee for moving expeditiously to examine this vital subject.

My perspective on these matters is informed by my service over the years in various capacities in the Justice Department. Most recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. I also served, from 1992 to 1996, as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office for the Central District of California in Los Angeles. And prior to that, I had served from 1989 to 1991 as an Attorney-Advisor in the Office of Legal Counsel in Washington, D.C. I am now back in private practice in Los Angeles, and in that capacity, I filed an *amicus curiae* brief in support of the Government in *Hamdan*, on behalf of an association known as "Citizens for the Common Defence." I emphasize, however, that the views I offer today are solely my own.

In *Hamdan*, a majority of the Supreme Court held that (1) it had jurisdiction to determine the merits of Hamdan's claims, notwithstanding the enactment of the Detainee Treatment Act of 2005 (DTA) or principles of abstention; (2) the procedures established for Hamdan's commission violated the requirement of Article 36(b) of the Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 836(b), which provides that rules of procedure for military tribunals “shall be uniform insofar as practicable”; and (3) the deviations from court-martial structure and procedure in Hamdan’s commission rendered it a tribunal that was not “regularly constituted” within the meaning of common Article 3 of the Geneva Conventions (which the Court held applicable to the conflict with al Qaeda in Afghanistan). I believe that the resulting state of the law is highly unsatisfactory, and threatens to eliminate the practical usefulness of military commissions as an option in combating the sort of elusive enemy that an organization like al Qaeda represents. In my view, Congress should move promptly to overrule each of these three holdings by statute.

Before turning to the specific subjects that I believe Congress should address by legislation, I wish to emphasize two very important aspects of the Court’s opinion that should not be overlooked.

First, the Court’s invalidation of the existing military commission structure and procedures does *not* rest upon any finding of a *constitutional* violation. On the contrary, the Court held only that “the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both *the UCMJ and the Geneva Conventions*.” Slip op. at 2 (emphasis added). Indeed, Justice Breyer’s concurring opinion (which was joined by three other concurring Justices) explicitly states that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.” Slip op. at 1 (Breyer, J., concurring) (emphases added). Justice Kennedy’s concurring opinion likewise states that “domestic statutes control this case” and that “[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.” Slip op. at 2 (Kennedy, J., concurring). And

again, in a portion of his concurring opinion joined by three other concurring Justices, Justice Kennedy reiterates that “[b]ecause Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws.” *Id.* at 18.¹ Because no constitutional violation was found by any of the Justices, there is nothing in *Hamdan* that this Congress does not have the power to fix.

Hamdan thus represents the Supreme Court’s judgment as to the *current* state of the law, and as such, it must be respected and adhered to unless and until Congress changes the applicable law. But in making the *policy judgment* as to whether the law should be changed, Congress can and should undertake its own independent examination of the matter and decide for itself whether the rules announced by the Court ought to be retained.

Second, it should be noted that no member of the *Hamdan* Court questioned the premise that the current conflict with al Qaeda was in fact an *armed conflict* within the meaning of the law of war and that it was sufficient to call into play the war powers of the President and Congress. On the contrary, the Court stated that it did “not question the Government’s position that the war commenced with the events of September 11, 2001,” slip op. at 35 n.31, and that it assumed that the September 18, 2001 Authorization for Use of Military Force (AUMF) “activated the President’s war powers,” *id.* at 29. This point is critically important. In discussing the subject of how to confront and disable al Qaeda, too many people seem to view the “war on terror” as being a “war” only in the rhetorical sense, like the “war on drugs” or the “war on

¹ Justice Kennedy’s reference to “other laws” and “other governing laws” is somewhat puzzling. In the second quotation, the reference to “other governing laws” can be understood as referring to other laws that Congress leaves undisturbed and that, together with any new standards, would thereafter govern military commissions. Slip op. at 18 (Kennedy, J., concurring). The first quotation — in a portion of Justice Kennedy’s concurrence that is joined by no other Justice — is more difficult to comprehend, because it almost seems to suggest that Congress’ power to “change the controlling statutes” must be “in conformance with the Constitution *and other laws*.” Slip op. at 2 (Kennedy, J., concurring) (emphasis added). I am aware of no source of law other than the Constitution that can ultimately purport to limit the Congress’ power to “change the controlling statutes.”

poverty,” and as a result, they fall back on law-enforcement models for fighting these terrorists. It is, I think, significant that no member of the Court questioned the applicability of a *military* model, calling forth military powers, including the power to use military tribunals. To be sure, criminal prosecution of individual suspects in Article III courts also remains an available option, but nothing in the numerous opinions in *Hamdan* in any way suggests that the option of military tribunals cannot also be retained as an appropriate tool.

In light of the fact that the *Hamdan* Court did not question the propriety of using military tribunals against members of al Qaeda who violate the laws of war, I can think of no good reason why the Congress would not choose to retain this important tool as an additional arrow in the quiver in fighting this elusive and intractable enemy.

With those observations in mind, I would like to address the question of a possible legislative response to *Hamdan*. There is, I think, little doubt that Congress should act, and should act promptly, to overrule this decision by statute. The form of military commission left in place by the Court is of so uncertain a character as to be of little utility. Under *Hamdan*, commission procedure may deviate from courts-martial procedure, but only if the departure is “tailored to the exigency that necessitates it.” Slip op. at 56 (emphases added). How much “tailor[ing]” is required? What “exigenc[ies]” will permit a departure? How much of a “necessit[y]” for a departure must be shown? The only thing I can say for certain about the meaning of these terms is that they are sure to be a source of future litigation. Likewise, the structure and regulation of the commission may deviate from those for courts-martial, but “only if some *practical need* explains [the] deviations from court-martial practice.” Slip op. at 70 (quoting slip op. at 10 (Kennedy, J., concurring)). In his separate concurring opinion (joined in this portion by three other Justices), Justice Kennedy suggested that the sort of “practical needs”

that might justify deviations from court-martial “structure, organization, and mechanisms” (as well as court-martial procedures) include “logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience.” Slip op. at 10 (Kennedy, J., concurring). I would not envy the Defense Department and Justice Department officials who might be tasked with implementing these vague lines. Is a deviation from court-martial procedure that is designed to accommodate the convenience of a witness a permissible “accommodation of witnesses” or is it a forbidden invocation of “mere ... convenience”?

Because *Hamdan* leaves so much uncertainty hovering over the extent to which military commissions may and may not deviate from courts-martial, their practical utility as an additional tool in the arsenal is greatly diminished. Congress can, and should, act so as to remove this uncertainty, and to preserve this additional mechanism for fighting against the sort of unconventional enemy that al Qaeda represents.

In particular, I recommend that Congress craft legislation to address four particular points raised by the Court’s opinion in *Hamdan*.

First, Article 36 of the UCMJ should be amended to eliminate the requirement (as construed in *Hamdan*) that military-commission procedure must conform to that of courts-martial “insofar as practicable.” 10 U.S.C. § 836(b). As I have just explained, the resulting current uncertainty surrounding the “practicability” determination is likely sufficiently great as to deprive military commissions of much of their practical utility. The *Hamdan* uniformity-insofar-as-practicable standard thus, in my view, should be rejected. The more difficult question is defining what should replace this standard. There are two aspects to this question, one of which is easier than the other.

One (hopefully less controversial) aspect relates to the preservation of some substantial measure of flexibility in the fashioning of military commission procedure. In *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952), the Supreme Court surveyed the then-existing landscape of the use of military commissions and noted that “[n]either their procedure nor their jurisdiction has been prescribed by statute,” but instead “has been adapted in each instance to the need that called it forth.” The need for the sort of flexibility thus highlighted is, if anything, greater in the context of an armed conflict with a secretive, unconventional, and fanatical enemy, such as al Qaeda, that is by its very nature organized around, and committed to, a policy of gross violations of the laws of war. To preserve this flexibility, both in reality as well as in theory, Congress should not require the President (as the Supreme Court seems to have done in *Hamdan*) to individually justify *to a court each and every* deviation from court-martial procedure. That is, there should be a very substantial residuum of Presidential discretion to set military commission procedure that (except as may be required by the Constitution) is not subject to judicial second-guessing. *Cf. Hamdan*, slip op. at 60 (stating that, because of the existing difference in language between Article 36(a) and Article 36(b), “[w]e assume that *complete deference* is owed [to] determination[s]” under Article 36(a), not under Article 36(b)) (emphasis added).

At the same time, Congress may wish to specify certain procedural minima from which no derogation will be permitted (or will be permitted only on certain conditions). Should Congress do so, however, I would strongly urge that it resist the temptation to micro-manage military commission procedure in advance, thereby eliminating the very flexibility that makes this tool so important. Any statutorily specified minima should be narrowly drawn to specify only those procedures that are categorically essential. *Cf. note 3 infra*.

There is one other point I wish to make on this issue of replacing the uniformity-insofar-as-practicable standard with an approach that relies on Presidential discretion (subject perhaps to certain statutory minima). Although the Court formally reserved any ruling as to whether the current military commission procedures violate the separate requirement in Article 36(a) that such procedures may not be “contrary to or inconsistent with” the terms of the UCMJ, *see slip op.* at 59, 61, prudence would dictate that, if Article 36(b) is amended to give the President the sort of discretion described here, an appropriate conforming amendment should be made to Article 36(a) so as to ensure that the degree of discretion intended to be conferred by the amendment to Article 36(b) is properly effectuated.

Second, Congress should adopt a new provision of law that eliminates the uncertainty and reduced flexibility occasioned by the *Hamdan* Court’s reliance upon common Article 3 of the Geneva Conventions. As Justice Kennedy’s concurring opinion makes clear, the Court relied upon common Article 3 to, in effect, create with respect to the issues of commission *structure and organization* a uniformity-insofar-as-practicable standard that “parallels the practicability standard” that Article 36(b) imposes with respect to procedure. *Slip op.* at 10 (Kennedy, J., concurring). Congress has the power to overturn this holding and should do so.

The Court in *Hamdan* construed Article 3’s requirement of a “regularly constituted” tribunal to mean a tribunal “‘established and organized in accordance with the laws and procedures already in force in a country,’” and it held that the current commissions were not such tribunals because “[a]s Justice Kennedy explains, ... ‘[t]he regular military courts in our system are the courts-martial established by *congressional statutes*.’” *Slip op.* at 69-70 (quoting *slip op.* at 8 (Kennedy, J., concurring)). Again relying upon Justice Kennedy’s concurring opinion, the Court stated that a military commission “‘can be “regularly constituted” *by the*

standards of our military justice system only if some practical need explains deviation from court-martial practice.” Slip op. at 70 (quoting slip op. at 10 (Kennedy, J., concurring)). This was true, Justice Kennedy explained in his separate opinion, because “courts-martial provide the relevant benchmark” for assessing the “level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.” Slip op. at 10 (Kennedy, J., concurring). Thus, “a military commission like the one at issue—a commission specially convened by the President to try specific persons *without express congressional authorization*—can be ‘regularly constituted’ by the standards of *our military justice system* only if some practical need explains deviations from court-martial practice.” *Id.* (emphasis added).

Because Congress has the authority to set “the standards of our military justice system” and to define which tribunals have “express congressional authorization” and which may be established pursuant to “congressional statutes,” it necessarily has the power, by statute, to establish that military commissions are henceforward “regularly constituted” within the meaning of common Article 3. Note that, by doing so, Congress would not have to directly challenge the Court’s conclusion that common Article 3 applied in the first place. *Cf.* slip op. at 42-44 (Thomas, J., dissenting).²

There are a variety of ways in which Congress could effectuate this. One might be to provide explicitly by statute that the use of military commissions is authorized to try *any* law-of-

² The Court has held that “‘an Act of Congress ... is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.’” *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (quoting *Reid v. Covert*, 354 U.S. 1, 18, (1957) (plurality opinion)). Congress may thus depart by statute from the Court’s interpretation of Article 3, and that departure will be binding on the domestic courts to the degree of the resulting conflict, but that manner of procedure may not eliminate issues (diplomatic and otherwise) related to what may be claimed (under the Court’s construction of Article 3) is a resulting international-law violation. As I have explained, however, congressional action to provide the authority to make military commissions be “regularly constituted” would be consonant with the Court’s construction of Article 3, not contradictory to it.

war violation (or any other offense made triable by statute before a military commission) committed by any unlawful combatant against whom the President has been congressionally authorized to use military force. As applicable in the immediate context, the basic concept would be that any unlawful combatant who is on the opposing side of the armed conflict recognized by the September 18, 2001 AUMF should be expressly statutorily eligible for trial by military commission for any law-of-war violations or any eligible statutory violations. Any necessary conforming amendment to Article 21 of the UCMJ should also be made.³

Third, although Justice Stevens did not garner a majority for his view that conspiracy is not a recognized violation of the law of war, slip op. at 31-49 (opin. of Stevens, J.), Congress may wish to clarify the uncertainty created by this discussion. Cf. slip op. at 20 (Kennedy, J., concurring) (declining to address the merits of this issue one way or the other). Under our Constitution, whether conspiracy is an offense under the laws of war is not a matter to be settled in the final instance by international consensus; on the contrary, the Constitution squarely grants to Congress the ultimate power to “define and punish ... Offences against the Law of Nations.” U.S. Const., art. I, § 8, cl. 10 (emphasis added).

Fourth, Congress should revise the applicable judicial review provisions (which had been amended in the Detainee Treatment Act, but in a manner that the Court determined not to be fully effective to pending cases), so as to eliminate the sort of pre-judgment review of military proceedings that occurred in *Hamdan*. Congress should make the necessary amendments to ensure that, except to the extent the Constitution may otherwise require, any further review of

³ Although a majority of the Court did not join that portion of Justice Stevens’ opinion that addressed the question whether the procedures of the commissions afforded “all of the judicial guarantees which are recognized as indispensable by civilized peoples,” slip op. at 70-72 (opin. of Stevens, J.) (quoting common Article 3), to the extent that Congress seeks to operate within the confines of common Article 3 rather than to reject it, *see supra* note 2, it may wish to express its view by statute as to which procedures are “indispensable” in that sense.

military commissions, including in pending cases, is “channeled ... exclusively through a single, postverdict appeal to Article III courts” as envisioned in the DTA. Slip op. at 24 (Scalia, J., dissenting).

* * *

In closing, I wish to thank the Committee for moving promptly to address this very important subject. The decision in *Hamdan* leaves the applicable law in is a highly undesirable state, and the Congress should move promptly to reject the decision’s central holdings.

I would be pleased to answer any questions the Committee might have on this subject.

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

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

Are Bush's Military Commissions Necessary?

By Bruce Fein*

Congress should reject President George W. Bush's plea to authorize military commissions to try noncitizen illegal combatants for war crimes when they are already mobilized indefinitely at Guantanamo Bay.

In Hamdan v. Rumsfeld (June 29, 2006), the United States Supreme Court held that the President's order creating such commissions in the aftermath of 9/11 violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions because of structural and procedural deficiencies. But as Justice Stephen Breyer emphasized in a concurring opinion, nothing in Hamdan "prevents the President from returning to Congress to seek the authority he believes necessary [for military commissions]."

Hamdan itself combined with testimony of then Assistant Attorney General (and now Secretary for Homeland Security) Michael Chertoff disprove the need for military commissions bereft of core procedural safeguards to try war crimes, such as a prohibition on secret or unsworn evidence. Customary courts-martial following the UCMJ are up to the task.

Neither speedy punishment nor national security justifies military commissions, and the leisurely proceedings against Hamdan corroborate. In November 2001, during hostilities between the United States and the Taliban, Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay for indefinite detention as an enemy combatant, a status later confirmed by a Combatant Status Review Tribunal. Hamdan has never questioned the

Government's power to detain him for the duration of active hostilities. Even if acquitted of war crimes, he would not go free.

Over a year after arriving at Guantanamo, President Bush identified Hamdan as eligible for trial by military commission for then-unspecified crimes. After another year elapsed, Hamdan was charged with one count of conspiring with Al Qaeda members to commit murder and terrorism. In furtherance of the conspiracy, Hamdan allegedly acted as Osama bin Laden's body guard and driver; transported weapons for Al Qaeda; drove bin Laden to terrorist training camps; and, received weapons training there.

A military commission did not convene on a battlefield to try Hamdan for war crimes based on fresh evidence. It convened years after the alleged wrongdoing and distant from any war zone. Moreover, a trial of Hamdan pursuant to the UCMJ in a Guantanamo facility would not create the safety risks to a surrounding community as would a trial in a civilian courtroom. In testimony before the Senate Judiciary Committee on November 28, 2001, then Assistant Attorney General Chertoff hypothesized but one example of a safety need for a military commission that bears no resemblance to Hamdan's situation: "If it were to turn out that we apprehended 50 Al Qaeda terrorists in the field in Afghanistan, the President might well wonder whether if it made sense from the standpoint of our national security to bring those people back to the United States, put them in a courtroom in New York or Washington or in Alexandria and try them. I think as we sit here now there is still a conflict going on in a prisoner-of-war camp in Afghanistan, where some of the people who have been apprehended apparently seized the camp and are now trying to fight with the Northern Alliance. So plainly that is an instance in which the President could well determine that while we have jurisdiction to

bring these people back and try them domestically, it makes no sense to do so when we can also try them for violation of the laws of war under the well-accepted principle of military commissions.”

