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STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HEARING

BEFORE THE

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

HEARING HELD
SEPTEMBER 7, 2006

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STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, September 7, 2006.

The committee met, pursuant to call, at 10:05 a.m., in room 2118, Rayburn House Office Building, Hon. Duncan Hunter (chairman of the committee) presiding.

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

The CHAIRMAN. The committee meets today on the future of military commissions, and I would like to welcome the distinguished panel that is prepared to testify to us on that subject. Mr. Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel of the Department of Justice; and Major General Scott Black, the Judge Advocate General of the Army. Rear Admiral Bruce MacDonald, the Judge Advocate General of the Navy; Major General Charles Dunlap, Jr., Deputy Judge Advocate General of the Air Force; Brigadier General James C. Walker, Staff Judge Advocate to the Commandant of the Marine Corps; Colonel Ronald Reed, USAF, Legal Counsel to the Chairman of the Joint Chiefs of Staff.

Thank you, gentlemen, for being with us today and contributing to this important discussion.

Today we hear from the Administration on its recommendations. We also hear from our top military lawyers and we want to have the advantage of their thinking on the Administration's recommendations.

The war against terror has produced a new type of battlefield and a new type of enemy. It is necessary at this point for Congress to develop a military commission process that is going to allow us to have effective prosecution of enemy terrorists, and while we need to provide basic fairness in our prosecutions, we must also preserve the ability of our warfighters to operate effectively on the battlefield. Balancing these two requirements means that we must pay special attention to the rules of evidence and the procedures used in any military commission process. My own interest is to protect our troops in the battlefield from becoming involved in a legal quagmire, which would prevent us from effectively pursuing terrorists, and also to ensure that America can effectively protect its citizens. Our foremost consideration should be protecting American troops and American citizens.

The Administration has worked with the Congress and the Judge Advocate Generals (TJAGs) who are with us here today. I look for-

ward to working with the President, the Senate, with my colleagues on the committee to construct a new process which strikes this necessary balance between justice and battlefield effectiveness and provides the legal standard in the coming decades in the war against terror.

I think a fair process has two guiding principles. First, the government must be able to present its case fully, and without compromising its intelligence sources or compromising military necessity and, second, the prosecutorial process must be done fairly swiftly and conclusively.

The Administration's proposed legislation also touches two areas that fall outside military commissions: The applicability of Common Article 3 to the War Crimes Act and the applicability of the Detainee Treatment Act of 2005 to detainees held prior to the enactment of this statute. I believe we should closely scrutinize both of these issues, and I look forward to the panel's comments on those. So let us get started. We have got a lot of work to do.

Let me before we go to our witnesses turn to the fine gentleman from Missouri, my great colleague, Mr. Skelton, for any remarks he would like to make.

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

Mr. SKELTON. Mr. Chairman, thank you. This is a very important hearing. We will listen very closely to your thoughts and recommendations. We do know some of them and appreciate you being with us. We are somewhat at a disadvantage because we only received the Administration's proposed budget legislation late yesterday afternoon, although we have talked about these issues for quite some time. It is critical to look at the words on the page and how each approaches include or are pieced together.

And Mr. Bradbury, from you I would like to know why in the world it took so long for this proposal to get to us. We have been talking about it for some time. We have been waiting to assist the President, provide him with important tools. It is terribly important that we pass some. In light of the Hamdan decision we can't go on in limbo. We must protect our troops and front line. We must be as stern and yet as fair as possible.

One approach would be for the war military commissions as they exist under the Uniform Code of Military Justice (UCMJ), which is mentioned in UCMJ, or is this a proposal of a new kind for a new court under military jurisdiction? Unlike other specialized courts such as the Foreign Intelligence Surveillance Act (FISA) court that is in existence, although not in use as we know, a couple of key principles to evaluate this is will this allow us to quickly and successfully prosecute terrorists? Will this system meet the requirements clearly laid out in by the Supreme Court in the Hamdan case? How closely does it adhere if we take this approach to the Uniform Code of Military Justice and does it rigorously maintain standards that protect American forces on the battlefield?

Well, gentlemen, we are looking forward to your views. We look forward to your thoughts on how the proposed legislation is enshrined in the Geneva Convention, including Common Article 3,

but like I say, the most important thing is to protect our troops on the battlefield, to have swift justice and as only Americans can give fair justice.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. And Mr. Bradbury, why don't you tee this thing up for us and tell us about the Administration's proposal?

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

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

The President announced yesterday that 14 senior members of al Qaeda had been transferred to the U.S. Naval Base at Guantanamo Bay. These men include those who orchestrated the murders of nearly 3,000 Americans on 9/11, the attack on the *USS Cole,* and the bombings of the American embassies in Kenya and Tanzania. In U.S. custody these individuals provided intelligence invaluable in the war on terror that has prevented attacks on the United States and saved American lives. As the President stated, the time now has come for the United States to prosecute these and other terrorists for the atrocities of 9/11 and their own war crimes.

Yesterday the President sent to Congress a Military Commission bill that will permit us to bring these terrorists to justice before fair and effective tribunals. This legislative proposal reflects the outcome of two months of intensive discussions within and across the executive branch and between the political branches of government. We have consulted extensively with Members of Congress and their staffs. These discussions have been equally extensive, even more so, within the Administration and have included input from the military lawyers in all branches of the armed services, including the TJAGs who are here today. They and their people have been active participants in our deliberations and many of their comments have been incorporated into the draft now before Congress.

The proposed legislation would enact a new Code of Military Commissions modeled on the courts-martial procedures of the Uniform Code of Military Justice, or the UCMJ, but adapted for use in the special context of military commission trials.

These military commission procedures would provide for fundamentally fair trials. The accused will know the charges against him. He will be presumed innocent until proven guilty beyond a reasonable doubt. He will have a right to counsel, including an appointed military defense counsel, and the ability to retain private counsel. He will be given a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the government. The prosecution will be required to disclose exculpatory evidence, evidence known to it. The accused will have the right to cross-examine witnesses who testify for the prosecution. He will have the right not to testify against himself. Evidence may be admitted only if the military judge finds that it would have probative value to a reasonable person, and it must be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice. The accused will have the right to at least two appeals from any conviction, including an appeal to an Article 3 court, and he may not be tried a second time for the same offense.

The new Code of Military Commissions would differ in significant respects from the military commission procedures established by the Administration before Hamdan. The presiding officer would be a certified military judge with the traditional authority of the judge to make final rulings at trial on law and evidence, just as in courts-martial. The minimum number of commission members would be increased to five from three. In death cases we would require a minimum of 12 members who would have to vote unanimously before a death sentence could be imposed.