Secretary Chertoff added, however, that “our [regular] legal system is terrific and can handle these [terrorism] cases,” and, “that the history of this Government in prosecuting terrorists in domestic courts has been one of unmitigated success and one in which the judges have done a superb job of managing the courtroom and not compromising our concerns about security and our concerns about classified information.”

President Bush’s military commissions should continue to be rejected by Congress because they gratuitously create unreasonable risks of erroneous convictions without advancing the safety of the American people. If the President has his way, the accused and his civilian counsel would be excluded from, and precluded from learning what evidence was presented during, any part of the proceedings that the presiding officer closes. Grounds for closure would “include the protection of information classified or classifiable....; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.” Further, unsworn and coerced testimony would be admissible in addition to hearsay.

In contrast, trial by courts-martial under the UCMJ would prohibit secret evidence and require sworn testimony. The reliability of verdicts compared with military

commissions would be sharply advanced. And the Government invariably wins when justice is done.

*Bruce Fein is a constitutional lawyer and international consultant with Bruce Fein & Associates and The Lichfield Group.

754 words – c. 5 mins.

**Statement of U.S. Senator Russell D. Feingold
Senate Judiciary Committee Hearing on
“*Hamdan v. Rumsfeld*: Establishing a Constitutional Process”
July 11, 2006**

Mr. Chairman, thank you for holding this hearing.

The Supreme Court’s decision striking down the President’s military commissions is yet another major rebuke to an Administration that has too often disregarded the rule of law. The Supreme Court has once again affirmed that detainees must be accorded basic rights and treated humanely, pursuant to U.S. law as well as universally respected international standards.

Throughout our history, the courts have often given great deference to the executive branch during times of war, but there are some actions that simply go too far.

It is a testament to our system of government that the Supreme Court stood up against this Administration's overreaching. We are fortunate to live in a country where the checks and balances in government are real.

Mr. Chairman, in the case of the treatment of detainees, this Administration has disregarded in many instances its own experts – military attorneys and other experts within the executive branch who tried to object to radical policies regarding military commissions, interrogation techniques and other actions. The Administration's extreme theories of executive power, its unilateral approach and its refusal to listen to any dissent have been entirely counter-productive and have harmed our relations around the world, weakening us in the fight against al Qaeda and its allies.

If this Administration had not argued that detainees were not subject to the Geneva Conventions, if this Administration had not argued that detainees had no right to counsel or to make their case in federal court, if this Administration had not insisted on trying those few detainees who are charged with crimes in tribunals lacking basic due process, if this Administration had not sought to exploit every ambiguity in the law to justify its unprecedented actions, we would not be where we are today.

Now, in the aftermath of the *Hamdan* decision, we are faced with an important question, one that Congress and the President should have worked together to

answer four years ago: How do we try suspected terrorists captured overseas?

There is one option that would allow trials to begin immediately, without further legislation, and with the least likelihood of further, successful legal challenges. The Supreme Court said very clearly that the President already has the authority to move forward under the long-established military system of justice, a system that has rules for dealing with classified evidence. In fact, Justice Kennedy in his concurrence seemed to suggest that might be our best option when he said: “The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”

So a threshold question, before we consider drafting legislation to authorize any new form of tribunal, is whether there are reasons why we can't or shouldn't use the existing military justice system. And let me just say, for supporters of the Administration to suggest that this option just amounts to "giving terrorists the same rights and privileges as our own brave soldiers" is offensive and misses the point.

However we move forward, the individuals held at Guantanamo Bay should be tried in accordance with our fundamental American values and the laws of war. Unfortunately, we have already heard some members of Congress argue that Congress should simply authorize the President's existing military commission structure. That would be a grave mistake. For one thing, it would

surely be subject to further legal challenge, and would likely squander another four years while cases work their way through the courts again. Let's learn the lesson that the Supreme Court has taught us in *Hamdan* and move forward with respect for the rule of law. We can and must fight terrorism aggressively without compromising fundamental American values.

Mr. Chairman, in closing let me do something I don't do very often – and that is quote John Ashcroft.

According to the New York Times, at a private meeting of high-level officials in 2003 about the military commission structure, then-Attorney General Ashcroft said: “Timothy McVeigh was one of the worst killers in U.S. history. But at least we had fair procedures for him.”

How the Congress proceeds in the wake of the *Hamdan* decision will say a lot about how it views the fundamental principles that make this country great. Thank you again for holding this hearing so we can start that discussion.

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

July 10, 2006

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

Dear Chairman Specter and Senator Leahy:

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

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

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

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

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

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

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

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

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

We urge your consideration of these views on this matter.

With respect,

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

Harold Hongju Koh
Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law
Yale Law School

Statement before the Senate Committee on the Judiciary
regarding
Hamdan v. Rumsfeld: Establishing a Constitutional Process

July 11, 2006

Thank you, Mr. Chairman and Members of the Committee, for inviting me today.

I am Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at the Yale Law School, where I have taught since 1985 in the areas of international law, human rights, and the law of U.S. foreign relations.¹ I have served the United States government in both Republican and Democratic Administrations.² I appear today to testify about the Supreme Court's historic June 29, 2006 decision in *Hamdan v. Rumsfeld*,³ and to suggest how the President and Congress can now work together to restore a constitutional process for humane treatment and fair trial of suspected terrorist detainees.

The *Hamdan* decision is perhaps the most significant decision regarding executive power since the Court's landmark 1952 decision in the *Steel Seizure* case.⁴ *Hamdan* is important not just because it invalidates the current system of military commissions, but also because its broader reasoning supports views I have previously offered this Committee regarding the incorrectness of the Administration's past legal positions regarding torture, cruel treatment and interrogation of detainees,⁵ the warrantless NSA domestic surveillance program,⁶ and the applicability of provisions of the Geneva Conventions to suspected terrorist detainees.⁷ Let me review the significant holdings of the *Hamdan* decision, outline its broader significance, and examine a legislative proposals to repair the system of military commissions that has already been suggested to this Committee.

¹ An expanded version of this statement will appear in 115 YALE LAW JOURNAL, Issue 9 (2006). A summary of my views on the constitutional law governing national security can be found, inter alia, in HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990). A brief *curriculum vitae* is attached as an appendix to this testimony. Although I sit on a law school faculty as well as on the boards of numerous organizations, the views expressed here are mine alone.

² I served as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice from 1983-85, and as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001.

³ *Hamdan v. Rumsfeld*, No. 05-184, 2006 WL 1764793 (U.S., Jun. 29, 2006).

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵ Statement of Harold Hongju Koh on the *Nomination of Alberto Gonzales to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Jan. 6, 2005), available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3938 ("Koh Statement on Gonzales").

⁶ *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Feb. 6, 2006) (statement of Harold Hongju Koh), transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html>.

⁷ See Koh Statement on Gonzales, *supra* note 5.

I. The *Hamdan* Decision

Hamdan v. Rumsfeld arose, according to one recent press account, from a presidential order that was issued without the knowledge or consultation of the Secretary of State, the National Security Adviser or her legal counsel, the General Counsel of the CIA, the Assistant Attorney General for the Criminal Division, or any of the top lawyers in the military's Judge Advocate General (JAG) corps.⁸ In November 2001, President Bush issued a military order, without congressional authorization or consultation, which declared that "[t]o protect the United States and its citizens, . . . it is necessary for [noncitizen suspects designated by the president under the order]. . . to be tried for violations of the laws of war and other applicable laws by military tribunals."⁹ Although that decision immediately triggered a huge public outcry,¹⁰ Salim Ahmed Hamdan was eventually charged with "conspiracy . . . to commit offenses triable by a military commission."¹²

Before the Supreme Court, the Administration asserted a constitutional theory of unfettered executive power, based on an extremely broad interpretation of Article II of the Constitution and the September 18, 2001 Authorization for the Use of Military Force resolution (AUMF).¹³ The Solicitor General argued, in effect, that Hamdan was a person outside the law, held in an extralegal zone (Guantanamo), who could be subjected to the jurisdiction of a non-court. The Administration further asserted that Hamdan's alleged crimes could be determined in a proceeding whose rules comported with neither a prior enactment of Congress-- the Uniform Code of Military Justice (UCMJ)¹⁴--nor a binding

⁸ Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006 at 44, 52.

⁹ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(e) (Nov. 13, 2001), 66 Fed. Reg. 57, 833 (Nov. 16, 2001) [hereinafter Military Order] (emphasis added).

¹⁰ See, e.g., Letter from Law Professors and Lawyers to the Honorable Patrick J. Leahy (Dec. 5, 2001), available at <http://www.yale.edu/lawweb/liman/letterleahy.pdf>. Those law professors (including this author) called "the untested institutions contemplated by the Order . . . legally deficient, unnecessary, and unwise." In particular, they argued that the order violates separation of powers, "does not comport with either constitutional or international standards of due process," and "allows the Executive to violate the United States' binding treaty obligations." For legal critiques of the Military Order, see, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); George P. Fletcher, *War and the Constitution: Bush's Military Tribunals Haven't Got a Legal Leg to Stand On*, AM. PROSPECT, Jan. 1-14, 2002, at 26.

¹² *Hamdan*, 2006 WL at *8.

¹³ Pub. L. No. 107-40, § 2 (a), 115 Stat. 224, 224 (Sept. 18, 2001) (authorizing the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the terrorist attacks of September 11, 2001, in order to protect the nation from the recurrence of such attacks).

¹⁴ 10 U. S. C. §801 *et seq.*, originally enacted as Act of May 5, 1950, ch. 169, 64 Stat. 107, amended by Military Justice Act of 1968, 82 Stat. 1335.

treaty obligation-- Common Article 3 of the Geneva Conventions of 1949 (Common Article 3).¹⁵

Justice Stevens's opinion for a five-justice majority demolished each of the Government's arguments. From the outset, the Court refused to accept the Government's core premise that a new "crisis paradigm" required that ordinary legal rules be jettisoned in this case.¹⁶ Calling the military commissions an "extraordinary measure raising important questions about the balance of powers in our constitutional structure,"¹⁷ the Court roundly rejected the Administration's extreme constitutional theory of executive power. Instead, all of the Justices who addressed the merits placed the case within the well-established tripartite framework of shared institutional powers set forth in Justice Jackson's concurrence in the *Steel Seizure Case*.¹⁸

By enacting the UCMJ, the Court reasoned, Congress had authorized the president to use commissions, but had specified that, wherever practicable, the executive must follow the same procedural rules in military commissions as are applied in ordinary courts-martial. Accordingly, Hamdan's case fell within the third *Youngstown* category: in which the executive action is held unlawful because "the President takes measures incompatible with the express or implied will of Congress, [and thus] his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter."¹⁹

The Court followed its earlier insistence in *Rasul v. Bush*²⁰ that Guantanamo be treated as a land subject to law by rejecting the Administration's attempt to depict Hamdan as a person outside the law. Even while acknowledging that Hamdan might have committed serious crimes, the Court nevertheless proclaimed that "in undertaking to

¹⁵ Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3318, T. I. A. S. No. 3364. [hereinafter Common Article 3].

¹⁶ See *Hamdan*, 2006 WL at *35 ("Without for one moment underestimating the danger posed by international terrorism, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial."). As Justice Kennedy put it, "a case that may be of extraordinary importance is resolved by ordinary rules . . . those pertaining to the authority of Congress and the interpretation of its enactments." Rather than embracing ad hoc, crisis solutions, he argued, "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Hamdan*, 2006 WL at *41 (Kennedy, J., concurring in part).

¹⁷ *Hamdan*, 2006 WL at *8.

¹⁸ 343 U.S. at 638 (Jackson, J., concurring). As the Court noted in footnote 23 of its opinion: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan*, 2006 WL at *21, n.23 (citing *Youngstown*); see also *Hamdan*, 2006 WL at *42 (Kennedy, J., concurring in part) ("The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*.".) Justice Thomas's dissent also began by invoking the *Youngstown* framework, but argued that implicit congressional authorization of the military commissions placed this case into Category I, where the presidential action is owed highest deference. See *id.* at *64 (Thomas, J. dissenting).

¹⁹ 343 U.S. at 638 (emphasis added) (Jackson, J., concurring). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the entire Supreme Court embraced Justice Jackson's view as "bringing together as much combination of analysis and common sense as there is in this area." *Id.* at 661 (Rehnquist, C.J.).

²⁰ 542 U.S. 466 (2004).

try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”²¹

Even more important, the Court rejected the Government’s attempted dichotomy between law and war by requiring consistent application of the *law of war* to Hamdan’s case. As Justice Kennedy cogently put it, “If the military commission at issue is illegal under the law of war, then an offender cannot be tried ‘by the law of war’ before that commission.”²² Applying the law of war, a majority of the Court denied the Government’s claim that individuals could never enforce the Geneva Conventions in U.S. court, reasoning that Hamdan’s proposed trial violated Common Article 3 of those Conventions, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²³ By so saying, the majority both took note of the treaty’s intention to be applied universally, not selectively, and confirmed that Congress had effectively “internalized” Common Article 3 into domestic law when it enacted the UCMJ.²⁴

Finally, given the individual liberties at stake, the Court demanded a clear congressional statement before the Commander-in-Chief could try a suspected alien terrorist before a military commission.²⁵ Said Justice Breyer, in his concurrence for four Justices, “[t]he Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check’” in the AUMF.²⁶ In demanding such a clear legislative statement, the Court followed a critically important line of cases holding that, in times of war or national crisis, the Executive Branch may not deny even suspected enemies of their basic liberties, without the explicit approval of Congress.²⁷

²¹ *Hamdan*, 2006 WL at *40.

²² *Hamdan*, 2006 WL at *44 (Kennedy, J., concurring in part). *See also id.* at *37 (“For, regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”) (citations omitted).

²³ *See, e.g.*, Common Article 3, *supra* note 14. Justice Kennedy joined the key part of the majority’s opinion regarding applicability of Common Article 3, and his concurring opinion not only referred to Common Article 3 as “part of a treaty the United States has ratified and thus accepted as binding law,” but also noted that Congress has made “violations of Common Article 3 ... ‘war crimes,’ punishable as federal offenses, when committed by or against United States nationals and military personnel.” 2006 WL at *44 (Kennedy, J., concurring in part) (citing 18 U. S. C. §2441).

²⁴ *Id.* at *38 (“the commentaries also make clear ‘that the scope of the Article must be as wide as possible.’ In fact, limiting language that would have rendered Common Article 3 applicable ‘especially [to] cases of civil war, colonial conflicts, or wars of religion,’ was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.”) (citations omitted).

²⁵ *Id.* at *19 (citing a “‘duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty’”), *citing* *Ex Parte Quirin*, 317 U.S. 1, 21 (1942).

²⁶ *Hamdan*, 2006 WL at *40 (Breyer, J., concurring) (citing *Hamdi v. Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion)).

²⁷ *See* *Kent v. Dulles*, 357 U.S. 116 (1958) (rejecting State Department denial of passport to Communist during Cold War, because of the absence of a clear congressional statement denying passports based on political convictions); *Duncan v. Kahanamoku*, 327 U. S. 304 (1946) (World War II case blocking executive branch from using military tribunals to try civilians in Hawaii because there was no clear authorizing congressional statement); *Ex Parte Milligan*, 4 Wall. 2, 140 (1866) (“nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and

In *Hamdan*, the Supreme Court reaffirmed the spirit of the *Steel Seizure* case for the 21st Century. The decision confirms that constitutional checks and balances do not stop at the water's edge. As important, on all three occasions in which the Supreme Court has now ruled on the merits of a challenge to presidential authority after September 11, it has set significant constitutional limits on the President's capacity to act unilaterally in national security and foreign affairs.²⁸

Hamdan instructs that our constitutional democracy must fight even a War on Terror through balanced institutional participation: led by an energetic executive, but guided by an engaged Congress and overseen by a judicial branch that enforces enacted law. The Court's ruling recognizes that the best way to develop a sustained democratic response to external crisis is through interbranch dialogue, and not executive unilateralism. As Justice Breyer put it:

"[w]here, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same."²⁹

II. Implications of the *Hamdan* ruling

Hamdan not only gives broad direction on how a war on terror may be constitutionally conducted, it also disproves exorbitant claims previously made by the Administration regarding the President's supposed freedom to authorize torture and cruel treatment, to carry out widespread warrantless domestic wiretapping, and to avoid Common Article 3. By so doing, *Hamdan* goes a long way toward reestablishing what Justice Jackson in his famous concurrence in the *Steel Seizure Case* termed the "equilibrium established by our constitutional system."³⁰

A. Torture and Cruel, Inhuman or Degrading Treatment: With respect to torture and cruel treatment, *Hamdan* confirms that the President must act within the scope of a specific statute (here, the McCain Amendment to the Defense Authorization Act)³¹

punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity...."). In *Youngstown* itself, the Court barred President Truman from seizing the steel mills, despite his claim that the seizure was necessary to ensure continued war production.