While the President's legislation tracks the UCMJ, in many respects it departs from court-martial procedures where applying them would be inappropriate or impractical. For instance, we do not incorporate into the legislation the UCMJ's Miranda type protections for U.S. military personnel. Nor do we incorporate the pre-charging investigation under Article 32. Terrorists are not entitled to these protections, which might frustrate interrogations vital to our national security.

The draft legislation also provides for the introduction of all probative and reliable evidence, including hearsay evidence. Military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, and therefore they can not apply the strict rules of evidence appropriate for peacetime or court-martial trials.

The draft legislation also provides that under very limited circumstances classified evidence may be considered by the commission outside the presence of the accused. In the midst of the current conflict, we cannot share with captured terrorists the highly sensitive intelligence relevant to some military commission prosecutions. We believe it critical to ensure that military commissions have the discretion to admit classified evidence not shared with the accused in extraordinary circumstances.

The circumstances for exclusion will be detailed and narrowly defined, and the military judge will be required to find that exclusion is necessary and consistent with the accused's rights to a fair trial. These will not be trials in absentia. These procedures, properly administered by the military judge, would strike the appropriate balance between safeguarding our Nation's secrets and ensuring a fair trial of the accused.

The legislation submitted by the President, Mr. Chairman, also addresses, as you stated, the Supreme Court's ruling that Common Article 3 applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 to a conflict with international terrorists. Common Article 3 contains certain vague prohibitions, including a prohibition on, quote, outrages upon human dignity, in particular humiliating and degrading treatment. These terms are susceptible of uncertain and unpredictable application, and the Supreme Court has stated that courts may look to international tribunals in interpreting these terms. Therefore, without clarification the meaning of Common Article 3, which is the standard that now applies to the conduct of U.S. personnel in the war on terror, would be informed by the evolving interpreta-

tions of tribunals and governments outside the United States. This will create unacceptable uncertainty for U.S. personnel, both military and intelligence personnel, who handle detainees in the war on terror.

Let me be clear, as the President stated yesterday, the United States does not torture and the President has not and will not authorize torture. The President also supports and the United States is committed to complying with the McCain Amendment to the Detainee Treatment Act, which prohibits cruel, inhumane, and degrading treatment as defined in U.S. law by reference to our own constitutional standards.

Because the standards governing the treatment of detainees by United States personnel should be certain and defined clearly by U.S. law, the President's legislation would define our obligations under Common Article 3 by reference to the U.S. constitutional standards already approved by Congress in the McCain Amendment. Congress rightly assumed that the McCain Amendment provided an acceptable and appropriate baseline to government of the treatment of detainees on the war on terror and that standard fully satisfies United States obligations under international law.

The Administration also believes that we owe it to those called upon to handle detainees in the war on terror to ensure that legislation addressing the Hamdan decision brings clarity and certainty to the War Crimes Act. To that end, the proposed legislation sets forth a definite and clear list of offenses serious enough to be considered war crimes punishable as the most serious breaches of Common Article 3, including clear and serious outrages upon human dignity such as rape, sexual assault and conducting human experiments.

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

[The prepared statement of Mr. Bradbury can be found in the Appendix on page 61.]

The CHAIRMAN. Mr. Bradbury, thank you for a very concise opening statement, and gentlemen, the reason we have asked your attendance this morning is to reflect on and give us your evaluation of the Administration's proposals. So I hope you were listening to what the high points or the important points especially with respect to classified treatment of classified evidence and hearsay evidence. And if you would give us your thoughts on the Administration's proposal that would instruct us greatly.

So, and I just might comment. I was kind of surprised. We went over—we have done some hearings on this area and when we did the side by side and we looked at Nuremburg and we looked at the other tribunals, it occurred to me that the—that first I think a number of the members, myself included, were surprised that hearsay evidence is allowed in varying degrees in these tribunals, but it also appeared to me that at Nuremburg when we were trying the Nazi war criminals, we had the advantage of thousands of witnesses in some cases who had participated in the capitulated government and were available to testify against Nazi leadership.

The war on terror in this case continues and many of the statements that were linked, much of the evidence I would think instinctively because I haven't seen the case against people like

Khalid Sheikh Mohammed, who is thought by our intelligence community to be the mastermind behind the strike on America on 9/11, that much of the evidence that will be forthcoming in the near term with these immediate cases that are going to be set up for prosecution and over the years will be evidence that is in fact hearsay evidence. It would also occur to me that a great deal of it is going to be classified evidence. So dealing with those two areas, I think in a way that will allow us to have an effective prosecution is going to be a major challenge for us.

So just having said that, why don't we walk down the line here and gentlemen, we are very interested in your comments and your evaluation of the Administration's proposal.

General Black.

STATEMENT OF MAJ. GEN. SCOTT C. BLACK, JUDGE ADVOCATE GENERAL, U.S. ARMY

General BLACK. Thank you, Mr. Chairman, Ranking Member Skelton, and members of the committee. I would like to thank you for the opportunity to appear before you today and for the committee's timely and thoughtful consideration of these significant issues.

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

At the outset, I will tell you that military commissions are a necessary forum for the trial of enemy combatants captured in the Global War on Terror (GWOT). They are legally viable and pragmatically vital. They allow us to maintain the maximum flexibility in coping with these combatants we find on the current battlefield. Military commissions are well grounded in history and the Uniform Code of Military Justice and provide an indispensable tool to ensure justice under the rule of law.

The Hamdan decision has reinforced our need to ensure military commissions are reflective of American values such as due process and the rule of law. Our task has been to balance the utility of the military commissions with these values that are foundational to our democratic society. We have been working within the government to assemble a product that will do this, that will not only protect this great Nation from those who are committed to destroy it but that will simultaneously uphold the principles that distinguish this Nation from those who attack it.

We are prepared to work together with the Congress and look forward to being participants in the continuing developmental process. And with that, Mr. Chairman, I look forward to your questions.

[The prepared statement of General Black can be found in the Appendix on page 71.]

The CHAIRMAN. Thank you, General Black. For the record all statements, without objection, will be taken, all written statements will be taken into the record and feel free to summarize your statements. Let me just ask our panel we understand that you are ready to work with the Congress and you feel this is a—you have opinions on whether this is a good product or not a good product. We would like to hear that, but I would also like to hear your

thoughts especially on these area of classified evidence, hearsay evidence, evidence obtained by coercion, some of these challenges that we are going to have to meet as we put this construct together. So if you could comment on that, that would be greatly appreciated.

So Admiral MacDonald, thank you for being with us today.

STATEMENT OF REAR ADM. BRUCE E. MACDONALD, JUDGE ADVOCATE GENERAL, U.S. NAVY

Admiral MACDONALD. Good morning, Mr. Chairman, Ranking Member Skelton, members of the Armed Services Committee. Thank you for the opportunity to testify today on the subject of military commissions.

The CHAIRMAN. Before you start, let me ask my colleagues, we are going to have other—if other members who are not members of the committee would like to sit in on either side of the aisle, it is my feeling we should let them sit in and after our questions are finished, we should let them ask questions. Without objection, let us let that occur. So ordered.

Go ahead, Admiral.

Admiral MACDONALD. Congress' establishment of a legal permanent framework for military commissions, a Code of Military Commissions, would be a welcome addition to military jurisprudence. My view is that existing court-martial rules are not practical for the prosecution of unlawful enemy combatants now or in future conflicts.

Yet our military justice model, the Uniform Code of Military Justice, can provide an appropriate starting point for the drafting of commission legislation. We have been working with others in the executive branch to formulate precisely such a bill. I recommend that legislation establish the jurisdiction of military commissions, set baseline standards of structure, procedure and evidence consistent with U.S. law and the law of war and proscribe all substantive offenses.

The legislation should further authorize the President to promulgate supplemental rules of practice similar to the manual for court-martial or in this case a manual for military commissions. The legislation proposed by the President generally accomplishes those goals.

I and other military lawyers have worked with many others in the Administration to incorporate these ideas into the draft legislation recently submitted before you. It reflects many of our comments, although there are some issues, particularly the use of classified evidence, where I would stand by the approach to that taken by the Uniform Code of Military Justice. It is Congress, however, that will make the final decision on these issues. I am confident in so doing that we can achieve the necessary and appropriate balance between affording an accused the judicial guarantees recognized as indispensable by civilized people on the one hand and/or valid national security interests on the other.

Mr. Chairman, you asked that we comment on some specifics that you talked about with respect to hearsay. It would be my opinion that the hearsay proposal that the Administration has for-

warded is adequate as it currently stands in the draft bill that you have before you.

With respect to coerced statements, it would be my position that I would not—I would recommend that the committee look at not allowing coerced statements, that the statements that are obtained under torture are excluded under the current commission rules. However, statements obtained through coercion if they meet a reliability and probative test are admitted. I would recommend that the committee look to the Detainee Treatment Act and the cruel, inhumane and degrading treatment standard and apply that standard as well to statements that may or may not be coerced, and I would leave that determination to the military judge in charge of the commission to balance those competing interests.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Okay. Thank you very much, Admiral. General Dunlap.

STATEMENT OF MAJ. GEN. CHARLES J. DUNLAP, JR., DEPUTY JUDGE ADVOCATE GENERAL, U.S. AIR FORCE

General DUNLAP. Thank you, Mr. Chairman, Ranking Member Skelton, and distinguished members of the committee.

Major General Rives, the Judge Advocate General, is traveling overseas. Accordingly, I appreciate the opportunity to appear before you today as this committee carefully considers the authority of the United States to prosecute suspected terrorists, consistent with the Supreme Court's decision in *Hamdan* v. *Rumsfeld*, and Mr. Chairman, with your permission I am going to summarize my statement.

The CHAIRMAN. Go right ahead.

General DUNLAP. It will be in the record.

The Uniform Code of Military Justice and the Manual for Courts-Martial provided a superior starting point for development for a revised commission process and there will of course, as Admiral MacDonald indicated, necessarily be adjustments and changes from the manual and the Uniform Code. However, many of these processes can be readily adapted to meet the needs of military commissions and at the same time meet the requirements of Common Article 3 of the Geneva Conventions. The proposal submitted to Congress by the President reflects an attempt to adapt the UCMJ to the military commissions process. I personally support many, if not most, of these provisions.

A revised approach to military commissions is not only the right thing to do, but it also serves a pragmatic military purpose in helping us in the Global War on Terror.

Success in this war requires cooperation of many nations around the world, and addressing the Supreme Court's concerns about military commissions will reaffirm our position on the moral and legal high ground. A process fully compliant with Common Article 3 will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind the prosecution of military commission cases. Doing so is plainly in our warfighting interests. I look forward to discussing these issues with the committee.

Mr. Chairman, with respect to your specific questions I concur with Admiral MacDonald in his view of the legislation.

With respect to coerced statements, I would say that every interrogation is coercive to some degree and what we are looking at here is unlawful coercion, and the concepts that Admiral MacDonald indicated I think are the right ones to do. I would leave it up to the military judge to determine in that context whether or not the interests of justice are served by admitting the statement.

[The prepared statement of General Dunlap can be found in the Appendix on page 79.]

The CHAIRMAN. Okay. Thank you, General. General Walker, thank you for being with us today. The floor is yours.

STATEMENT OF BRIG. GEN. JAMES C. WALKER, STAFF JUDGE ADVOCATE TO THE COMMANDMENT, U.S. MARINE CORPS

General WALKER. Thank you, Chairman Hunter. Members of the committee, good morning. I want to thank you for the opportunity to be here today and for your committee's continuing interest in the military commission process.

Since the Supreme Court decision in *Hamdan* v. *Rumsfeld* back in June there has been a lot of discussion and debate on the future course of the commissions and of course yesterday the President announced a new legislative proposal. All the proposed solutions must achieve that delicate balance between individual due process and our national security interest. We must maintain our Nation's ability to deal with terrorists and unlawful enemy combatants, but at the same time we must also provide those judicial guarantees which are recognized as indispensable by civilized people.

While we seek that balance we also must remember the concept of reciprocity. What we do and how we treat these individuals can in the future have a direct impact on our servicemen and women overseas. I have reviewed the administrative proposal legislation submitted yesterday and I think it does provide a solid foundation to achieve these balances.

I personally remain concerned about any process which would permit the introduction of evidence against an accused outside of his presence. I simply believe the right to see the evidence against you and to be present when evidence is presented are fundamental to a full and fair trial and are also part of those judicial guarantees which are recognized as indispensable by civilized people.

This may require in particular cases, I understand, that the government would have to balance and then have to balance the need for prosecution on a particular charge against the need to protect certain classified information.