²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (enemy combatant deserves due process), *Rasul v. Bush*, 542 U.S. 466 (2004) (detainees on Guantanamo have right to seek habeas corpus), *Hamdan v. Rumsfeld*, No. 05-184, 2006 WL 1764793 (U.S., Jun. 29, 2006) (invalidating military commissions not conducted in accordance with UCMJ or Common Article 3). A fourth case, *Padilla v. Rumsfeld*, 542 U.S. 426 (2004), did not rule on the merits of a detainee's habeas petition, but merely specified in which jurisdiction the petition could be heard.

²⁹ *Hamdan*, 2006 WL at *40 (Breyer, J., concurring).

³⁰ *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

³¹ The McCain Amendment to the Defense Authorization Act prohibits the use of "cruel, inhuman, or degrading treatment or punishment" against any "individual in the custody or under the physical control of the United States Government." Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003 (2005). In addition, "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation

and treaty (here, Geneva Conventions Common Article 3), or his actions will be invalidated under *Youngstown*.³² According to a longstanding canon of statutory construction, courts must construe statutes, absent clear congressional intent to the contrary, consistently with international law.³³ Such a reading would interpret the McCain Amendment-- notwithstanding any presidential signing statement to the contrary-- to require the Executive branch to comply with the anti-torture provisions of Common Article 3, which the *Hamdan* Court held to apply not just to inter-state armed conflicts, but as widely as possible.

With respect to covered persons, who would appear after *Hamdan* to include suspected Al Qaeda detainees, Common Article 3 prohibits "at any time and in any place whatsoever ... violence to life and person, in particular ... cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment." But this prohibition simply confirms the existing legal obligations of American officials under the McCain Amendment and two other treaties-- Articles 1-4 and 16 of the Convention Against Torture³⁴ and Articles 7 and 10 of the International Covenant on Civil and Political Rights³⁵-- both of which the United States has ratified. As a matter of both international and U.S. law, techniques such as waterboarding, sexual and other forms of humiliation, forcing detainees into painful positions for extended periods, mock executions, and the like, manifestly violate Common Article 3 as well as these other legal provisions.

Although news accounts suggest that some officials of the United States government have opposed embedding compliance with the anti-torture and cruel treatment provisions of Common Article 3 into the Army Field Manual,³⁶ the *Hamdan* opinions now make clear that these obligations must be treated by U.S. officials as "binding law."³⁷ In its now-withdrawn August 1, 2002 "Torture Opinion," which I have previously criticized before this Committee, the Office of Legal Counsel of the Justice Department argued that American officials who commit torture or cruel, inhuman or degrading treatment could claim immunity from prosecution on the grounds that they

not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." *Id.* at § 1002(a), codified at 10 USCA § 801 note.

³² For further discussion of these issues, see generally Harold Hongju Koh, *Can the President be Torturer-in-Chief?*, 81 INDIANA L.J. 1145 (2006).

³³ The *Charming Betsy* canon has long directed that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988), 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987).

³⁵ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

³⁶ See Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES (Nov. 2, 2005) at A1; Mayer, *supra* note 8.

³⁷ See *Hamdan*, 2006 WL at *44 (Kennedy, J., concurring in part) (Common Article 3 is "part of a treaty the United States has ratified and thus accepted as binding law").

were following the orders of the Commander-in-Chief.³⁸ In *Hamdan*, Justice Kennedy rejected OLC's discredited reasoning in his separate opinion, stating clearly that Congress has made "violations of Common Article 3 ... 'war crimes,' punishable as federal offenses, *when committed by or against United States nationals and military personnel*."³⁹

B. Warrantless Domestic Surveillance: *Hamdan* equally destroys the legal case underlying the NSA's sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents.⁴⁰ Under the Foreign Intelligence Surveillance Act of 1978 (FISA),⁴¹ if Executive officials want to wiretap or conduct electronic surveillance, they can do so without a warrant, but only for three days, or for fifteen days after a declaration of war.⁴² After that, they must either go to the special FISA court for an order to approve the surveillance, come to Congress seeking wartime amendments to the FISA, or be in violation of the criminal law. Moreover, Congress clearly specified that the FISA (and specified provisions of the federal criminal code that govern criminal wiretaps) "shall be the *exclusive* means by which electronic surveillance ... and the interception of domestic wire communications may be conducted."⁴³

Despite this settled law, last December it was revealed that the Executive Branch has in fact been secretly eavesdropping on "large volumes of telephone calls, e-mail messages, and other Internet traffic inside the United States," without ever seeking warrants or new authorizing legislation, and with no guarantee that those searches are limited to those having contact with Al Qaeda.⁴⁴ In its legal defense, the Administration claimed that the Congress implicitly authorized the NSA surveillance plan when it voted

³⁸ Memorandum of August 1, 2002 from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, re Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-2340A, available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>, rescinded by Memorandum of December 30, 2004 from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C. § 2340-2340A, available at <http://www.justice.gov/olc/dagmemo.pdf>. But see Koh, *supra* note 5 (criticizing that opinion).

³⁹ See *Hamdan*, 2006 WL at *44 (Kennedy, J., concurring in part) (emphasis added). These are prosecutable offenses under 18 U.S.C. § 2441 and 18 U.S.C. §§ 2340-2340A (torture).

⁴⁰ See generally Statement of Harold Hongju Koh, *supra* note 6.

⁴¹ Act of Oct. 25, 1978, Pub. L. No. 95-511, 92 Stat. 1783.

⁴² 50 U.S.C. § 1809, 1801, 1811 (West 2004). The House version of the bill would have authorized the President to conduct warrantless electronic surveillance for one year after a declaration of war, but the Conference Committee expressly rejected that suggestion, reasoning that the 15-day "period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. CONF. REP. NO. 95-1720, at 34 (1978). "The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter." *Id.*

⁴³ 18 U.S.C. § 2511(2)(f) (West 2002) (emphasis added).

⁴⁴ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. Recent Justice Department documents and statements acknowledge that the NSA engages in such surveillance without judicial approval, apparently without the substantive showings that FISA requires, e.g., that the target subject is an "agent of a foreign power;" 50 U.S.C. § 1805(a), and without any prior approval from the White House, the Justice Department, or any court, lawyer, or prosecutor before it starts monitoring any specific email or phone line. *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Feb. 6, 2006) (statement of Alberto Gonzales).

for the AUMF, even though the AUMF never discusses surveillance in general, or FISA in particular. But to accept that reading, one would have to conclude that in September 2001, Congress had somehow silently approved what twenty-three years earlier, in the FISA, it had expressly criminalized.⁴⁵ To so read the law would violate *Hamdan* by construing the AUMF to give the President the kind of “blank check” to engage in warrantless wiretapping on U.S. soil that the *Hamdan* Court expressly withheld with respect to military commissions. *Hamdan* thus joins a long string of Supreme Court decisions rejecting the claim that the President may invoke his Commander in Chief power to disregard an Act of Congress designed specifically to restrain executive conduct in a particular field.⁴⁶

In the alternative, the Administration claimed that the President has an implied exclusive constitutional authority over “the means and methods of engaging the enemy,” including the conduct of “signals intelligence” during wartime.⁴⁷ But as Justice Jackson wrote in *Youngstown*, “the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants.”⁴⁸ Congress undeniably has power “[t]o make Rules for the Government and Regulation of the land and naval Forces” and to “make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer

⁴⁵ The *Hamdan* majority noted that “there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.” *Hamdan*, 2006 WL at *21. Similarly, there is no evidence in the AUMF hinting that Congress intended by that law silently to repeal 18 U.S.C. § 2511(2)(f), which makes the FISA (and other specific criminal code provisions) “the exclusive means by which electronic surveillance...may be conducted.” Professor Cass Sunstein, who had previously sympathized with the Government’s AUMF argument, has recently written,

“After *Hamdan*, the defense of the NSA foreign surveillance program is much more difficult.

Justice Thomas took a route very similar to that sketched by the most plausible arguments for the NSA program -- and his view was squarely rejected by a majority. The Court refused to construe the AUMF as overriding the Uniform Code of Military Justice -- and it would be easy to say that the AUMF has the same relationship to FISA as to the UCMJ (that is, it leaves it 100% intact).”

Cass Sunstein, *The NSA and Hamdan* (July 8, 2006), available at <http://balkin.blogspot.com>.

⁴⁶ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) (rejecting the President’s claim that courts may not inquire into the factual basis for detention of a U.S. citizen “enemy combatant,” reasoning that “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting the President’s claim that it would be an unconstitutional interference with the President’s Commander in Chief power to interpret the habeas corpus statute to encompass actions filed on behalf of Guantanamo detainees); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (invalidating the President’s seizure of the steel mills where Congress had previously “rejected an amendment which would have authorized such governmental seizures in cases of emergency.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that the Executive had violated the Habeas Corpus Act by failing to discharge from military custody a petitioner charged, *inter alia*, with violation of the laws of war); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (invalidating a presidential seizure of a ship during a conflict with France as implicitly disapproved by Congress); *United States v. Smith*, 27 F. Cas. 1192, 1218 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., Circuit Justice) (“[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what law forbids.”).

⁴⁷ *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Department of Justice Whitepaper), (Jan. 19, 2006), at 6-10, 28-36 (setting forth, after the fact, the Department’s analysis of the legal basis for the terrorist surveillance program).

⁴⁸ *Youngstown*, 343 U.S. 579, 643-44 (Jackson, J., concurring).

thereof.”⁴⁹ Under these authorities, Congress has enacted myriad statutes regulating the “means and methods of engaging the enemy,” including, most obviously, the UCMJ. But given that *Hamdan* required the President to follow the terms of the UCMJ despite his claim of exclusive presidential authority, congressional assertion now of legislative authority over NSA surveillance would also plainly be constitutional.

C. Applicability of Geneva Conventions Common Article 3: Common Article 3 establishes the minimum legal protections that must be accorded to all persons, in situations of conflict, who are no longer taking part in hostilities. As Counsel to the President, now-Attorney General Alberto Gonzales correctly noted in a Memorandum to the President that: “Since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so.”⁵⁰ Nevertheless, Mr. Gonzales found that the war on terror presents a “new paradigm [that] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.”⁵¹ Since then, the Administration has asserted in numerous settings that Common Article 3 does not apply to the War on Terror. In the *Hamdan* case, a majority of the Court authoritatively rejected that notion.

It is hornbook law that “[c]ourts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States”⁵² The Constitution gives the Supreme Court interpretive jurisdiction over “all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .”⁵³ A treaty interpretation made by the U.S. Supreme Court thus binds both the states and the coordinate branches of the federal government.

In *Hamdan*, Justice Stevens, writing for the Court, stated as a matter of binding treaty interpretation that “*Common Article 3, then, is applicable here* and, as indicated above, requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”⁵⁴ Justice Kennedy, concurring, also joined the key part of the majority’s opinion regarding

⁴⁹ U.S. CONST. art. I, § 8, cl. 14; cl. 18.

⁵⁰ Memorandum of Alberto Gonzales to President George W. Bush, Regarding Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaida and the Taliban (Jan. 25, 2002), at 3, available at http://msnbc.com/modules/newweek/pdf/gonzales_memo.pdf.

⁵¹ *Id.* at 2.

⁵² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 & cmt. d (1987).

⁵³ U.S. CONST. art. III, § 2.

⁵⁴ Justice Stevens discussed the applicability of Common Article 3 in Parts VI-D-ii and iii of his opinion, where he wrote for five Justices, including Justice Kennedy. The only parts of Justice Stevens’s discussion that Justice Kennedy did *not* join were Part V (finding that the right to be present at one’s trial is one of the “judicial guarantees which are recognized as indispensable by civilized peoples,” *Hamdan*, 2006 WL at *50) and Part VI-D-iv (holding that the charge of conspiracy does not support the military commission’s jurisdiction, *id.* at *51). Nor Justice Alito’s dissent argue that Common Article 3 was inapplicable; he merely asserted that the existing military commissions did not violate the requirements of that law. *Id.* at *86 (Alito, J., dissenting).

applicability of Common Article 3.⁵⁵ Moreover, his concurring opinion referred to Common Article 3 as “part of a treaty the United States has ratified and *thus accepted as binding law*.”⁵⁶

The President and his subordinates now have a solemn constitutional duty to “take Care that the Laws be faithfully executed,”⁵⁷ including Common Article 3 as a law of the United States, which the Court has now definitively interpreted. Nothing in the Court’s ruling suggests that the Executive Branch has any option but to apply Common Article 3 in its entirety.⁵⁸ Indeed, it would defy logic to read *Hamdan* as requiring suspected terrorist detainees to have fair trials, while nevertheless leaving them free to be subjected at the will of their captors to torture and cruel and inhuman treatment. Nor is Congress free to pick and choose with which elements of the Court’s ruling it will comply. Given the authoritative nature of the Supreme Court’s interpretation of the applicability of Common Article 3 under U.S. law, Congress could not now enact legislation modifying or rejecting the Supreme Court’s interpretation without also violating a binding treaty obligation (Common Article 3) and amending or repealing at least three controlling statutes (the UCMJ, the War Crimes Act, and the McCain Amendment).

When testifying before this Committee in January 2005, I was asked by Senator Cornyn whether the Geneva Conventions applied to Al Qaeda detainees. In answering that question affirmatively, I noted that

“Broad applicability is the logic. We [Americans] have been the ones who are saying it should apply broadly because we want our troops to have a strong presumption of protection. . . . The bottom line, Senator, is we have tried not to create ways in which people can be taken in and out of the protections of the Convention, because that might happen to our troops.”⁵⁹

In response, Senator Cornyn asked whether reasonable, respectable legal minds could differ on whether the Geneva Conventions apply to Al Qaeda. I answered: “[D]isputes among lawyers are often resolved at the Supreme Court. . . . I think we are moving to a definitive resolution of these issues . . . in the courts.”⁶⁰

That definitive judicial resolution has now occurred. Accordingly, the political branches must now act upon it.

III. After *Hamdan*: Next Steps

⁵⁵ Justice Stevens’ opinion made clear that there were five justices agreeing on this point. See *Hamdan*, 2006 WL at *39 (“We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any ‘evident practical need,’ and for that reason, at least, fail to afford the requisite guarantees.”).

⁵⁶ 2006 WL at *44 (Kennedy, J., concurring in part) (emphasis added) (citing 18 U. S. C. §2441).

⁵⁷ U.S. CONST. art. II, § 3.

⁵⁸ Not only do the Court’s holding and reasoning apply to Common Article 3 as a whole, there is also no suggestion that the provisions of Common Article 3 are severable from one another. By its terms, the provision as a whole is intended to state the minimum protections owed to those who are no longer in conflict.

⁵⁹ Koh Testimony on Gonzales Nomination, *supra* note 5. The *Hamdan* Court clearly confirmed the broad applicability of Common Article 3, noting that “the commentaries [leading to adoption of Common Article 3] . . . make clear ‘that the scope of the Article must be as wide as possible.’” *Hamdan*, at *38 (citations omitted).

⁶⁰ *Id.*

By statute, treaty, and judicial opinion, the McCain Amendment, the UCMJ, Common Article 3, and *Hamdan* have all established beyond doubt that the United States is legally bound not to commit torture and cruel, inhuman or degrading treatment, as well as to give detainees in the War on Terror a fair trial. Now that the Supreme Court has settled these legal issues, both the Executive and Legislative Branches face important policy tasks.

A. Executive Branch:

Notwithstanding past internal disputes,⁶¹ the Department of Defense should follow *Hamdan* by promptly revising its Army Field Manual to reaffirm that U.S. Armed Forces are legally bound, under U.S. statutory and treaty law, to abide by Common Article 3.

By clarifying this obligation, *Hamdan* would remove any impediment to the President finally following the prudent recommendation of the bipartisan 9/11 Commission that

The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. *New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict.* That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.⁶²

The upcoming G-8 summit in St. Petersburg, Russia on July 15-17, 2006, presents the Administration with a rare opportunity to seize upon the 9/11 Commission's recommendation. The President should take that occasion to propose, as part of the anti-terrorism declaration to be issued at the St. Petersburg summit, a Joint Declaration of Principles on Humane Treatment and Fair Trial. Such a Joint Declaration would make clear that, as part of a durable, long-term approach to the War on the Terror, all the G-8 countries commit themselves to obey Common Article 3. By so doing, the President would reassert United States leadership on human rights and proactively address the growing human rights concerns of our allies about our conduct of the War on Terror. In addition, such a step would help to secure the support of our leading allies for future anti-terrorism efforts by ensuring the interoperability of treatment and detention of terrorist suspects. Finally, such a declaration—issued twenty years after the historic Helsinki Accords—would lay down a critically important standard to restrain such governments as China and Russia, both of whom have cited U.S. antiterrorism practices to justify their own harsh dealings with the Uighur Muslims and Chechens, respectively.

B. Legislative Branch:

1. *Hamdan's* Requirements: I have long ago expressed skepticism as to whether we really need military commissions to deal with terrorist suspects.⁶³ But if we are to have military commissions, surely they must be lawfully constituted.

⁶¹ See *supra* note 36.

⁶² THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 380 (2004) (emphasis added).

⁶³ See Koh, *supra* note 10; Harold Hongju Koh, *We Have the Right Courts for bin Laden*, N.Y. TIMES, Nov. 23, 2001.

On June 29, 2006, the same day as the Supreme Court decided *Hamdan*, Senator Specter introduced S. 3614, the “Unprivileged Combatant Act of 2006.”⁶⁴ Let me first suggest what minimum requirements the *Hamdan* ruling would require in any legislation that Congress might now consider, and second, explain why, under those minimum requirements, S. 3614 has serious deficiencies.

The *Hamdan* opinions make clear that any legislation authorizing military commissions must meet seven minimum standards:

A. *Providing Necessary Statutory Authority*: The statute should make clear that it derives not from vague presidential authority, but rather, from Congress’ legislative authority to constitute tribunals inferior to the Supreme Court.

B. *Ensuring Humane Treatment during Proceedings*: Common Article 3 prohibits “at any time and in any place whatsoever [including during the pendency of criminal proceedings]... violence to life and person, in particular ... cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”

C. *Defining Eligible Defendants*: The law should define, clearly and fairly, what kinds of combatants can be charged before the military commission.

D. *Defining Crimes Chargeable Under the Law of War*: The law should define a list of crimes that can validly be charged under the law of war, e.g., war crimes and crimes against humanity.

E. *Provide Procedures Comparable to Courts-Martial that Satisfy Common Article Three and the ICCPR*: Ideally, the procedures adopted would resemble those applied in courts-martial conducted under the UCMJ, as closely as reasonably possible. In addition, the procedures must, under *Hamdan*, strictly adhere to the fundamental requirements of international human rights law and the laws of war, in particular Common Article 3, which mandates “the passing of sentences and the carrying out of executions” with “previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), currently ratified by 156 nations (including the United States),⁶⁵ these indispensable guarantees would include:

1. A fair and public hearing by a competent, independent and impartial tribunal established by law;
2. A presumption of innocence until proved guilty according to law;
3. A right to a trial without undue delay, in the presence of the accused, with the right to defend himself in person or through legal assistance, under rules of evidence designed to ensure admission only of reliable, probative information;
4. A right of the accused to examine evidence and witnesses against him and to obtain the attendance and examination of witnesses on his behalf; and
5. A right of the accused not to be compelled to testify against himself or to confess guilt.

⁶⁴ 152 CONG. REC. S6796 (June 29, 2006). Senator Specter explained that the bill had been prepared by committee staff in advance of the Court’s decision in *Hamdan*, and “still requires a great deal more analysis and a great deal more thought.” *Id.*

⁶⁵ See <http://www.ohchr.org/english/countries/ratification/4.htm>.

F. *Giving Meaningful Judicial Review*: The bill must provide for meaningful, independent judicial review of military commission decisions before a civilian court.

G. *Giving Meaningful Congressional Oversight*: Congress must also oversee the overall operation of any new military commission system, to ensure that only those cases that cannot be properly handled by standing civilian or military courts are sent to military commissions.

2. S. 3614, the “Unprivileged Combatant Act of 2006”: In its current form, S. 3614 seriously fails under each of the above criteria:

A. *Providing Necessary Statutory Authority*: § 1(c)(3) of S. 3614 claims that the Executive Branch has “inherent” constitutional and statutory authority to establish “military tribunals to adjudicate and punish offenses relating to the war on terrorism.” But if Congress may only contribute “additional” authorization to military commissions that the President is already empowered to establish on his own, this Act has just declared itself unnecessary. *Hamdan* insisted upon proper legislative approval, which *Hamdan*’s military commission lacked. But by the logic of this provision, the President could simply continue with his current military commissions under existing authority, even without any form of congressional approval. This language should therefore be deleted, leaving the language in current § 3 of the bill, which simply states that “The President is authorized to establish military commissions for the trial of individuals for offenses as provided in this Act.”

Far better on this issue is S. 1941, the Military Tribunal Authorization Act of 2002, introduced by Senator Leahy (“2002 Leahy Bill”), which explicitly invokes Congress’s authority to constitute tribunals inferior to the Supreme Court, makes plain the need for a “clear and unambiguous legal foundation for such trial,” and emphasizes the importance of ensuring “basic procedural guarantees of fairness, consistent with the international law of armed conflict and the [ICCPR] to garner the support of the community of nations.”

B. *Ensuring Humane Treatment During Proceedings*: In clear violation of *Hamdan*, the bill would only apply the standards of humane treatment established by the Geneva Conventions Relative to the Treatment of Prisoners of War (GPW)⁶⁶ after a “Field Tribunal” determines whether the accused is a “privileged” or “unprivileged” combatant. Sections 7 and 11 of S. 3614 in effect authorize indefinite imprisonment, and Section 9(g) permits a detainee to be held as long as six months before determining his status. The bill also allows removal of prisoners to other countries regardless of whether these other countries practice torture or other abuse, Section 9(a). Moreover, Section 14 prohibits a detainee from communicating with his family or friends, or even with the International Committee of the Red Cross, unless the military approves, even though such approval should be routinely granted.

The 2002 Leahy bill (§ 5), by contrast, placed statutory limits on the duration, terms of detention, and the conditions under which detainees may be held.

⁶⁶ The Geneva Conventions of 1949, which the United States has ratified, set forth the international humanitarian law war applicable to all international armed conflicts. In particular, the Third and Fourth Conventions specify terms of detention for prisoners of war and civilians in such conflicts.

C. *Defining Eligible Defendants*: The bill would create statutory “Field Tribunals” to separate detainees into “privileged” and “unprivileged” combatants.⁶⁷ Under § 9(b) of S. 3614, only if “a detainee is found to be a privileged combatant entitled to provisions under the [GPW], then the detainee must be treated in accordance with that convention,” a standard plainly at odds with *Hamdan*. Nothing in the bill ensures that these “Field Tribunals” meet the standards of a speedy determination by a “competent tribunal” required by Article 5 of the GPW.⁶⁸ S. 3614 would also potentially permit denial of GPW protections to a vaguely described group: anyone associated with a group or individual “hostile to the United States,” Section 2(11)(B)(ii)(I), or who “intentionally assisted combat operations against the United States,” Section 2(11)(B)(ii)(IV). If a detainee were denied POW status, the detainee would be subject to the processes provided by the bill, not the standards of Common Article 3, again in clear violation of *Hamdan*.

E. *Defining Crimes Chargeable Under the Law of War*: S. 3614 authorizes military commissions to hear any criminal prosecution involving international terrorism, presumably including the crime of conspiracy (which was not allowed by a plurality of the Court in *Hamdan*). Unprivileged combatants may be punished for “bad acts . . . deemed to be relevant by a commission including propensity,” a term which might well include the charge of conspiracy. § 13(a)(4). By contrast, an earlier bill introduced by Senator Specter, S. 1937, Military Commission Procedures Act of 2002 (“2002 Specter bill”) more appropriately limited military commissions to trying only “violations of the international law of war” (§ 4).

F. *Providing Procedures Comparable to Courts-Martial that Satisfy Common Article Three and ICCPR*: S. 3614 falls below court-martial standards and does not meet the fundamental requirements of international human rights law and the laws of war. In particular, despite the requirement of a fair and public hearing by a competent, independent and impartial tribunal established by law, the bill would constitute a commission comprised of military officers.⁶⁹ Because the Secretary of Defense would appoint, and presumably could remove, all officers, and the bill states no requirement of cause for removal, there is no assurance that these tribunals will in fact be independent and impartial. Section 12(c)(2)(A)-(B) also provides that upon motion by the Government, criminal proceedings before a commission can be closed to the public, or

⁶⁷ S. 3614 would define an “unprivileged combatant” as an individual: “who has been designated as an enemy combatant by a Combatant Status Review Tribunal prior to the enactment of this Act; or (B) who a Field Tribunal conducted by the United States military as provided in this Act determines-- (i) is not entitled to the protections set out in the Convention Relative to the Treatment of Prisoners of War, done at Geneva, August 12, 1949[9] (6 UST 3516) (referred to in this Act as the ‘Geneva Convention’); and (ii) has--(I) knowingly assisted, conspired with, or solicited for a group or an individual hostile to the United States; (II) knowingly attempted to assist others in taking up arms against the United States; (III) conspired with or solicited others to take up arms against the United States; or (IV) has taken up arms against, or intentionally assisted combat operations against, the United States.”

⁶⁸ Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3319, T. I. A. S. No. 3364, provides: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [of this treaty], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” (emphasis added).

⁶⁹ See S. 3614, § 6(a)(1)(B).

held in secret, violating the requirement of a public hearing. Nor would the accused have the right to be present at all stages of the proceedings⁷⁰

S. 3614 mentions the accused's "right to be represented by counsel" (§ 12(a)(1)), but sets no comparison to the rights of accused in a court-martial. Under the 2002 Specter Bill, by contrast, "[a] defendant charged with any offense referred or to be referred to trial by a military commission shall have the same rights to representation by counsel as does an accused in a general court-martial under [the UCMJ]."

Nor does the bill set up any presumption of innocence. Some provisions of the new bill purport to: allow the admission of any evidence of "probative value to a reasonable person," Sections 10(d)(2) and 13(a)(2)(B); permit the admission of evidence obtained by coercion or torture, Section 9(f)(1)(C); and permit the government to "proceed by proffer," Section 10(d)(3), which apparently means that the government can submit an affidavit telling a tribunal what it can prove, and then use the affidavit as the proof. S. 3614 even denies access by prisoners to classified evidence considered in determining whether they are "unprivileged combatants," Section 10(a)(2), which could well constitute most, or even all, of the evidence used against them. By contrast, the 2002 Specter Bill (S. 1937 § 7) required that the accused be considered innocent until proven guilty, required that guilt be proved beyond a reasonable doubt, and established various voting guidelines for various kinds of sentences.

Standards of evidence in both the Classification Tribunal Boards and the Commissions created by the bill permit admission of anything with "probative value to a reasonable person"—which does not ensure exclusion of confessions extracted by torture and cruel treatment. Similarly, § 9(f)(1)(C) states that "any statements made by the detainee in response to interrogation" are admissible as evidence, presumably including confessions extracted by torture or cruel, inhuman or degrading treatment, providing no assurance that an accused may not be compelled to testify against himself or to confess guilt.

By contrast, the 2002 Leahy Bill (S. 1941) would have required that the tribunal be independent and impartial (§ 4(a)(1)); that all evidence must be made available to the accused (§ 4(a)(4)); that the accused must be present at all proceedings (§ 4(a)(5)); and that there be a presumption of innocence and proof beyond a reasonable doubt (§ 4(a)(15)).

G. Giving Meaningful Judicial Review: The 2002 Leahy bill would also have required appeal "at a minimum" at the United States Court of Appeals for the Armed Forces established under the UCMJ (§ 4(e)(3)). S. 3614, however, appears to eliminate all original federal court jurisdiction, including habeas jurisdiction, with respect to Guantanamo prisoners in Defense Department custody in pending and future cases.⁷¹ In addition, Section 5(c)(1)(B) of the new bill would unwisely repeal § 1005(h)(2) of the Detainee Treatment Act, which underlay the Supreme Court's conclusion that Congress

⁷⁰ *Id.*, § 10 (a)(2): "A detainee shall be entitled to be present at the classification tribunal, *unless the head of the tribunal has decided to admit classified information.*" (emphasis added).

⁷¹ Section 1(c)(4) of S. 3614 states that "alien enemy combatants detained or prosecuted under this Act may not challenge their detentions in the Federal courts of the United States via the habeas or any other statute." Section 5(a) gives the U.S. Court of Appeals for the Armed Forces "exclusive jurisdiction of appeals from all final decisions of a classification tribunal board or commission under this Act."

did not intend by passing that law to cut off habeas and other actions by Guantanamo detainees pending on the date of enactment of that law.

H. Giving Meaningful Congressional Oversight: The bill provides for only modest congressional oversight, by requiring the Secretary of Defense to submit a list of all people detained on Guantanamo to Congress and a summary of the evidence against them, with periodic updates. Given the human rights concerns that have been raised about the Guantanamo detention center over the past few years, the operation of that center and the trials of its detainees must be subject to more regular and searching congressional oversight.⁷²

IV. Conclusion

The Supreme Court's historic decision in *Hamdan v. Rumsfeld* has presented both Congress and the President with an opportunity to make a fresh start in crafting a fair and durable solution to the problems of humane treatment and fair trial of suspected terrorist detainees. My government service has made me fully sensitive to the ongoing threat from al Qaeda and the need to prevent and punish terrorist crimes. But even in times of war and national emergency, our Constitution requires that the President take care that the laws be faithfully executed.

Hamdan reminds us that both the courts and Congress have significant roles to play in crafting those laws, which plainly include the UCMJ and Common Article 3 of the Geneva Conventions. The Court having now done its job, it is now Congress's turn. But to enact new legislation quickly and without full hearings, at which advice from experts in international and military law can be heard, would be both poor legislative process and an invitation to more legal challenges like those that led to *Hamdan* itself. "Quick-fix legislation," such as the proposed S. 3614, would do little to repair the legal defects that *Hamdan* exposed in the current military commission system. Nor would such legislation help to redress the serious injury to our international reputation caused by the Administration's five-year misadventure of creating military commissions that plainly fall short of minimum global standards of fair trial.

Thank you. I stand ready to answer any questions the Committee may have.

⁷²The President has recently suggested that the Court effectively endorsed the Government's right to hold Hamdan on Guantanamo, see Sheryl Gay Stolberg, *Justices Tacitly Backed Use of Guantánamo*, *Bush Says*, N.Y. TIMES, July 8, 2006 at A14. In fact, as Justice Stevens wrote for the *Hamdan* majority: "[i]t bears emphasizing that Hamdan does not challenge and we do not today address the Government's power to detain him for the duration of active hostilities in order to prevent...great harm and even death to innocent civilians." 2006 WL at *40 (emphasis added).

Appendix

Harold Hongju Koh is Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where he has taught since 1985, and has served as the fifteenth Dean since July, 2004. From 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor. He teaches international law, the law of U.S. foreign relations, international human rights, international organizations and international regimes, international business transactions, international trade and civil procedure. A graduate of Harvard College 1975 (*summa cum laude* in Government), Magdalen College, Oxford 1977 (Marshall Scholar and First Class Honours in Philosophy, Politics and Economics), and Harvard Law School 1980 (Developments Editor, *Harvard Law Review*), Professor Koh went on to serve as law clerk to Judge Malcolm Richard Wilkey of the D.C. Circuit (1980-81), and Justice Harry A. Blackmun of the U.S. Supreme Court (1981-82). Before coming to Yale, he practiced law at the Washington D.C. law firm of Covington and Burling (1982-83) and at the Office of Legal Counsel at the U.S. Department of Justice (1983-85). He has written more than 80 articles and authored or co-authored eight books, including *Foundations of International Law and Politics* (2004 Foundation with O. Hathaway); *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (2003 Oxford with S. Herr & L. Gostin); *Transnational Business Problems* (2003 Foundation with D. Vagts and W. Dodge); *The Justice Harry A. Blackmun Supreme Court Oral History Project* (released 2004); *Deliberative Democracy and Human Rights* (1999 Yale with R. Slye), *International Business Transactions in United States Courts* (Hague Academy of International Law 1996); *Transnational Legal Problems* (2d ed. 1994 Foundation with H. Steiner & D. Vagts) and *The National Security Constitution* (Yale 1990), which won the American Political Science Association's award as best book on the American Presidency.

Dean Koh has been awarded nine honorary doctorates and three law school medals. He is a Fellow of the American Academy of Arts and Sciences, an Honorary Fellow of Magdalen College, Oxford (where he was 1997 Waynflete Lecturer), and has been a Visiting Fellow at All Souls College, Oxford. He is an Overseer of Harvard University and a member of the American Law Institute. He has served as an Editor of the *American Journal of International Law* and the Foundation Press Casebook Series. He has received Guggenheim and Century Foundation Fellowships, and has given several dozen named lectures. He sits on the boards of directors of the Brookings Institution, the National Democratic Institute, and Human Rights First and has received more than twenty awards for his human rights work. He recently received the 2005 Louis B. Sohn Award from the American Bar Association's Section on International Law and Practice and the 2003 Wolfgang Friedmann Award from Columbia Law School for lifetime achievements in International Law. He was named by *American Lawyer* magazine as one of America's 45 leading public sector lawyers under the age of 45, and by *A Magazine* as one of the 100 most influential Asian-Americans of the 1990s. He lives in New Haven with his wife, Mary-Christy Fisher, a legal services attorney, and their children Emily and William. For a fuller curriculum vitae, see <http://www.law.yale.edu/outside/html/faculty/hkoh/profile.htm>.