I concur with the comments of Admiral MacDonald and General Dunlap as to hearsay evidence. I think that the proposals on hearsay evidence do provide adequate safeguards. They conform with the accepted legal standards but also recognize the unique character of the conflict we are in now and the availability of evidence and the availability of witnesses worldwide.

Like my counterparts, I look forward to working with Congress to create a system that will simultaneously help defend our Nation from those who seek to destroy it but also uphold the values which have set us apart for over 230 years. Thank you, sir.

[The prepared statement of General Walker can be found in the Appendix on page 84.]

The CHAIRMAN. Thank you very much. Colonel Reed.

STATEMENT OF COL. RONALD M. REED, LEGAL COUNSEL TO THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, U.S. AIR FORCE

Colonel REED. Thank you for the opportunity to come here this morning and speak to you about this extremely critical issue. I do not have a written statement to provide. I was notified late that I would be attending this hearing.

The CHAIRMAN. That may be good, Colonel Reed. Go right ahead.

Colonel REED. I am happy to answer any questions you have today. With respect to my opinion on the draft of legislation that has been offered by the Administration and my discussions with General Pace, the Chairman of the Joint Chiefs, I am comfortable that the balance that is established in the legislation meets the requirements of fundamental fairness that you talked about at the beginning and also at the same time allows us to operate effectively on the battlefield. We feel that the language in the legislation, the protections that are articulated in the legislation, particularly with respect to the issues you identified, hearsay, coercion and access to classified information, provide the appropriate balance as well as providing that stopgap safeguard of a military judge making decisions based on the rules presented.

So I am happy to answer questions that you have today. Thank you.

The CHAIRMAN. Thank you, Colonel Reed. Gentlemen, let us get right to work and talk about practical aspects of this proposal.

If you have a defendant and the key information; that is, the evidence that would convict him or her, is classified evidence, we have a procedure under UCMJ where you have attorneys, an attorney, a gentlemen or a lady wearing a uniform with a clearance who can *in camera*, the attorney for the accused confronts that evidence, cross-examines with respect to that evidence and treats that evidence. You have an opportunity at least through counsel to confront the classified evidence that is utilized against you. If you have a defendant, an alleged terrorist who fires his government attorney and hires a civilian attorney and the evidence that would convict that terrorist is classified and if you allowed the people or the process, the sources and methods, if you will, to be identified and to have that get out it would mean that people would die and that valuable information would be lost. And so you can't compromise that classified evidence by giving it to the defendant. Nor can you—nor can you compromise it by giving it to his attorney who does not have security clearances and perhaps has no interest in keeping that evidence secret.

What do you do? Do you—does the court—can the court appoint for purposes of confronting that classified evidence only a court appointed JAG lawyer with the necessary clearances? Do you drop that evidence and in doing so dismiss or cause a dismissal of the case? What happens? What do you think, Mr. Bradbury?

Mr. BRADBURY. Mr. Chairman, one way to handle that is not to let the accused fire his military defense counsel, the appointed de-

fense counsel. One way to handle it is to require that all of these accused in these military commissions will have an appointed military defense counsel who will have the necessary clearances and will be able to get access to any evidence that is proposed to be used against the accused.

The CHAIRMAN. You have a provision like that in the Administration proposal where you cannot because you rarely see a case where you are not allowed to fire your counsel?

Mr. BRADBURY. Well, we don't have a provision that expressly satisfies that but we have a provision that makes it clear that each accused will have an appointed military defense counsel, and it is envisioned that that is an essential part of these procedures.

The CHAIRMAN. But it also allows for defendants to have their own counsel and I think you can imagine that some of these high profile people, some of the people who are alleged to have participated in the attack on the United States at 9/11 will have plenty of money available and will have civilian counsel available and will be in a position at one point to walk in and tell the judge that they want to get rid of their court appointed military counsel with the necessary clearances. What then?

Mr. BRADBURY. Well, we would envision that you—it would not be appropriate and is not a necessary requirement that you allow these accused to represent themselves in trials to turn in——

The CHAIRMAN. I am not talking about representing yourselves. I am talking about substituting out their military counsel for their paid and perhaps very well paid civilian counsel who do not have clearances and with whom you can't entrust highly classified information. What do you do?

Mr. BRADBURY. Mr. Chairman, that is why we would require that every accused get an appointed military defense counsel. If he hires a private counsel he has a right to do that. If he hires a private counsel, we would provide that the military counsel would be the associate counsel to the hired counsel. But in the circumstances you described, it is precisely because of circumstances like that where it is essential for these procedures to work in an orderly and efficient fashion and in a fair fashion that there be a counsel appointed by the military that is cleared in and has the ability to treat all of that evidence and handle these matters, and it just has to be that way in my view.

In addition, I would quickly point out in addition to that, in the proposal we have put forward there are many procedural hurdles, requirements, and limitations that would have to be met before any classified evidence would be considered by the military commission outside the presence of the accused. Lots of procedural hurdles and findings the military judge would need to make. Alternatives would need to be explored such as the use of summaries or substitutes, et cetera, and in all cases there would be at least one military counsel or private counsel that would get access to that information. So it is limited to extraordinary circumstances, and I think that is the best way to approach it.

The CHAIRMAN. If we placed in the legislation a provision that said that at all times the accused must have a defense counsel with sufficient security clearances to participate in any proceeding, especially with respect to this classified evidence, including *ex parte* or

an *in camera* presentation with respect to classified information, would that be—would that give any value added to this proposal?

Mr. BRADBURY. That would be acceptable and may be a good idea, yes.

The CHAIRMAN. You have laid out how the Administration proposes to deal with this classified information. Let us walk down the line here.

General Black, what do you think?

General BLACK. Yes, sir. You have hit on the real key issue here, the balance between protecting our national interests and our security and skill providing a full and just trial for these unlawful combatants. As Mr. Bradbury said, the proposed legislation does indeed contain a great number of safeguards in this process, many of which mirror what we have in Military Rule of Evidence 505 that you alluded to earlier. And I commend the Department of Justice and all of the people that have worked on this in terms of getting this as far as we have. We really have strengthened the procedures and we can be quite proud of that.

I remain concerned about a couple of things, though, and I would add a little bit to this package with respect to the introduction of classified evidence.

The CHAIRMAN. Go right ahead.

General BLACK. I am concerned, one, that the package does not contain a provision that would prohibit the admission of evidence outside of the presence of the accused when that evidence is the sole evidence admitted to establish a material fact. If you follow. If it is the only piece of evidence that is necessary to convict, then I remain concerned about excluding the accused.