United State Senate Committee on the Judiciary
Hamdan v. Rumsfeld: Establishing a Constitutional Process
Statement of Senator Herb Kohl
July 11, 2006

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

The Supreme Court's decision in *Hamdan* provides us with some guidance on not only the question of military tribunals but also – more importantly and more broadly – how to fight the war on terror.

Security and adherence to the rule of law are not mutually exclusive principles. Nobody is advocating, nor should they be, that members of al Qaeda should get special protections. And, nobody is advocating that members of al Qaeda should ever be set free. Many are suggesting – and the Supreme Court has told us – that we can do a better job of prosecuting the war and prosecuting the terrorists if we rethink some of our approach.

Indeed, the Court reminded us that our nation is strengthened in the war on terror when we work together to defeat the enemy. Justice Breyer wrote, in his concurrence, QUOTE “Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine – through democratic means – how best to do so.”

For the past five years, this has not been the Administration’s approach to the war on terror. And many suggest it has worked to the detriment of our war effort. Too often, the Administration has treated Congress like a mere advisory panel. They refuse to share information with the American people through their elected representatives. They appear before our Committees when it is convenient for them -- acting as if our oversight function is a nuisance. And, they too frequently treat the laws we pass as friendly advice that can be disregarded as they see fit.

The Supreme Court has reminded us that this Administration must follow the law, and has an obligation to work with Congress if they believe the rules need to be changed in the war on terror. The immediate issue addressed in the *Hamdan* case, of course, was the use of military tribunals. When the tribunals were created in November 2001, the Administration explained that they were the best way to achieve swift justice. Yet, more than four years later, only ten Guantanamo prisoners have been charged with crimes -- and not a single one has been convicted. And, now, the Supreme Court has abolished them because they violate our own laws.

How we prosecute the terrorists matters to the success of this war. It is important to remember, as the 9/11 Commission said in its report, QUOTE “the United States has to help defeat an ideology, not just a group of people.” Yet, Guantanamo itself has become a symbol of bad acts and misguided policies, straining relations with our allies, fueling the fire of anti-Americanism around the world, and serving as a recruiting tool for al Qaeda.

We must recognize that the legal system we design must bring terrorists to justice while still illustrating our superiority in the battle of ideas. We must show the world that we can win the war on terror without fundamentally altering who we are and what we stand for as Americans.

Once we are ready to work together, and within our Constitutional system, we can face the issue at hand – how to bring terrorists in our custody to justice. Some have suggested using our existing courts-martial system. Others have suggested creating military commissions. According to Hamdan, both options are available to us. However, what we call them is much less important than what they look like and how they operate.

Regardless of which option we choose – military commissions or courts-martial – the rules we set out must be consistent with our values. We have the finest justice system in the history of the world. We can find a way to punish those who must be punished. Yet, we must do so in a way that is consistent with our values as a civilized nation, and, most importantly, one that we can all be proud of.

Statement
United States Senate Committee on the Judiciary
Hamdan v. Rumsfeld: Establishing a Constitutional Process
 July 11, 2006

The Honorable Patrick Leahy
 United States Senator , Vermont

Statement Of Senator Patrick Leahy,
 Ranking Member, Judiciary Committee
 Hearing On "Hamdan v. Rumsfeld: Establishing a Constitutional Process"

July 11, 2006

Mr. Chairman, today we pick up where the Judiciary Committee started almost five years ago in November and December 2001, when we urged the President to work with us to construct a just system of special military commissions. You and I introduced bills with procedures that would have complied with our obligations under law and provided the kind of "full and fair trials" the President has said that he wants to provide.

This hearing today follows the United States Supreme Court's repudiation of the President's military commissions. The Supreme Court determined that the Bush-Cheney Administration's system for prosecuting detainees at Guantanamo is "illegal." It is a decision that has given our system of constitutional checks and balances a tonic that was sorely needed. The Supreme Court is right in holding that the President "is bound to comply with the Rule of Law." One of our core American values is that no one is above the law. I commend the Supreme Court for acting as a much-needed check on this Administration's unilateral policies that have stretched beyond the President's lawful authority.

This decision provides yet another example of this Administration's arrogance and incompetence in the war on terror. When the President announced the creation of these commissions, Alberto Gonzales, then White House Counsel, touted them as a means to "dispense justice swiftly, close to where our forces may be fighting." But the results have proved otherwise. In the last five years there have been no trials and no convictions of any of the detainees and no one has been brought to justice through these commissions. Instead, precious time, effort and resources have been wasted.

In our hearings in 2001 we heard from the Attorney General as well as from two Assistant Attorneys General, the General Counsel to the Department of Defense and a number of knowledgeable witnesses. We suggested that at this hearing the Bush-Cheney Administration be represented at the highest levels, by the current Attorney General, the Secretary of Defense, and the Navy Judge Advocate General.

Unfortunately, we have been sent a deputy counsel and an acting assistant attorney general and no one

from the Judge Advocate General's Corps. That is not the fault of the witnesses, though it is an unmistakable message about this Administration's continuing unwillingness to work with us and listen to those most knowledgeable in these matters from the ranks of experienced and dedicated military lawyers and those from the State Department, as well. Had this Administration done so from the outset, we would not be in the circumstance that we find ourselves in today.

When the Bush-Cheney Administration rejected our advice, refused to work with Congress and chose to go it alone in the development of military commissions, they made a mistake of historic and constitutional proportions. I hope that the Administration will begin today's hearings by admitting their mistakes and acknowledging the limits on presidential authority. As Justice Kennedy emphasized in his opinion: "Subject to constitutional limitations, Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them."

The Supreme Court's decision is a triumph for our constitutional system of checks and balances. It stands for a simple proposition: When Congress passes a law the President is bound to follow it. Congress passed the Uniform Code of Military Justice. Our country adopted and is bound to abide by the Geneva Conventions, regardless of whether the Attorney General still considers them to be "quaint." This President decided not to follow the law. In America, no one, not even the President, is above the law.

The Supreme Court's opinion is not surprising. What is surprising is that three Justices who claim the mantle of conservatism were so deferential to the President that they would not stand up for the Rule of Law and reinforce the protections of our fundamental freedoms made possible by the Constitution's separation of powers. Instead, they dissented.

In the Fall of 2001, in the wake of September 11, a Democratically led Senate worked on a bipartisan basis to give the Administration the tools it needed to fight the war on terror. Within days of September 11, we passed an Authorization for Use of Military Force in order to provide authority for the military action against Osama bin Laden for those horrific attacks and against those harboring him in Afghanistan. We worked with the President to pass the USA PATRIOT Act, but we included sunset provisions in order to be able to revisit those powers in a timely fashion.

I urged the Administration to work with us on establishing military commissions to ensure their legitimacy, their efficiency, and their effectiveness. The President decided to go it alone. Instead of acting in unity and pursuant to congressional authority, the Administration decided to rely on what it called "an extension of the President's power as Commander-in-Chief."

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Instead of working with us, the President established a system so flawed that upon reviewing it, the United States Supreme Court concluded that it violated not only "the American common law of war," but also the rest of the Uniform Code of Military Justice and "the rules and precepts of the law of nations."

It is telling that within a week of the 230th anniversary of our great Declaration of Independence from tyranny, the Supreme Court found it necessary to admonish this Administration with James Madison's warning: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." In America, no one, not even the President, is above the law.

I am a former prosecutor. I find it hard to fathom that this Administration is so incompetent that it needs kangaroo-court procedures to convince a tribunal of United States military officers that the "worst-of-the-worst" imprisoned at Guantanamo Bay should be held accountable. Military commissions should not be set up as a sham. They should be consistent with the high-standard of American military justice that has worked for decades. If they are to be United States military commissions, they should dispense just punishment fairly, not just be an easier way to punish.

For five years, the Bush-Cheney Administration has violated fundamental American values, damaged our international reputation, and delayed and weakened prosecution of the war on terror -- not because of any coherent strategic view that it had, but because of its stubborn unilateralism and dangerous theory of unfettered Executive power augmented by self-serving legal reasoning. Guantanamo Bay has been such a debacle that even the President now says it should be shut down. But the damage keeps accumulating under this President. Along with Abu Ghraib and the alleged criminal misconduct against civilians in Iraq, the detention of hundreds held at Guantanamo without a single trial or conviction through these now-illegal commissions have undermined our standing in the world and sullied the moral high ground from which we look to lead the world toward democracy, freedom, human rights and human dignity.

I said to the Attorney General in 2001, and I say again now: America works best when all parts of our Government work together. By acting unilaterally, and in violation of laws passed by Congress, this Administration has acted as if it was above the law. The President has important responsibilities and tremendous power, but he is part of a constitutional system and must be subject to the Rule of Law.

Too often the rhetoric surrounding this debate is couched as one about conflicting values of national security versus civil liberties. That is a political distraction that undermines our security and our values. That rhetoric ignores the reality that by getting the process right we will have greater security. The point of having a just system is not to be "soft" on terrorism -- rather, it is to ensure the process actually gets the right people. We are not safer as a Nation by imprisoning innocent people while the truly dangerous remain free.

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Some still will not admit this Administration's errors. They argue as if the United States should measure itself against the brutality of the terrorists. Our standards have always been higher than that. I disagree with their argument when it comes to the Rule of Law. I disagree when it comes to engaging in torture. I disagree when it comes to honoring our legal and international obligations. America's ideals are sullied whenever we resort to bumper-sticker slogans about giving special privileges to terrorists. No one is urging special privileges. The President says he is for fairness and justice. So am I. But I would like to see a system that can determine guilt and punish the guilty. I am for a system that works, and a system that honors the American values that have been part of our strength as a good and great nation.

Military justice is swift and effective. Courts-martial have been used to bring some members of our own Armed Forces, who violated the law, to justice. Others are being investigated. Meanwhile, not one of the prisoners at Guantanamo Bay, who the President has called the worst-of-the-worst, has been brought to justice. Iraq may well complete its trial of Saddam Hussein before a single Guantanamo detainee is tried. The system the Administration created was fatally flawed, and it has created perverse results.

If the President decides not to proceed promptly by courts-martial against the detainees, I remain willing to work to develop bipartisan legislation creating military commissions that will comply with our laws. I will do so despite the past five years in which the Administration has shown no interest in working with us. If we are to do so we need to have our questions answered. We need to know why we are being asked to deviate from rules for courts-martial. And we also need to see a realization by this Administration that it is Congress that writes our laws, and that no officeholder, branch or agency of our government is above the law.

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Theodore B. Olson
© July 11, 2006

Senate Committee on the Judiciary

***Hamdan v. Rumsfeld*: Establishing a Constitutional Process**

July 11, 2006

Testimony of Theodore B. Olson

Good morning, Chairman Specter, ranking Member Leahy, and Members of the Committee.

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

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

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

[Footnote continued on next page]

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

[Footnote continued from previous page]

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

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

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

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

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
TESTIMONY OF SCOTT L. SILLIMAN ON
HAMDAN V. RUMSFELD: ESTABLISHING A CONSTITUTIONAL PROCESS

Tuesday, July 11, 2006

Mr. Chairman, Senator Leahy and members of the Committee. My name is Scott L. Silliman and I am a Professor of the Practice of Law at Duke Law School and the Executive Director of Duke's Center on Law, Ethics and National Security. I also hold appointments as an adjunct Associate Professor of Law at the University of North Carolina, and as an Adjunct Professor of Law at North Carolina Central University. My research and teaching focus primarily on national security law and military justice. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department.

I thank you for the invitation to discuss with the Committee my views on the Supreme Court's opinion in *Hamdan v. Rumsfeld* and what type of legislative response, if any, might now be needed in light of that ruling. Much has been said and written about the opinion in the last twelve days. Some hailed it for what they thought was a sharp rebuke of the President for overreaching his Constitutional authority, and for the Court's establishing that protections under Common Article 3 of the Geneva Conventions extend to everyone we hold in detention in the War on Terrorism, whether at Guantanamo Bay or elsewhere. On the other hand, some cited it as a refusal by the Court to give appropriate judicial deference to a "war fighting" Commander in Chief during a time of crisis in this country. I agree with neither claim and, as I will explain later, I view the opinion more narrowly than most. It is important, I submit, that we distinguish between what the Court actually ruled and the extent of that ruling, and what may be the more long term implications of the decision for other presidentially approved programs in the War on Terrorism. I'd like to start by discussing the topic of military commissions generally before giving my assessment of the opinion itself. Then, I'll end with my thoughts on the issue now before this Committee.

Military Commissions Generally

There is a rich historical tradition in this country involving the use of military commissions to try those accused of violations of the law of war, dating back to the Revolutionary War when Major John Andre, Adjutant-General to the British Army, was prosecuted in 1780 on a charge that he had crossed the battle lines to meet with Benedict Arnold and had been captured in disguise and while using an assumed name.¹ Others were conducted during the Mexican and Civil Wars, but

¹ See generally Scott L. Silliman, *On Military Commissions*, 36 Case W. Res. J. Int'l L. 529 (2005); Louis Fisher, *Military Tribunals and Presidential Power* (Univ. Of Kansas Press 2005).

the two which are of greatest relevance to the challenged commissions at Guantanamo Bay were conducted during World War II². In the first, after the declaration of war between the United States and Germany, eight Nazi saboteurs disembarked from two German submarines at Amagansett Beach on Long Island and at Ponte Vedra Beach in Florida, respectively, and proceeded to bury their uniforms and don civilian attire. They thereafter set about to sabotage war industries and war facilities in this country, but were quickly captured and prosecuted by a military commission convened by President Roosevelt and held in Washington DC. All eight were convicted, and six of the eight were executed only five days after being sentenced to death by the commission. The Supreme Court, in the context of reviewing the district court's denial of petitions for habeas corpus, issued a carefully limited ruling affirming the government's power to detain and try the saboteurs by military commission under the circumstances presented.³ In the second, after the surrender of Germany but before the surrender of Japan, 21 German nationals were convicted by a military commission sitting in China of violating the laws of war by collecting and furnishing to the Japanese armed forces intelligence concerning American forces and their movements. They were sentenced to prison terms and relocated to occupied Germany to serve them. The Supreme Court, again in the context of a district court denial of petitions for habeas corpus, held that enemy aliens, who at no relevant time and in no stage of their captivity had been within our territorial jurisdiction, had no constitutional right to access to our courts. The Court also reiterated that a military commission is a lawful tribunal to adjudicate enemy offenses against the laws of war.⁴

The military commissions which gave rise to both the *Quirin* and *Eisentrager* cases, as well as the one used to prosecute General Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines, were *war courts*, one of three types of military commissions.⁵ The other two types of commissions are *martial law courts*, such as those used during the Civil War in *Ex parte Milligan*⁶ and in World War II in *Duncan v. Kahanamoku*⁷; and *occupation courts*, such as the one used in *Madsen v. Kinsella*⁸ for the trial of an American dependent wife charged with murdering her husband in occupied Germany in violation of the German criminal code. The

² *Id.*

³ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁴ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵ Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, The Army Lawyer, March 2002, DA PAM 27-50-350, 19, 37.

⁶ 71 U.S. (4 Wall.) 2 (1866).

⁷ 327 U.S. 304 (1946).

⁸ 343 U.S. 341 (1952).

military commissions which were established by President Bush for use at Guantanamo were of the first type, *war courts*.

The Court's Opinion in *Hamdan v. Rumsfeld*

As mentioned previously, it is important to understand the precise ruling in *Hamdan v. Rumsfeld*⁹, and resist the urge to read into the opinion more than what is actually there. This is vital in light of the perceived urgency for some legislative response.

The first issue facing the Court was jurisdictional—could it still rule on Hamdan's case since the Government argued that the Detainee Treatment Act, enacted on December 30, 2005, "stripped" the Court of the power to hear Hamdan's petitions for habeas and mandamus, even though they had been filed in the district court over two years earlier and the Supreme Court had granted certiorari on almost two months prior to the President signing the Act into law. In deciding that it still retained jurisdiction, the Court said that absent a clear statement by Congress to the contrary, the presumption was that the statutory restriction applied only to petitions filed after December 30th, and Hamdan's challenge came before that. The Court's ruling on this particular issue should also effectively defeat the Government's attempt to dismiss, based upon the same jurisdiction-stripping statute, more than 100 habeas challenges brought before December 30th by other detainees at Guantanamo Bay. Those cases are currently pending a ruling by the Court of Appeals for the District of Columbia on the jurisdictional issue. Predicated upon the Hamdan opinion, the Court of Appeals seems to have no other option but to let them proceed.

In contrast to the Court's handling of the jurisdictional issue, its ruling on the merits is more narrowly focused. With regard to the question of who is empowered to establish military commissions, the Court initially probed the interplay between the powers of the President and those of Congress in time of war, and then raised, but did not answer, a question left lingering from *Milligan*:

"Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity' is a question this Court has not answered definitively, and need not answer today."¹⁰

It is also interesting to note that the Court described as "controversial" Chief Justice Stone's characterization in the 1942 German saboteur case, *Ex parte Quirin*¹¹, of Article 15 of the

⁹ *Hamdan v. Rumsfeld*, ___ S.Ct. ___, 2006 WL 1764793 (U.S.).

¹⁰ *Id.* at 20.

¹¹ *Quirin*, *supra* note 3.

Articles of War (the predecessor of the current Article 21 of the Uniform Code of Military Justice) as being congressional authorization for military commissions.¹² To what purpose? I believe the Court was clearly not discounting, nor specifically affirming, the constitutional authority of the President to convene military commissions in time of necessity in the absence of any specific statutory authorization.¹³ What it did discount was the Government's assertion that the President's authority to convene military commissions flowed from statute, whether it be the Authorization for the Use of Military Force (AUMF), the Detainee Treatment Act, or the Uniform Code of Military Justice.¹⁴ Then, in one sentence of singular significance, albeit buried

¹² *Hamdan*, *supra* note 1, at 21.

¹³ The legislative history of Article 15 of the Articles of War, the predecessor of Article 21 of the UCMJ, is of interest in this regard. Army Brigadier General Crowder, then Judge Advocate General of the Army, testified before the Senate Subcommittee on Military Affairs on February 7, 1916, as follows:

“General Crowder: Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation “persons subject to military law,” and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced....It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient....Yet, as I have said, these war courts never have been formally authorized by statute.

Senator Colt. They grew out of usage and necessity?

Gen. Crowder. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.”

Testimony of Brigadier General Enoch H. Crowder, United States Army, Judge Advocate General of the Army, on February 7, 1916, before the Subcommittee on Military Affairs, United States Senate, Revision of the Articles of War, S. Rep. No. 130, 64th Cong., 1st Sess. 40.

¹⁴ “The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions.”....“Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws’, including the law of war.” (*Id.*). The Court's specific determination that the AUMF was not a statutory predicate for the commissions may, in future cases, put into question similar claims made by the Administration with regard to the AUMF and other presidentially approved programs in the War on Terrorism.

in a footnote, the Court clearly foreshadowed its principal holding:

“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations which that Congress has, in proper exercise of its own war powers, placed upon his powers. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.”¹⁵

The Court went on to discuss two statutory provisions which established just those limitations, Articles 21 and 36 of the Uniform Code of Military Justice, 10 U.S.C. §§ 821 and 836(b), respectively. In Article 21, said the Court, Congress had conditioned the President’s use of military commissions on compliance with the law of war, which includes the four Geneva Conventions including Common Article 3 of those conventions which applies in non-international conflict.¹⁶ One of the provisions of Common Article 3 requires the use of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.¹⁷ Because the accepted definition of a regularly constituted court includes ordinary military courts (courts-martial) but excludes all special tribunals¹⁸, the President’s military commissions are not in compliance with Common Article 3 since he has demonstrated no practical need for deviating from courts-martial practice.¹⁹ A word of caution is appropriate here with regard to the breadth of this part of the ruling. The Court’s inclusion of Common Article 3 as being incorporated within the law of war was only within the context of how that phrase was used in Article 21 of the Uniform Code of Military Justice, an article which deals with military commissions and courts-martial. I do not join those who read the Court’s opinion more broadly as applying Common Article 3 to others at Guantanamo Bay or elsewhere who are being detained but who are not facing military commissions, and the majority clearly emphasized the limited nature of its holding²⁰. Further, the Court accepted the view expressed by all three judges in the Court of Appeals decision that the Geneva Conventions, standing alone,

¹⁵ *Id.* n. 23.

¹⁶ *Id.* at 37.

¹⁷ *Id.* citing the Geneva Conventions of 1949, 6 U.S.T. at 3320 (Art 3(1)(d)).

¹⁸ *Id.* at 39.

¹⁹ *Id.*

²⁰ “It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.” *Id.* at 40.

are not judicially enforceable in our courts.²¹ Thus, my view is that the Court's determination as to the applicability of Common Article 3 affects Hamdan and the nine others who have been specifically charged with violations of the law of war and were facing military commissions, but because other possible applications of Common Article 3 were not before the Court, nor addressed in the opinion, that issue is obviously left for future cases.

In testing the President's military commissions against the other limiting provision of the UCMJ, Article 36, the Court arrived at a similar result. It first enumerated some of the military commission procedures which did not provide the same level of due process as courts-martial²², and then looked to the text of Article 36(b) itself²³, interpreting it to mean that procedures established for military commissions must be uniform with those established in the UCMJ for courts-martial unless the uniformity was not practicable.²⁴ The Court ruled that the President's determination that such uniformity was impracticable was insufficient to justify the variances from court-martial procedures.²⁵ Throughout this part of the opinion, the Court clearly implied that courts-martial, the type of military court used to prosecute members of our own armed forces, could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay; and Justice Breyer, in his concurring opinion, specifically invited the Administration to work with the Congress in remedying the deficiencies the Court found in the military commission system.²⁶

As I see it, the sum and substance of the Court's ruling is that in unilaterally creating a system for

²¹ "We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right. For regardless of the nature of the rights conferred on Hamdan, cf. *United States v. Raucher*, 119 U.S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi*, 542 U.S., at 520-521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Id.* at 37.

²² The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding which either the Appointing Authority or the presiding officer decides to close; and evidence (e.g. hearsay and unsworn statements) may be admitted which, in the opinion of the presiding officer, would have probative value to a reasonable person. *Id.* at 30.

²³ "All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b).

²⁴ *Hamdan*, *supra* note 1, at 33.

²⁵ *Id.* at 34.

²⁶ *Id.* at 40.

military commissions, the President exceeded his authority by running afoul of the statutory limitations imposed by the UCMJ. Apart from the Court's treatment of the jurisdictional issue involving the interpretation of the Detainee Treatment Act, the opinion, including its discussion of Common Article 3 as being a part of the "law of war" referenced in Article 21, has direct impact only upon those currently facing military commissions. Although there may be implications as to how courts may rule in the future on the extent of protections under the Geneva Conventions or on other presidential programs in the War on Terrorism, those are issues for another day. The Court did not address them here.

Establishing a Constitutional Process

Because I read the *Hamdan* decision as being quite narrow in scope, I urge the Committee, if it deems a legislative response necessary, to consider one that is carefully tailored to meet the specific issues raised in the opinion. For example, since the Court did not deal with the broader question of the President's authority to detain unlawful combatants at Guantanamo Bay until the cessation of hostilities, and because the Detainee Treatment Act already prescribes procedures for status review of those detainees, this is an issue that, at least for now, need not be addressed. Therefore, any proposed legislative response should be limited to addressing the Court's list of due process shortcomings in the military commission system.

If the Congress passes a law which merely gives legislative sanction to the prior system for military commissions—putting everything back in place the way it was—there is no assurance that it would pass judicial muster. With regard to the Court's determination that Common Article 3 was part of the "law of war" as referenced in Article 21 of the UCMJ, can Congress, by statute, nullify that requirement for compliance with international law as it applies to military commission procedures? Many legal scholars believe so, but it could well invite further challenges in the courts and years of further uncertainty. Merely giving Congressional sanction to the minimal level of due process in commissions which was criticized as inadequate by the Supreme Court and which fails to satisfy commonly recognized international legal standards is, I believe, imprudent.

Congress could also authorize a completely new system for military commissions which remedies most of the defects which the Court cited in its opinion, but which allows for a more flexible standard for the admission of evidence. For example, less reliable testimony such as unsworn statements or hearsay is not allowed in our federal and state courts, but could be admissible in military commissions if Congress made that the rule. Even under this more flexible standard, however, evidence acquired through coercive interrogation techniques should not be admissible. If there was some provision for a more substantial judicial review of a conviction, such as in the United States Court of Appeals for the Armed Forces which deals with military justice issues, and if a detainee was allowed to be present at all trial sessions unless he became disruptive, such a system would, I think, satisfy the objections of most. In other words, if virtually all the due process safeguards which currently apply in courts-martial, save the

standard for admissibility of evidence, were grafted into a newly enacted military commission system, that type of legislative response would be, I suggest, a better option, but not the one I advocate.

What I urge the Committee to consider requires no new legislation. The Supreme Court in *Hamdan* clearly implied that courts-martial under the Uniform Code of Military Justice, the type of military trial system used to prosecute members of our own armed forces, could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay. This is a fair and well-proven system of law, created by Congress some 56 years ago, that is more than adequate to the task. Article 18 of the Code²⁷ gives general courts-martial jurisdiction to prosecute violations of the law of war, and the President need only make the policy decision to use them.

Some might argue that using the court-martial system, with its higher standard for admissibility of evidence and other due process rights found in our federal courts, would prevent the government from getting convictions in some cases. Although I do not accept the validity of that argument, the impact would be marginal even if true. There will probably be no more than 20 or so military commissions convened under any system because, although the standard for detaining an individual requires only an administrative determination that he was an enemy combatant in an armed conflict against the United States, the standard for bringing criminal charges in a military commission requires far more-credible evidence of a specific violation of the law of war. To those who suggest that we disadvantage ourselves by using courts-martial and that some of those 20 or so potential cases might not be able to be successfully pursued, I say that in the worldwide court of public opinion we would actually gain far more than we would lose. By adopting the same system of military trials for prosecuting terrorists that we use for our own service personnel, we send a loud and clear message to all that we have set the bar high, no matter what the enemy does. In light of recent allegations of atrocities committed in Iraq by our servicemen, such a decision would help to restore our international credibility by proving that we are, in practice as well as rhetoric, a nation under the rule of law.

Finally, I suggest that as this Committee and others weigh the legislative options for dealing with military commissions and other questions regarding detainees, you continue to solicit the counsel of those who are well versed and most familiar with the issues—military judge advocates, both active duty and retired. I believe their advice will be of great benefit to you in your deliberations.

Mr. Chairman, Senator Leahy, and members of the Committee, thank you again for inviting me to share my concerns with you. I look forward to answering any questions you might have.

²⁷ 10 U.S.C. § 818. That article reads, in part, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war."

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
SENATE JUDICIARY COMMITTEE

STATEMENT OF
LIEUTENANT COMMANDER CHARLES D. SWIFT, JAGC, USN
BEFORE THE
SENATE COMMITTEE ON JUDICIARY
ON
SUPREME COURT DECISION ON DETAINEES:
"HAMDAN v. RUMSFELD"
11 JULY 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
SENATE JUDICIARY COMMITTEE

My name is Charles D. Swift. I am a Lieutenant Commander in the Judge Advocate General's Corps, United States Navy, and I am the detailed defense counsel in the military commission case of *United States v. Salim Ahmed Hamdan*. I thank the Committee for inviting me to testify today as you begin the vitally important process of determining the necessity of a legislative response to the Supreme Court's opinion in *Hamdan v. Rumsfeld*.

Critical to that consideration is the question of whether military commissions can ever actually deliver the full and fair trials promised by the President's order. Based on the past five years the inescapable conclusion is that the commission consistently failed to meet the President's mandate for full and fair trials. This isn't simply the view of a defense counsel who litigated in the commission system. It is also the view of some of the commission prosecutors. One of those prosecutors, Air Force Captain John Carr, wrote that in his experience, the commission system was "a half hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged." (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A) Another prosecutor, Air Force Major Robert Preston, lamented that "writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard – particularly when you want to call yourself an officer and a lawyer." (E-mail from Major Robert Preston to Colonel Fred Borch, attached at Tab A) The commission system, as these prosecutors concluded, was incapable of holding a fair trial.

Those of us who litigated cases in Guantanamo recognized that the military commission system was flawed in both design and execution. The military commission system's procedures were simply inadequate to ensure that trials produced accurate results. The system's many shortcomings included the following.

The military commission system had inadequate rules to ensure that the Defense would receive exculpatory evidence in the government's possession. Providing the defense with exculpatory evidence in the government's possession promotes not only a tribunal's fairness, but also the accuracy of its results. That is why the Supreme Court has held that an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Yet in the military commission system, the Prosecution had no obligation to give the Defense exculpatory evidence in the possession of other government agencies. This was significant because, according to one former military commission prosecutor, government agencies intended to deliberately exploit this gap in discovery obligations to keep the defense from obtaining exculpatory evidence. Commission prosecutor Captain John Carr wrote to the commission system's Chief Prosecutor, "In our meeting with [a government agency], they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it." (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A)

Very simply, under the military commission rules the Prosecution had no obligation to disclose evidence from other government agencies suggesting the defendant was innocent.

- The military commission system's lax evidence admissibility standard allowed the Prosecution to obtain a conviction through the use of rank hearsay, including unsworn written statements and law enforcement agents' summaries of interviews. During the commission discovery process, it became apparent that major portions of the Prosecution's cases would

consist of calling law enforcement agents to the stand who would then testify about what they heard from various witnesses they interviewed. The defendants would have no ability to cross-examine the actual witnesses against them, because those witnesses would never be called. Instead only the government's agents would be called.

This procedure contrasts sharply with the guidance of Justice Scalia's opinion for the Supreme Court in *Crawford v. Washington*, which noted that the Confrontation Clause was adopted in response to arguments that "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth."¹ The dissenting Justices in *Hamdan* were incorrect in maintaining that "Petitioner . . . may confront witnesses against him."² The Defense could confront *only those witnesses the Prosecution chose to present*. In practice, this meant little or no confrontation right at all.

- The military commission system had no rule preventing the admissibility of statements obtained by coercion. As Chief Justice Roberts recently wrote for the Supreme Court, "We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable."³ Yet military commissions had no rule excluding such unreliable evidence unless the coercion rose to the level of torture. Even the prohibition against statements obtained by torture – belatedly adopted on March 24, 2006 and

¹ *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting Richard Henry Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (1971)).

² *Hamdan v. Rumsfeld*, 548 U.S. ___, ___, 2006 U.S. LEXIS 5185, at *276 (June 29, 2006) (Thomas, J., dissenting) (quoting Brief for Respondents at 4).

³ *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 2006 U.S. LEXIS 5177, at *30-*31 (June 28, 2006).

announced the day before the Supreme Court's oral argument in the *Hamdan* case – fails to provide a standard of proof or allocate who has the burden of proof to establish that statements were the product of torture. Perhaps the most glaring problem was that, as a practical matter, the rule barred tortured testimony only when it was torture in the eyes of the prosecution – and there was no provision at all guaranteeing to the defense any sort of discovery about coercion to obtain testimony.

- Both the Presiding Officers, who performed the judicial function in the military commission system, and the military commission panel members, who served as jurors, were selected by the Appointing Authority – the same official who approved the charges against the defendant. One of the military commission prosecutors, Air Force Captain John Carr, wrote that the Chief Prosecutor told him “the military panel will be handpicked and will not acquit these detainees.” (E-mail from Captain John Carr to Colonel Fred Borch, attached at Tab A) For the position of Chief Presiding Officer, the Appointing Authority picked a long-time friend who had retired from the Army five years previously, had not practiced law since his retirement, and had never been an active member of any bar.

- The Appointing Authority – the same individual who approved the charges and appointed the commission's members and its presiding officer – also performed a judicial role. Any interlocutory appeals were resolved by the Appointing Authority. So any ruling by the commission that would result in dismissal of the charges was forwarded to the Appointing Authority for his review. Thus, the same official who had begun the prosecution by approving the charges was allowed to overrule any determination that the charges should not go forward.

- The Review Panel, which was supposed to serve as the appellate body of the military commission system, was not impartial. One member – William T. Coleman, Jr. – attended a

meeting in July 2003 during which the prosecution discussed its efforts and strategy and a discussion was held as to various legal authorities relevant to military commissions. (Exhibit 11 to Declaration of Christine S. Ricci, pages 47-50, Vaughn Index, *NIMJ v. Department of Justice*, No. 1:04CV00312 (RBW), attached at Tab B)

- The Defense had no right to call witnesses. The parties' ability to obtain witnesses to testify at military commission hearings was unequal. The Prosecution could obtain whatever witnesses it wished unilaterally, but the Defense was required to ask the *Prosecution* for permission to obtain any witnesses it wished to call. The Defense was required to give its opposing counsel a synopsis of the witness's expected testimony along with an explanation of how the testimony supported the Defense case. This resulted in the equivalent of a poker game in which the Prosecution's cards were dealt face down while the Defense cards were dealt face up. The advantage to the Prosecution was palpable. Additionally, while the Defense could seek the Presiding Officer's review of the Prosecution's denial of a witness request, in practice the Presiding Officers denied literally every Defense witness request on which they ruled. In all ten commission cases, in only a single case and then only in one instance has the Defense been permitted to call a witness. That witness – the only witness to ever testify at a military commission proceeding in Guantanamo – was allowed to testify under a pseudonym despite the fact that the same witness had previously provided a sworn affidavit concerning the same subject matter in which he identified himself in open Federal proceedings. Again, the *Hamdan* dissent was incorrect in claiming that "Petitioner . . . may subpoena his own witnesses, if reasonably available."⁴ In fact, the Defense had no ability to issue subpoenas and, with only one exception, no success in obtaining witnesses through the Prosecution or the Presiding Officer.