The CHAIRMAN. Now let me ask you on this point. If you have—let us take a hypothetical situation—a person hands a piece of prohibited information or secret information in furtherance of a terrorist plot over the fence to a fellow terrorist at a—let us say at a military base, an American agent who is undisclosed sees that. He is a trusted agent. He knows the people. He sees the hand-off and yet the last thing you want to do is to reveal that agent's identity. According to what you have just said—and that is the only piece of evidence that you have that would convict this particular person, yet it seems to be highly reliable and the person who sees it is a member of the Armed Forces and he knows the parties who make the hand-off. But according to what you have just said, you would drop the case against that alleged terrorist on the basis that you don't want to—that you don't want to prevent him from confronting his accuser who in this case can't be confronted because he is an agent. Is that what you are saying?

General BLACK. No, sir. I am saying you would drop that piece of evidence.

The CHAIRMAN. But I want to pin you down here, General. That is the only piece of evidence that you have. You know, some of these acts of complicity in terrorist operations or plots are very small pieces. The guy that drives the car, the guy that delivers the document, and you don't have in many cases other broad evidence. And yet that obviously is very probative. If in fact you see that person is seen by an American agent handing off a document which furthers a plot to kill Americans, that is obviously very probative.

That is enough to convict him and yet if you are saying that if that is the only piece you have, you have to let him walk. Is that right?

General BLACK. If you get to the end of that trail, you do. You are skipping the safeguard that we already have put in place and we have a number of mechanisms that have been drawn by 505 summarization of the evidence, alternative forms of testimony or alternative forms of evidence that comes in to provide the same kind of information so that the case can go forward. I think if you get to that trail and you have gone through all of those things and the military judge has determined that it is still probative, I think then you have to exclude the evidence if the accused is not allowed to see it.

The CHAIRMAN. Please understand, in the hypothetical I am giving you there isn't additional evidence and if you can—if you say a summary of the evidence, summary of the evidence does not amount to face-to-face confrontation by a defendant or his attorney. So I know I am asking the tough questions, the problem is the tough questions are the ones that are going to arise when we put this system in place. You are saying that if you had that one piece of probative evidence itself based on an agent's statements whose identity we can't disclose that and you would drop that case rather than allow an *in camera* examination by a cleared court appointed military counsel; is that what you are saying?

General BLACK. I believe the accused should see that evidence. In the example you provided, I believe the accused should see that. I would add one additional protection. I would add a jury instruction. I think the members of the commission with evidence that the accused has not been allowed to see, assured we get that far, I believe that the members of the commission should be advised that the accused has not seen that evidence, has not had an opportunity to confront that evidence and the members of the commission should be advised to accord appropriate weight to that evidence.

The CHAIRMAN. I understand that. Now that is assuming that we have a rule that does allow for a conviction without the person being able to see the evidence.

General BLACK. Roger, Sir.

The CHAIRMAN. But your position is if that is the evidence that convicts that person it is a Khalid Sheikh Mohammed or anybody else should be allowed to personally confront that person—maybe it is an American agent—and without that confrontation should be—if that is the only probative evidence then the case should be dropped.

General BLACK. If it is the sole evidence to prove the material fact.

The CHAIRMAN. Fair enough. That is your position. Admiral, what do you think?

Admiral MACDONALD. Yes, sir. I agree with General Black. I believe that is required under Common Article 3 as one of the judicial guarantees recognized as indispensable by all civilized nations. I think that is so important in this context to get that balance right.

The CHAIRMAN. Okay. But let me offer you the caveat, though. What the Administration apparently has offered and is the idea that you would have, while Khalid Sheikh Mohammed might not be able to see the identity of that agent and cross-examine him, his

attorney, a court appointed attorney, a judge appointed attorney who is appointed for that purpose of cross-examining the nondisclosable information or nondisclosable persons would do that, would be allowed to do that cross-examination, do that confrontation and examination. You are saying even with that safeguard unless Khalid Sheikh Mohammed himself got to see the agent then you would not move forward.

Admiral MACDONALD. Yes, sir.

The CHAIRMAN. What is your answer?

Admiral MACDONALD. I would not let it go forward. And part of the reason is the—as the commission rules are currently constituted, the defense counsel cannot talk to their client about the classified information either. So I think that they need, the defense needs to be able to talk to their client about the evidence that has been presented in your hypothetical if it is the only piece of evidence. What essentially we have set up is a commission where the accused is going to be excluded from the entire commission process. If that is the only evidence that the government is going to present, the accused won't be in the commission to hear any of the evidence that is introduced against them.

The CHAIRMAN. Well, now are you conclusively sure that the counsel could not communicate in any way to the accused about the accusation. There may be aspects, there may be aspects of the accusations of the evidence which are not classified.

Admiral MACDONALD. He could communicate about those unclassified but in your hypothetical——

The CHAIRMAN. He couldn't disclose the identity?

Admiral MACDONALD. He could not disclose anything that the military judge determined was classified and necessary to come in. And if it was the only piece of evidence I would have serious concerns about preceding in a military commission under those circumstances.

I would also add, sir, that even under the commission rules as currently constituted, there is a provision at the end under this balance that is done under this 505 like rule that talks about the military judge making a determination that the accused received a full and fair hearing. I can't imagine any military judge believing that an accused has had a full and fair hearing if all of the government's evidence that was introduced was all classified and the accused was not able to see any of it.

The CHAIRMAN. Not the accused but his attorney?

Admiral MACDONALD. No. I think the accused, sir. I think that is what *Hamdan*, Common Article 3, at least four Justices came out and said that they would view—that they view that as a judicial guarantee and a fifth, Justice Kennedy, said he would view with concern an attempt to exclude an accused from hearing the evidence against him.

The CHAIRMAN. Okay. Okay. Fair enough. And incidentally on that one point under the UCMJ is that the—isn't that the—and we have walked through this process several times about how classified evidence is used in trials with respect to our own uniform personnel. Is that the rule that is in place under the UCMJ? In other words, if you are represented by Colonel Jones, who is a JAG officer, and you have maybe that same scenario where you don't want

to disclose something or it is classified evidence, do we have the rule that if that is the probative evidence in the case and the defendant is not personally allowed to cross-examine the agents or to see the agent and see what he is saying, then the case is dropped? Is that the rule under UCMJ?