⁴ *Hamdan v. Rumsfeld*, 548 U.S. ___, ___, 2006 U.S. LEXIS 5185, at *276 (June 29, 2006)

Almost all of the documents that the defense counsel did receive through the discovery process could not be shared with the client. Most of the documents the defense received were “Protected Information” because the Prosecution made the discretionary decision to stamp them “For Official Use Only” or “Law Enforcement Sensitive.” Protective orders in commission cases also severely limited the defense counsel’s ability to discuss prosecution witnesses’ identifies with the defendant. Preventing the defense counsel from discussing virtually all of the Prosecution’s evidence with the defendant made effective case preparation almost impossible.

- The commission system not only prevented the defendant from preparing for trial by reviewing the evidence with his defense counsel, but also allowed the defendant to be excluded from portions of his own trial. Any civilian defense counsel representing the accused could also be excluded from closed sessions. In two commission cases – *United States v. Hamdan* and *United States v. Hicks* – the defendant was removed from his own trial during voir dire. When a defendant or civilian defense counsel was excluded, commission rules prevented the military defense counsel from sharing with them what occurred during the closed session. In the history of Anglo-American jurisprudence, including that of military justice, I have only learned of one incident during the Civil War where this is documented to have occurred. In that case the Judge Advocate General of the Army summarily reversed the decision.

- Those few rules that did exist to govern commission proceedings were subject to constant revision. The rules could, and did, change after cases had already begun. Additionally, the power to make new rules was subdelegated all the way down to the Presiding Officers. The result was equivalent to allowing U.S. district court judges to make up new Federal Rules of Criminal Procedure and apply them to cases that had already started. The Presiding Officers on

(Thomas, J., dissenting) (quoting Brief for Respondents at 4).

occasion abused this authority by adopting new rules that not only aggrandized their own power, but also prejudged matters that the parties were litigating before them by promulgating rules that codified the Prosecution's desired outcome.

- The system for assigning several defense counsel from the same office to represent alleged co-conspirators violated some defense counsel's state bar ethical rules. The Pennsylvania Bar Association advised the military defense counsel in one military commission case that she had "a disqualifying conflict of interest" due to the office's representation of multiple alleged co-conspirators. (Advisory opinion of Pennsylvania Bar Association, attached at Tab C)

- Even if the handpicked commission panel were to review all of the evidence and acquit the defendant, the defendant could nevertheless remain incarcerated. Secretary of Defense Rumsfeld stated, "Even in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over."⁵ If a detainee can be held indefinitely with or without a guilty verdict at a military commission, then why even bother?

When then-White House Counsel Alberto Gonzales promoted the concept of military commissions in a November 30, 2001 *New York Times* op-ed piece, he argued, "They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals."⁶ Almost five years later, not a single military commission has been completed. The ten that began were convened 8,000 miles from where our forces are fighting in Afghanistan. By contrast, during the same period the Army alone has held 373

⁵ Defense Department Operational Update Briefing, Federal News Service, March 28, 2002 (available at LEXIS/NEXIS (Federal News Service file).

⁶ Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at 27.

courts-martial on the battlefields of Iraq and Afghanistan. These proceedings accomplished every one of the objectives laid out by the Attorney General in his op-ed.

In his dissent, Justice Thomas echoed the proponents of commissions and criticized Justice Stevens for ignoring the reality of the battlefield. Such criticism is unjustified. The court-martial was developed for both use on the battlefield and the protection of information vital to national security without compromising the essential substantive safeguards necessary for a fair trial. Judge Robertson, who issued the injunction requiring the use of courts-martial, and Justice Stevens and Justice Kennedy, who authored the opinions upholding Judge Robertson's opinion, *are all former service members* well acquainted with the realities of the battlefield. The reality of the battlefield is that our service members are best served by scrupulously following the laws of war, even when our enemies do not. Following the law of war protects our military in the field, enhances our national reputation at home and abroad, and promotes the growth of the rule of law and democracy that in the end are our strongest weapons against terrorism.

To illustrate the potential damage to our national reputation posed by quick-fix legislation in the wake of the Supreme Court's decision, consider the following: Suppose that in order to protect our troops from false allegations of the murder of civilians by our enemies, military commanders invoked the historic requirement that the crime of murder cannot be prosecuted unless the prosecution can produce a body. A military prosecutor seeking justice for the victims and believing that the rule conflicts with both the modern law of war and the Uniform Code of Military Justice appeals the order all the way to the Supreme Court, ultimately prevailing. The decision is hailed around the world as evidence that the United States stands first and foremost for the rule of law. Under these circumstances, attempting to circumvent such a decision without proof that the existing rules were inadequate would not make sense. Hastily adopting legislation

that revives the discredited commission system would similarly detract from our nation's reputation as the leading proponent of human rights in the world

Four years and eight months ago, following the publication of the President's unilateral decision adopting Military Commissions, my co-counsel Professor Neal Katyal warned this committee that they would fail to produce convictions and eventually be struck down by the Supreme Court. Not only was Professor Katyal's legal analysis correct, but the practical benefits of commissions extolled by its proponents have failed to materialize. The commissions have completed not a single trial. No one was even indicted for almost three years, and when indictments finally came, a total of 10 have been made. Do we really want to change the entire legal regime – exposing us to untold criticism around the world for abrogating the Geneva Conventions – for 10 trials? Perhaps such a regime change makes sense if there is incontrovertible evidence that the current one has failed. But, as five Justices of the Supreme Court repeatedly emphasized in the *Hamdan* decision, the existing court-martial system provides a battle-tested way to try terrorists today. Before junking an existing system, we should give that system a try - particularly when making any changes will inevitably result in yet more litigation and uncertainty.

Trials that comply with the Uniform Code of Justice will cure all of the abuses I have identified for this committee. If on the other hand we again elect to stray from the tried and true path laid out in the Uniform Code of Military Justice that the Supreme Court returned us to, not only will these abuses continue, but I fear that we will find ourselves right back where we started yet again. Except this time, the situation will have deteriorated to the point that trials are no longer even possible. It is time for the American people to have their day in court. It is time to use courts-martial.

-----Original Message-----

From: Borch, Fred, COL, DoD OGC

Sent: Monday, March 15, 2004 11:29

To: Davenport, Teresa, CAPT, DoD OGC; Lang,

Scott, CDR, DoD OGC; Brubaker, Kurt, LtCol, DoD OGC; Couch, Stuart,

LtCol, DoD OGC; Sullivan, Ronald, MAJ, DoD OGC; Wolf, Carrie, CPT, DoD

OGC; Trivett, Jr, Clayton, LT, DoD OGC; Khanna, Karunesh, Mr, DoD OGC;

Keegan, Michael, Mr, DoD OGC; Ambrose, Bruce, LtCol, DoD OGC

Cc: Bertotti, James, CW3, DoD OGC; Preston,

Robert, MAJ, DoD OGC; Carr, John, CPT, DoD OGC

Subject: Allegations of misconduct and

unprofessionalism against Chief Prosecutor

Importance: High

All:

Please read below.

Capt. Carr has made some serious allegations against me as the Chief Prosecutor---charges that, if true, mandate that I be relieved of my duties.

Among other things, Capt. Carr. insists that an "environment of dishonesty, secrecy, and deceit" exists within the entire office.

In an email preceding Capt. Carr's, you will note that Maj. Preston voices similar views: he states that he is "disgusted" with the "lack of vision" and "lack of integrity" in the office, and has "utter contempt" for many of the judge advocates serving with us.

Bottom line: Both Capt. Carr and Maj. Preston believe that what we are doing is so wrong that they cannot "morally, ethically, or professionally continue to be a part of this process."

I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the Office of Military Commissions---and that no one on the team has anything but the highest ethical principles. I am also convinced that what we are doing is critical to the Nation's on-going war on terrorism, that what we have done in the past---and will continue to do in the future---is truly the "right" thing, and that the allegations contained in these emails are monstrous lies.

It saddens me greatly that two judge advocates---whom I like very much and for whom I have only the greatest respect and admiration---think otherwise. In fairness to all of you, however, it is important that you read what has been written about me and you.

COL Borch

-----Original Message-----

From: Carr, John, CPT, DoD OGC
Sent: Monday, March 15, 2004 07:56
To: Borch, Fred, COL, DoD OGC
Cc: Preston, Robert, MAJ, DoD OGC; Davenport, Teresa, CAPT, DoD OGC; Wolf, Carrie, CPT, DoD OGC
Subject: RE: Meeting with Colonel Borch and

myself, 4:00 p.m. today, Col Borch's office

Sir,

I appreciated the opportunity to meet last Thursday night, as well as the frankness of the discussion. The topics covered and the comments made have been replaying in my mind since we ended the meeting. I have also reviewed Maj Preston's comments in his e-mail below, and I agree with them in every respect.

I feel a responsibility to emphasize a few issues. I do not think that our current troubles in the office stem from a clash of personalities. It would be a simple, common, and easily remedied situation to correct if this were true. People could be reassigned or removed.

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position - the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

An environment of secrecy, deceit and dishonesty exists within our office. This environment appears to have been passively allowed to flourish, if it has not been actively encouraged. The examples are many, but a few include:

1. CDR Lang's misrepresentations at the Mock Trial - CDR Lang made many misrepresentations at the Mock Trial, to include stating that we had no reason to believe that al Bahlul had suffered any mistreatment or torture. When I confronted him immediately after the mock trial with his notes to the contrary, he admitted that he was aware of abuse allegations related specifically to al Bahlul. Interestingly, it was because of Prof. Wedgewood's comments at the mock trial that we even began to inquire into the conditions at the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we would be ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.

2. Suppressing FBI Allegations of Abuse at Bagram - Over dinner and drinks, KK and Lt Trivett heard from FBI agents

that detainees were being abused at the Bagram detention facility. Lt Trivett told KK after dinner that they couldn't report the allegations because it was told to them "in confidence." KK told CDR Lang, LtCol Couch and Brubaker anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to you or other members of the office. Interestingly, CDR Lang recently suggested the Lt Trivett, despite his lack of experience and judgment, be sent to review the CID reports of abuse at Bagram.

3. Refusal to give Mr. Haynes the COLE video -

Mr. Haynes asked CDR Loftus twice for a copy of the COLE video. I heard CDR Loftus ask CDR Lang whether she should take a copy of the video over to Mr. Haynes. CDR Lang told her not to, and that maybe in a few days Mr. Haynes would forget that he asked for it.

4. The disappearance/destruction of evidence -

As I have detailed to you, my copy of CDR Lang's notes detailing the 302 in which al Bahlul claims torture and abuse is now missing from my notebook. The 302 can not be located. Additionally, Craig King of the FBI related last week that he called and spoke to CDR Lang about the systematic destruction of statements of the detainees, and CDR Lang said that this did not raise any issues.

5. "I've known about this for a year."

Hamden's name is on the UN 1267 list, and we only learned of it in Dec. When CDR Lang was confronted with this information, he claimed that he had known about it for the last year. No attempt had been made prior to Dec to discover upon what evidence Hamdan was added to the list, and we still don't know. If he was aware of this fact, one is left to wonder why no inquiry was made with the State Department. He made the same "I've known about this for a year" claim about the Tiger Team AQ 101 brief, although he has had many of us searching for the information contained within it for months.

6. CDR Lang's misrepresentations at the office

overview of his case. As detailed in a previous e-mail to you, CDR Lang made numerous misrepresentations concerning his case at the office meeting to discuss his case, indicating that he either consciously lied to the office, or does not know the facts of his case after 18 months of working on it.

I have discussed each of these specific examples

with you, and you told me that you had taken corrective action to some. For example, in reference to paragraph 2, I asked how I was suppose to trust these attorneys to review documents and highlight exculpatory evidence and you responded that "when the time comes" you would put out very direct guidance. I do not believe that ethical behavior is something that can be directed during selective time periods.

These examples are well known to the members of this office, yet there has been no public rebuke of the behaviors. Hence, the environment and behaviors continue to flourish. I am left to wonder why at an office meeting we were not told:

"I understand that misrepresentations are being

made concerning the facts of *our* cases. If I find out this happens again, the responsible party is going to be fired."

"I understand that evidence is being withheld from our civilian leadership.. If I find out this happens again, someone is going to be fired."

"I understand that allegations of abuse are not being brought to my attention or reported to the appropriate authorities. If I find out this happens again, someone is going to be fired."

"I understand that evidence is being hidden or destroyed. If I find out this happens again, someone is going to be fired."

Even in regards to CDR Lang's recent behavior towards Maj Preston and myself, the office was not told the real reason for why he has been removed as the deputy, only further feeding the underlying animosity and indicating that the action was forced upon you and not really justified - if not, surely you would have taken a less conciliatory stance.

You stated in our meeting last week that what else can you do but lead by example.

In regard to this environment of secrecy, deceit and dishonesty, the attorneys in this office appear to merely be following the example that you have set.

A few examples include:

You continue to make statements to the office that you admit in private are not true. With many of the issues listed here, the modus operandi appears to be for you to make a statement at a meeting, pause, and when no one states a disagreement, assume that everyone is in agreement. To the listener, it is clear that the statements are not true, but we are not to correct, disagree, or question you in front of the office. (For example, when I asked you basic questions concerning conspiracy law at an office briefing, CDR Lang called me into his office and told me that my conduct was borderline disrespectful because it put you in an uncomfortable position.)

You have stated for months that we are ready to go immediately with the first four cases. At the same time, e-mails are being sent out admitting that we don't have the evidence to prove the general conspiracy, let alone the specific accused's culpability. In fact, it may be questioned how we are in a better position to prove the general conspiracy today than we were last November at the mock trial. Of course, it should also be noted that we have substantially changed course even since November and now acknowledge that the plan to prove

principal liability for TANBOM, KENBOM, COLE and PENTBOM was misguided to say the least.

We are rushing to put 9 more RTBs together for cases that you admit are not even close to being ready to go trial. We are also being pressed to prepare charge sheets, and you have asked that discovery letter go out on these cases. We are led to believe that representations are being made are that these cases can be prosecuted in short order, when this simply is not true.

You told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which CDR Lang quietly allowed to go uncorrected, that I brought up CDR Lang's missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it.

You state in a morning meeting that al Bahlul has claimed "in every statement" that he was an AQ member. When I told you after the meeting that this was not true, you simply admitted that you hadn't read the statements but were relying on what CDR Lang had told you. As I have detailed in another e-mail, it does not appear that CDR Lang is even aware of how many statements al Bahlul has made, let alone conducted a thorough analysis.

When Maj Preston raises concerns about him advising the AA given the potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally.

CDR Lang has emphasized at morning meetings, with you in the office, that we do not need to be putting so many of our concerns in e-mails and that we can just come down and talk. Given the disparity between what is said in casual conversation and the statements made by our leadership in e-mails, it is understandable that we have relied more and more on written communications.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel. In private you have went further and stated that we are really concerned with review by academicians 10 years from now, who will go back and pick the cases apart.

We continue to foster the impression that CTF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have

gathered it. You acknowledged last week that we will not even try to fix the problems with CITF. What is perhaps most disturbing about the lack of progress by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CITF leadership.

Our morning meetings, briefings, and group discussions are short and superficial - it could be argued designed to permit a claim that the office has discussed or debated a certain topic without permitting such meaningful discussions to actually take place. Two prosecutors were scheduled 15 minutes each to go over the facts of their case. Charge sheets are reviewed by the office the afternoon that they are to be taken over to the Deputy AA. The lay down on the general conspiracy is cursory and devoid of meaningful comments or suggestions. The fact that we did not approach the FBI for assistance prior to 17 Dec - a month after the mock trial - is not only indefensible, but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for some time, when in fact the opposite is true.

It is claimed that the Tiger Team didn't do "shit" when in fact many of the products (i.e., AQ 101 and the statement of predicate facts) that they put together almost two years ago closely mirror products that have taken us months to put together. In fact, even a cursory review of the Tiger Team materials we now have (after several efforts to get them were sharply rebuffed by our own staff) shows that the Tiger Team had articulated many of the obstacles we now face and had warned that if these obstacles were not removed that prosecutions could not succeed.

As part of this atmosphere that you fostered, Maj Preston was publicly rebuked for bringing this issue to the group's attention and you specifically stated that you had reviewed the tiger team materials, there was little if any usable material in them, and that the demise of the tiger team had been the result of an unfortunate personality clash and nothing else. A review of the files shows otherwise.

From June to December, you were only present in the office for brief periods, often less than 4 hours every two weeks. However, you continued to insist that CDR Lang spoke for you and directed those who e-mailed you with concerns to address them with CDR Lang. It is difficult to believe that his deficiencies were unknown at that time, and consequently it is difficult to believe that you were unaware of the fact that we had little to no direction during that time frame. The fact that he directed each of us in the office not to speak to you directly was, and remains to me, astonishing - but does permit one to argue that they were unaware of any difficulties during a critical period of this endeavor.