Admiral MACDONALD. Yes, sir. There are a number of provisions under 505—that is one remedy—is the government is put to the task of making a decision if the judge has said look, the defense needs to see this evidence, it is material to their defense of their case, then the judge would make a ruling that would say government, it comes in in all of its classified form and then the government at that point would step back and say do we really want to proceed forward. So the government would—could drop that particular specification under a charge. That would be a possible remedy.

The CHAIRMAN. Let me ask you one further question there. My understanding is that in these *ex parte* or *in camera* proceedings you have JAG officers who have necessary clearances to see the classified evidence or a civilian officer who has the necessary clearances. If you are telling me that the defendant in all cases gets to see it anyway, even if he has no clearance or the case is going to be dropped if it is the only piece of evidence, why then is it necessary to give that type—to require that type of a clearance for his attorney? You see what I am saying? If a corporal, general is going to get to see the evidence and he doesn't have the clearance, why is it a requisite that Colonel Smith, who is his JAG officer, have that clearance?

Admiral MACDONALD. But he is potentially—the defendant is potentially not going to see it. In that *ex parte in camera* proceeding under 505, the military judge listens to the government counsel, the government counsel produces the evidence. If it is classified evidence, the government has to demonstrate that it remains classified and the government counsel then talks to the judge about this is how I intend to use this. The judge in that case will look at trial to prepare a redacted, unclassified version that could be used and could be delivered to the defendant under 505.

The CHAIRMAN. Okay, fair enough. Thank you. And General, well, let me first advise the committee. We have got the rule coming up on the livestock bill, and I understand it is just one vote. So why don't we go ahead and keep moving? We have got a lot of work to do and we will go right on down the line here and let me ask, one of my colleagues can whip over and get that vote. We will keep moving here.

Dr. SNYDER. Mr. Chairman, I am sorry. I understand your wanting to keep it moving, but, I mean, those—I think most of us will go vote and we are going to miss minutes of this discussion. Will you at least give us five minutes?

The CHAIRMAN. Let us have a show of hands. How many folks want to keep going? How many folks? Put your hand up. How many folks would like to take a break and come back in 10 minutes or so? Okay, we will take a break, and General Dunlap, we will come back and we will resume with you.

On to the livestock vote.

Okay, folks, we will fire back up.

And, General Dunlap, you have—you have listened to the preceding comments and know the issue. What is your take here?

General DUNLAP. Thank you, Mr. Chairman. A couple points I wanted to add to this conversation: one, this is a great demonstration of democracy in action that you have invited this kind of debate. I very much appreciate it. Thank you, sir.

Just the proposal by the Administration does require civilian counsel to be eligible for security clearances. And when we talk about the procedures for the admission of evidence, the 505 procedure under the military rules of evidence that we use at courts-martial is a process by which the military judge examines the classified material, sees if it can be summarized, redacted in some way, and the accused is not present during that process.

The issue that I think is—once you get, for example, a redacted or summarized version of the testimony—and in the military commission process you don't have the confrontation issues that you would necessarily have in a court-martial because hearsay is generally allowed. What goes to the members, the finders of fact, must be presented to the accused, in my judgment.

In other words, I don't believe that we ought to have a trial where, for example, the entire evidence is not presented, that is, presented to the finders of fact the accuser never sees, so—but that is distinct from the preliminary process where the classified is evaluated and an effort is made to summarize it or redact it in a way so that sources or methods aren't compromised, and that would be facilitated under the commission process because of the liberal rules on hearsay.

The CHAIRMAN. Yeah. It would seem to me the problem is going to occur when it is cases of identifying people and allowing the accused to see who the agent is, for example, or the unidentified person who may be of great value to our—to our intelligence apparatus.

General DUNLAP. And—right, and a particular case, it may not be necessary to have the accused see that person because it may not be necessary for that person to be presented to the finders of fact. In other words, you might have summarized testimony or summarized redacted material down to an unclassified level.

The CHAIRMAN. But certainly you know that he is going to demand, especially if he knows that the failure to produce the identity and allow him to identify that person would result in a dismissal.

General DUNLAP. Well, even under the——

The CHAIRMAN. You understand that, General. There will be an aggressive demand.

General DUNLAP. Absolutely, sir. We will see litigation on every aspect of this no matter what kind of legislation we have. Under the Military Rules of Evidence, we have what we call "pseudonym testimony." For example, individuals can testify under a different name. The trier of fact will know that that person is testifying under a different name, but that protects the individual, provides another level of protection and the triers of fact are so instructed.

As I say, in the military commission process, there is an additional flexibility because of the relaxed rules with hearsay, but my bottom line, my personal opinion, sir, is that we cannot have a

process whereby the finder of fact, not the judge, is deciding, but the finder of fact gets evidence that the accused never sees and never has the opportunity to defend against because——

The CHAIRMAN. Even though his lawyer sees it?

General DUNLAP. Even though his lawyer sees it.

The CHAIRMAN. Okay. Okay. Fair enough, General.

General Walker.

General WALKER. Sir, I concur with my colleagues that if we get to a point where the sole evidence against an accused is classified, he must be able to see that evidence; that is just essentially one of those elements of a full and fair trial.

I am not aware of any situation in the world where there is a system of jurisprudence that is recognized by civilized people where an individual can be tried without—and convicted without seeing the evidence against him. And I don't think that the United States needs to become the first in that scenario.

I think though, sir——

The CHAIRMAN. Well, what if the held-back evidence, though, is not the testimony that he did such and such or that he said such and such or he moved a bomb from a certain place to another place, but simply the identity of the person who saw that even though his lawyer with a security clearance gets to cross-examine that person and sees the identity—in other words, he would get the evidence surrounding the accusation, all of the peripheral facts would be known to the person himself, to Khalid Sheikh Mohammed, for example, but the identity of the American agent, the person who conveys that, that would be known only by his defense counsel. You see that as not acceptable? Because that is what we—we have got to get down to tough cases here.

General WALKER. Yes, sir. The key is not whether his attorney saw it. The key is whether the trier of fact saw that evidence.

The CHAIRMAN. No. Certainly the trier of fact sees it, but I am talking about his team. If he doesn't get to know the name of the person who testified, who gave this evidence, but you get to know the nature of the evidence, what it was—somebody saw him carry the bomb, do some other thing—it is your position that even though his attorney gets to cross-examine that person in camera with this classification, unless he himself gets to know the identity of the agent, then you can't move forward if that is the sole evidence?

General WALKER. If that is the sole evidence, yes, sir.

The CHAIRMAN. Okay.

General WALKER. Because the key is the meaningful participation of the accused in his trial, not the participation of his attorney.

One additional point though, Mr. Chairman, is that in a couple of discussions already, we have said if we arrive at that situation, then prosecution must be dropped. In fact, I don't think that is entirely accurate. The prosecution could, in fact, be deferred.

Most of the scenarios where we are discussing this classified information would come down to scenarios where the classification deals with means, methods or sources. Often the passage of time makes a difference in whether those remain classified; and particularly with the unlawful combatants that we are dealing with here, deferral of prosecution is an option. It doesn't necessarily mean

that if the government was unable to prosecute based on divulging the classified information that the individual would walk free.

The CHAIRMAN. Okay. Very good, General. Thank you.

Colonel Reed.

Colonel REED. Sir, implicit in what General Walker just said is the recognition that the unlawful combatants that we are currently detaining are, in fact, enemy combatants against the United States and are being detained based upon that. I think that is an important factor to recognize, that they are being detained, and those being detained at Guantanamo are being detained because they are combatants of the United States, being kept off the battlefield.

With respect to your question on the issue of classified information and with respect to the points that the panel members have made so far and the question whether or not you could ever have a situation where evidence is admitted against an accused where the accused is not seeing that evidence, in fact, there are circumstances where that happens. There are currently circumstances in the Uniform Code of Military Justice where, for example, an accused who has been arraigned voluntarily absents themselves from the proceeding, or if they become disruptive, they can be pulled from the courtroom and not have access to any of the evidence that is being presented against them.

Now, that does not go directly—that is a voluntary act on their part; it does not go directly to the issue that you have asked, but it does present a point where there may be circumstances where the accused is not going to be present when evidence is being offered to the trier of fact. So then you have to look at the current circumstances we find ourselves in today with respect to the enemy that we are fighting, how they operate, the need to protect the methods and sources that General Walker talked about and determine, as you create a system that is fundamentally fair, whether or not you can then limit their access to that classified information. That is another one of those kinds of examples where an accused may not be present when certain evidence is being offered.

The CHAIRMAN. Very good. Thank you, Colonel.

Mr. BRADBURY. Mr. Chairman, may I just add a couple more cents?

The CHAIRMAN. Absolutely.

Mr. BRADBURY. Thank you.

I would implore Congress not to prejudge these issues through black-and-white prohibitions in statute. I think it should be left up to the military judges on a case-by-case basis to protect the fairness of trials, and anything that we are talking about in this legislation would be subject to a finding that the accused has received a full and fair trial.

And many of the procedures we are proposing are very similar to those in rule 505 of the Military Rules of Evidence that would require the use of substitutes or summaries in lieu of classified evidence wherever possible, and the accused would always get to the extent possible an unclassified summary of the evidence that was presented.

But as Colonel Reed just said, the notion of presence at trial I don't think is—it is clearly not an absolute in international law. If, for example, the safety of witnesses require it, the accused may be

excluded from the trial. And so the principle is not different from the protection of witnesses versus the protection of sensitive sources, methods and intelligence information in an ongoing conflict.

For example, in the Tadic prosecution before the International Criminal Tribunal for the former Yugoslavia, the tribunal decided that a witness—anonymous witness' testimony could be taken. So as long as it was facially credible, they allowed witnesses to testify whose identities were concealed from the accused, and even from the accused counsel, and whose voices were obscured and were even screened off.

So that is a form of evidence being taken outside the presence of the accused, and there the court, the tribunal, is the fact finder, and it is also the court that made judgment that the testimony was facially credible and the court knew the identity of the witnesses involved, but the accused did not. And that was determined to be consistent with international standards for a fair trial.

So principle—it is a different situation, but the principle is really the same. You are protecting the safety of intelligence information in the war versus protecting the safety of individual witnesses.

And then just the last thing I would say, Mr. Chairman, is the idea that there be some blanket prohibition on the use of classified evidence outside the presence of the accused if it is the sole evidence on the material fact. Again, I wouldn't prejudge that, try to do that by statute. I think the accused will always claim that every fact is a material fact, and these arguments will be made, and as I think General Dunlap said, they will be litigated. I think I would leave it up to the military judges on a case-by-case basis to decide, so that the fairness of the trial is preserved and that in particular circumstances, particular evidence is appropriate and in others it is not. And I would leave it to them and I wouldn't try to prejudge it.

Thank you.

The CHAIRMAN. Okay. Thank you, Mr. Bradbury.

The gentleman from Missouri, Mr. Skelton.

Mr. SKELTON. Mr. Bradbury, I am somewhat intrigued by your comments to leave it to the judge and for us not to write basic rules by which trials are to be conducted. I am an old country lawyer, and we pretty much follow the statutes back in Missouri and I think it would be a good idea for us on major things, major items, to have a statute thereon.

Mr. Bradbury, let me ask you: Senator John McCain was quoted in *The New York Sun* as saying, "I think it is important that we stand by 200 years of legal precedence concerning classified information because the defendant should have a right to know what evidence is being used."

Do you agree or disagree with Senator McCain?

Mr. BRADBURY. Well, I think the——

Mr. SKELTON. No. Just agree. Do you agree or disagree? We will get along much quicker.

Mr. BRADBURY. I stand by the proposal in the Administration's legislation which would allow for the possibility——

Mr. SKELTON. You disagree with that statement?

Mr. BRADBURY. If the statement means——

Mr. SKELTON. I will read it again. Do you want me to read it again?

"I think it is important that we stand by 200 years of legal precedence concerning classified information because the defendant should have a right to know what evidence is being used."

Do you agree or disagree?

Mr. BRADBURY. If the—I am sorry, Congressman. If that statement means that there would never be a circumstance where classified evidence could be used at trial and not—and the classified evidence not made available to the accused, I would disagree. But I would point out that we would provide summaries of the evidence that is unclassified to the accused; and then in that sense, the accused would have an understanding of the evidence that is being used against him, but would not see the classified aspects of the evidence. His attorney would.

So his attorney would have a full opportunity to see it, to make an argument based on it. So consistent with the full and fair trial, up to the military judge; and I don't think that is inconsistent with traditional or, as I say, with international standards.

Mr. SKELTON. Do you agree or disagree with Senator Lindsey Graham quoted from *The New York Times*, "I do not believe it is necessary to have trials where the accused cannot see the evidence against them"?

Mr. BRADBURY. In these limited circumstances, we do think it is necessary to have this tool available for these prosecutions.

Mr. SKELTON. You are disagreeing with that statement?