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of cases (e.g. proof analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations -- not the proper preparation of our cases or the interests of the American people.

The posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal at which they hide from scrutiny or review the specific facts of their case - thereby assuring their participation.

The evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of our accuseds, or the sustainability of our efforts.

I understand that part of the frustration with Maj Preston's discussions with BG Hemingway was that you did not have the opportunity to discuss the matters with him in the first instance. It was clear from the discussions with BG Hemingway that he was unaware of the lack of preparation with our cases prior to signing the charges, or many of the other problems that we have discussed.

You have stated that you are confident that if you told MG Altenburg that we needed more time that he would give it to you. Underlying this comment is the fact that MG Altenburg has not been made aware of the significant shortcomings of our cases and our lack of preparation and cooperation with outside agencies.

I also have significant reason to believe that Mr. Haynes has not been advised in the most accurate and precise way. It appears that even the results and critiques of the mock trial, described like so many other efforts in this office as a "home run," were manipulated to present the maximum appearance of endorsement (for example, the reorganization and bold-face in Lt Col Lietzau's critique that was openly discussed in the office)

We originally alleged that the accuseds were responsible as principles for 9/11, the COLE and the embassy bombings. Additionally, we alleged that al Qosi was involved with Mubarak and that al Bahlul was aware of Atta and Jarrah, and was somehow linked to a 9/11 meeting in Malaysia. I understand that significant policy decisions have yet to be vetted with DOJ OLC, and that they appeared less than totally comfortable with our theory of liability and culpability of the accuseds.

The comments we have heard in the office appear to revolve around one goal - to get the process advanced to the point that it can not be turned off. We are told that we just need to get defense counsel assigned, because then they can't stop the process and we can fix the problems. We just need to get charges approved because then they can't stop the process and then maybe we can fix the problems.

If the appropriate decisionmakers are provided accurate information and determine that we must go forward on the path we are currently on, then all would be very committed to accomplishing this task. However, it instead appears that the decisionmakers are being provided false information to get them to make the key decisions, to only learn the truth after a point of no return.

It is at least possible that the appropriate officials would be more concerned about approving charges, arraigning accuseds, and signing more RTBs prior to the arguments in front of the Supreme Court if they knew the true state of the cases and the position they will be left in this fall.

[It is also unclear how the steadfast refusal to have the prosecutors co-located with the CTF agents is in the interests of the American people or the preparation of the cases, and could be motivated by anything but a purely personal issue with someone involved in the process. You have admitted that both organizations productivity would be greatly increased.]

To address at least some of the underlying issues, the following may be proposed:

1. After fully informing the sages or invitees to the Mock Trial of the deficiencies we now acknowledge, solicit their recommendations and suggested courses of action.
2. Before MG Altenburg signs in -- taking on the AA responsibility and further damaging his lucrative private practice -- fully and accurately brief him on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
3. Fully and accurately brief Mr. Haynes and DOJ on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
4. Take immediate action within the office to develop a comprehensive prosecution strategy.
5. Take immediate action within the office to establish an environment that fosters openness, honesty, and ethical behavior.
6. Replace current prosecutors with senior experienced trial litigators capable of maintaining objectivity while zealously preparing for trial.

Instead, what I fear the reaction to Maj Preston's and my concerns will simply be a greater effort to make sure that we are walled off from the damaging information - as we are aware has been attempted in the past.

I would like to conclude with the following --
when I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

I echo Maj Preston's belief that I can not morally, ethically, or professionally continue to be a part of this process. While many may simply be concerned with a moment of fame and the ability in the future to engage in a small-time practice, that is neither what I aspire to do, nor what I have been trained to do. It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly.

v/r,

Capt Carr

-----Original Message-----

From: Preston, Robert, MAJ, DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: Davenport, Teresa, CAPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: RE: Meeting with Colonel Borch and myself, 4:00 p.m. today, Col Borch's office

Ma'am

While I appreciate the sentiment, I have to tell you that I don't see a lot of use continuing to talk about this stuff, unless your looking at reassigning us out of this office. I don't intend to speak for John although I know he feels the same way, but for me I sincerely believe that this process is wrongly managed, wrongly focused and a blight on the reputation of the armed forces. I don't have anything new to say. I am pretty sure that everyone in the world knows my sentiments about this office and this process.

Certainly there have been some unfortunate symptomatic issues like Cdr Lang's recently heightened animosity towards John (and I'm not going to let that one go either), but my fundamental

concerns here have nothing to do with personality conflicts or intellectual disagreements.

I don't think that anyone really understands what our mission is, but whatever we are doing here is not an appropriate mission. I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the Military Justice System and even a fraud on the American people - surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time.

At the same time, my frank impression of my colleagues is that they are minimizing and/or concealing the problems we are facing and the potential embarrassment of the Armed Forces (and the people of the United States) either because they are afraid to admit mistakes, feel powerless to fix things, or because they are more concerned with their own reputations than they are with doing the right thing. Whether I am right or wrong about that, my utter contempt for most of them makes it impossible for me to work effectively.

Frankly, I became disgusted with the lack of vision and in my view the lack of integrity long ago and I no longer want to be part of the process - my mindset is such that I don't believe that I can effectively participate - professionally, ethically, or morally.

I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission - after all, writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard - particularly when you want to call yourself an officer and a lawyer. This assignment is quite literally ruining my life.

I really see no way to fix this situation other than reassignment. I don't want to be an obstacle to anyone, but I'm not going to go along with things that I think are wrong - and I think this is wrong. It's not like I'm going to change my opinion in order to "go along with the program." I'm only going to persist in doing what I think is right and at some point that is going to lead to even harder feelings. Half the office thinks we are traitors anyway and frankly I think they are gutless, simple-minded, self-serving, some, or all of the above so you can see how that's going to go...

I know even well-meaning people get tired of hearing this, but the fact is that I really can't stomach doing this and I really don't want to waste time talking about it.

PS: John's not back yet. I think he was at FBI this afternoon.

-----Original Message-----

From: Davenport, Teresa, CAPT, DoD OGC
Sent: Thursday, March 11, 2004 13:36

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To: Preston, Robert, MAJ, DoD OGC; Carr, John,
CPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: Meeting with Colonel Borch and myself,
4:00 p.m. today, Col Borch's office

Major Preston and Captain Carr,

Captain Carr and I had a long talk this morning.
Based on his expressions of concern for some unresolved issues,
including both ethical matters and person

UNITED STATES OF AMERICA)	
)	
)	Defense Motion
v.)	Ethics Advisory Opinion of the PBA
)	in Support of Defense Motion D-7
)	
)	
BINYAM MOHAMED)	[June 7, 2006]

1. On May 4, 2006, undersigned counsel timely filed a motion titled, Defense Motion to Withdraw Appearance as Counsel if the Structure of the OMC-D Remains Unchanged. (the motion is marked as D-7 and RE 53 in the filing inventory). This motion explicitly noted in paragraph 3(j) ii that counsel was seeking an ethics advisory opinion from the Pennsylvania Bar Association (PBA).

2. On June 6, 2006, counsel, received in her inbox, the attached ethics advisory opinion from the PBA dated May 18, 2006.

3. Counsel is therefore filing the PBA opinion which she referenced in her May 4, 2006 motion (i.e., D-7 and RE 53) with the Commissions for admission into the record and in support of Defense Motion to Withdraw Appearance as Counsel if the Structure of the OMC-D Remains Unchanged (D-7 and RE 53).

WHEREFORE, undersigned counsel requests that the attached PBA opinion be filed and admitted by the Commission in support of Defense Motion to Withdraw Appearance as Counsel if the Structure of the OMC-D Remains Unchanged (D-7 and RE 53).

//signed//

Yvonne R. Bradley, Major, USAFR
Detailed Military Counsel of Binyam Mohamed



 COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

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ETHICS COORDINATOR
LOUISE M. LAMOREAUX

May 18, 2006

ATTORNEY-CLIENT PRIVILEGE

Major Yvonne R. Bradley
1051 Fairchild Avenue
Willow Grove, ARS PA 19090

Rc: Inquiry No. 2006-050

Dear Major Bradley:

Your request to the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee has been referred to me. You have advised the Committee as follows:

You are licensed to practice law in Pennsylvania. You are also a member of the United States Air Force Reserve Station at Willow Grove, Pennsylvania. In December 2005 you were assigned and detailed by the military to represent one of ten detainees charged by the Military Commissions for war crimes. You were assigned to work in the Office of Military Commissions - Defense ("OMC-D") in Washington, DC. All the attorneys who represent each of the charged detainees work for OMC-D and a majority of the attorneys work in the same office. You have advised that the lawyers in this office share confidential information about their cases.

Your client has been charged in a specific conspiracy involving three other alleged co-conspirators, each of whom is represented by a lawyer working in OMC-D. All the defense lawyers at OMC-D report to the Chief Military Counsel who is responsible for managing, advising, evaluating and approving funding for each attorney. The Chief Military Counsel has a privilege with each attorney working for the OMC-D, advises all of the attorneys in the office and receives confidential information from each attorney about their cases.

You have asked whether the Pennsylvania Rules of Professional Conduct govern your representation, and whether you have a conflict of interest under those rules.

1. The Pennsylvania Rules of Professional Conduct apply.

Rule 8.5 of the Pennsylvania Rules of Professional Conduct states:

PHIL-5380502.1/000001-103619

100 South Street • P.O. Box 186 • Harrisburg, PA 17108-0186 • Phone: (800) 932-0311 or (717) 238-6713 • Fax: (717) 238-7182
E-mail: info@pabar.org • Website: www.pabar.org

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rule of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits shall be applied, unless the rules of the tribunal provide otherwise.

Under the Pennsylvania choice of rules, the choice of law will be determined by the Military Commission's Rules of Professional Responsibility of Appointing Authority Regulation No. 3. That regulation establishes policies for the ethical conduct of attorneys in connection with a proceeding before, during and after a trial by military commission.

Appointing Authority Regulation No. 3 acknowledges that lawyers working in the Commission process must comply with state Rules of Professional Conduct. It states:

In addition to State and branch specific armed forces Rules of Professional Conduct, compliance with all rules, regulations, and instructions applicable to trials by military commission convened pursuant to references (a) and (b) shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

The November 30, 2005 letter from Col. Dwight Sullivan to you detailing you to represent your client also states that you are bound by the Pennsylvania Rules of Professional Conduct. The letter states:

You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to represent client before a military commission, you will be subject to professional supervision by the Department of Defense General Counsel.

2. OMC-D is a "firm."

Comment [1] to Rule 1.10 of the Pennsylvania Rules of Professional Conduct reads as follows:

For the purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition depends on specific facts. See Rule 1.0, Comments [2]-[4].

The Comments to Rule 1.0 states:

[2] The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of a rule that the same lawyer should not represent opposing parties in litigation, e.g., Rules 1.7(a), 1.10(a), while it might not be so regarded for purposes of a rule that information acquired by one lawyer is attributed to another, e.g., Rule 1.10(b).

Since each of the lawyers at OMC-D report to the Chief Defense Counsel who is their supervisor, shares confidential information with the Chief Defense Counsel and share confidential information about their cases with each other, the lawyers in this office effectively act as though OMC-D were a law firm where confidential information about clients can be shared with other lawyers in the firm.

3. The Pennsylvania Rules impute each lawyer's conflicts to all lawyers in OMC-D.

Rule 1.10(a) of the Pennsylvania Rules of Professional Conduct states:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, . . .

4. You have a disqualifying conflict of interest.

Rule 1.7 of the Pennsylvania Rules of Professional Conduct provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.


(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

The exceptions in Rule 1.7(b) do not apply since (i) it would not be reasonable for you to believe that you could provide competent and diligent representation to each alleged participant charged in a conspiracy and (ii) your client has refused to consent.

You have advised that co-defendants have made statements against each other which are likely to be used against them during the Military Commission process. In the representation of your client, you would attempt to impeach the other co-defendants who are represented by other lawyers in OMC-D. There is, therefore, a significant risk that the representation of your client will be materially limited by the representation of other clients by other lawyers in OMC-D. See, for example, Inquiry No. 92-171, a copy of which is enclosed.

Very truly yours,


Michael L. Temin

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE. MOREOVER, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT AN OPINION OF THE FULL COMMITTEE.

JANUARY 25, 1993

INQUIRY NO. 92-171

You have requested an analysis and opinion of the ethical implications of representation in a case where a possible conflict of interest may occur. The facts as provided to me are as follows:

Statement of the Facts

Defendants A and B were arrested as co-conspirators to a crime and applied for a public defender. Because B will testify against A, A's case is conflicted out of the Public Defenders' Office and apparently assigned to outside counsel. While the case of Commonwealth vs. A & B is still open and the Public Defenders' Office is still representing B, A is charged with another offense unrelated to the Commonwealth vs. A & B case.

-

Question Presented

Whether the Public Defenders' Office can represent a criminal defendant in a later criminal proceeding when it has been determined that the Public Defender's Office cannot represent this same defendant in a different proceeding currently being handled by the Public Defender's office because of a direct conflict in the pending case?

-

Legal Analysis

The Pennsylvania rules of Professional Conduct address conflict of interest in Rule 1.7. This Rule states as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

42 Pa. C.S.A. Rule 1.7. (1989 & Supp. 1992).

Because this case arises in the criminal area, extreme care must be exercised. Indeed, the Comment to Rule 1.7 specifically mentions the difficulties which arise in criminal cases when multiple representation occurs. Further, the section of the Comment to Rule 1.7 entitled Conflicts in Litigation cautions as follows:

The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.

Comment to Rule 1.7 Conflict of Interest - Conflicts in Litigation section

While the facts of the case presented for analysis here do not require the automatic disqualification of counsel seemingly required in a multiple representation case, the question here does arise in the criminal context where most commentators have taken the position that even the slightest potential for conflict should be resolved by assigning a case to separate counsel. See, The Law and Ethics of Lawyering, Jeffrey C. Hazard, Jr. and Susan P. Koniak, Foundation Press, Inc. (1990) pages 625 - 626.

Accordingly, when the language of Rule 1.7 (b) is examined, it becomes clear that the determination of whether the representation of A is possible while the matter of Commonwealth vs. A & B is still pending, hinges on whether information that is gained by virtue of the lawyer/client relationship in either matter would adversely affect a Public Defender's ability to represent either client to his or her best ability. In the event that there is any opportunity for confidential information gained by the lawyer to effect the performance of counsel during either case, the Public Defenders' Office should not accept representation of A in the second matter.

Arguably, if the two cases were totally unrelated and if both individuals, A and B, after being apprised of the representation by the Public Defender of each other, agreed to continue having the Public Defender's office represent them, no problem could occur with Rule 1.7 because consent to the adverse representation had been given. Unfortunately, courts have often looked with disfavor on waivers defendants have made regarding conflict, or potential conflicts, in a criminal setting. See, The Law and Ethics of Lawyering, supra, pp. 627-630. Therefore, the most prudent course of action is to refer the second case out to independent counsel.¹

Conclusion

Because of the great importance in maintaining criminal cases in an uncompromised manner, it is necessary for the Public Defender's Office to find independent counsel for A while the case of Commonwealth v. A&B is pending and being handled by the same Public Defender's Office.

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OF PENNSYLVANIA OR ANY COURT. IT CARRIES
ONLY SUCH WEIGHT AS AN APPROPRIATE
REVIEWING AUTHORITY MAY CHOOSE TO GIVE
IT. MOREOVER, THIS IS THE OPINION OF ONLY
ONE MEMBER OF THE COMMITTEE AND IS NOT
AN OPINION OF THE FULL COMMITTEE.

¹ If the first action of Commonwealth vs. A&B were concluded, it is possible that with consent by A&B and the building of sufficient "chinese walls" around the lawyers handling both cases, that the public defenders office could handle A's second case. However, while Commonwealth vs. A&B is pending, the case should not be undertaken by the public defenders office.

ETHICS OPINIONS ARE AUTHORED BY THE PENNSYLVANIA BAR
ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL
RESPONSIBILITY.



U.S. ARMY JUDICIARY
OFFICE OF THE CLERK OF COURT
IRAQ/KUWAIT/AFGHANISTAN Statistics Since 11-Sep-2001



Trial Location	CY 2001*	2002	2003	2004	2005	Jun-2006	Total
All	***1	1	52	143	181	64	442
Iraq	0	0	37	118	137	43	335
Afghanistan	0	0	0	7	18	13	38
Kuwait	***1	1	15	18	26	8	89

Offense Location**	CY 2001*	2002	2003	2004	2005	Jun-2006	Total
All	0	3	75	229	265	93	665
Iraq	0	0	46	183	197	61	487
Afghanistan	0	1	12	20	39	24	96
Kuwait	0	2	21	39	32	8	102

* Since 11-Sep-2001
** There are 20 cases that involve offenses in more than one country.
*** Offense committed in Saudi Arabia