Mr. BRADBURY. Again, if that statement means there would never be such circumstances——

Mr. SKELTON. It means what the English language says. Do you agree or disagree with it? This isn't—this isn't——

Mr. BRADBURY. I disagree that we should close the door to this possibility. This is going to be an important aspect of our ability to prosecute in certain of these important cases, not all; and not—and we are not talking about a common part of it. We are talking about in extraordinary circumstances.

We have to leave that door open, and I would just implore the Congress not to close that door, and if that statement means the door should be closed to the use of that kind of evidence, then I think that is unacceptable.

The President has said, yes, as it was suggested, we could wait until the end of the conflict to prosecute or we could drop the prosecutions. I think from the President's perspective, both of those options at this point are unacceptable.

Mr. SKELTON. Under your proposal, who would be the persons covered by your language in this bill?

Mr. BRADBURY. The persons who would be subject to the military commission trial would be unlawful enemy combatants. There is a definition in the bill that would include those who fight on behalf of terrorist organizations like al Qaeda, and it would be limited to unlawful enemy combatants who commit violations of the law of war. So it would not apply to prisoners of war (POWs) or protected persons under the Geneva Conventions, and the legislation would expressly stipulate that those protected persons would be tried

even for their war crimes by courts-martial or other tribunals and not by these military commissions.

Mr. SKELTON. How about those that violate human rights?

Mr. BRADBURY. Well, some of the war crimes are also crimes against humanity, but what we are talking about here is enemy combatants who have been engaged in supporting hostilities against the United States. So fundamentally we are talking about war crimes and enemy combatants. This is a law of war paradigm.

Mr. SKELTON. May I ask you what I posed in my opening statement? I know you have been working on this for quite some time, but we just received this yesterday. Would you explain to the committee why we didn't have it at least several days before?

Mr. BRADBURY. Well, I can certainly say we have worked very hard, as I believe you know, Congressman, for two months on this project, coming off the court's decision, and much of that work involved consultations with the armed services and military lawyers and the Department of Defense; and much, much work was done, many changes were made in the legislation as it evolved.

I think a lot of improvements were made. I think these gentlemen and their staffs provided terrific input that improved the bill significantly. And in addition to that process, there was extensive consultation with various Members of Congress and their staffs.

I walked through proposals, draft language with members and with staff and took suggestions, and the product continued to evolve right up until days before we submitted it. So I think we have benefited from that continued work.

Mr. SKELTON. Did you contact any person on our side of the aisle regarding this?

Mr. BRADBURY. There were consultations, yes.

Mr. SKELTON. Now, you did not put this within the structure of the Uniform Code of Military Justice; is that correct?

Mr. BRADBURY. It actually is modeled closely on——

Mr. SKELTON. No, no, no, no. I am not talking about modeled. I am talking about within the structure of the Uniform Code of Military Justice.

Mr. BRADBURY. We adopted the structure of the Uniform Code of Military Justice for this Code of Military Commissions. So it does reflect almost the entire structure of the Uniform Code of Military Justice for courts-martial with certain key differences, as we have pointed out. But it would be—you are right, Congressman, it would be a separate code and a separate procedure, because the President feels very strongly that these proceedings and these trials for enemy combatants, for unlawful enemy combatants should be kept separate from the court-martial proceedings that we use for our own troops.

Mr. SKELTON. I won't be short, but let me ask you just a couple more questions.

The former detainees that have just been turned over to the Department of Defense, what is that—15; what is the number?

Mr. BRADBURY. Fourteen.

Mr. SKELTON. Fourteen. The intention is that they be tried under whatever law Congress passes; is that correct?

Mr. BRADBURY. I think the intention is that all of their cases will be reviewed for trial—for possible prosecution under the military

commission procedures that come out of this process. So we will seek to prosecute them. There is no guarantee that prosecutions will move forward.

They remain enemy combatants, and we will hold them either way, but the hope and the intent is that as quickly as possible after legislation is in place, we will review their cases and move them forward for possible prosecution.

Mr. SKELTON. Does your proposal include the protections under the Geneva Common Article 3?

Mr. BRADBURY. Yes, it does, Congressman. We think the procedures for these military commissions would fully satisfy the requirements for the Common Article 3.

Mr. SKELTON. Does it state that?

Mr. BRADBURY. Yes.

Mr. SKELTON. Thank you.

The CHAIRMAN. Thank the gentleman.

The gentleman from New Jersey, Mr. Saxton.

Mr. SAXTON. Thank you, Mr. Chairman.

Mr. Bradbury, as I read the Administration proposal, it seems fairly clear that the proposal would target not only members of the organization that we call al Qaeda, but it would target other individuals from organizations who are in the business of carrying out asymmetrical warfare that we generally refer to as terrorism.

Let me ask you a hypothetical question.

In the case of Hezbollah, which is clearly a state-sponsored organization and an organization that clearly targets civilians, in the event that the U.S. captures a member of Hezbollah—incidentally, an organization that has killed more Americans than any organization other than al Qaeda—under what circumstances, I guess is the question, could that member of Hezbollah be tried under the military commission that you have proposed?

Mr. BRADBURY. Congressman, I believe it would only be if it were determined that Hezbollah is engaged in hostilities against the United States. Again, this is an armed conflict law, war paradigm, and it is clear that we are at war with al Qaeda and its affiliates. So that would be—that is a prerequisite here, that you are in a—essentially, a state of armed conflict; hostilities are going on, or have gone on, and the organization in question is engaged in or supporting those hostilities against the United States.

Mr. SAXTON. I would suspect that if a member of Hezbollah were to kill a United States citizen, that would constitute a reason that the tribunal could be used to prosecute that person?

Mr. BRADBURY. Well, I am going to hesitate to give a blanket answer on that. I think that, again, there would need to be a state of hostilities or have been a state of hostilities between the organization and the United States, and the act of one person does not make a state of hostilities.

Mr. SAXTON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

The gentleman from South Carolina, Mr. Spratt.

Mr. SPRATT. Mr. Bradbury, from your testimony, I gather that you don't believe that the detainees currently held can be adequately tried under existing law, including the Uniform Code of Military Justice.

Mr. BRADBURY. Well, Congressman, that actually is not a judgment for me to make. But I have talked to some prosecutors who would likely be involved, and I think the strong view is that we need flexible procedures, we need the type of procedures that are reflected in this proposed legislation for military commissions, and that some of the limitations under the Uniform Code of Military Justice for courts-martial are incompatible with that.

For example, speedy trial rights—some of these people have been held for a long time already. For example, Miranda warnings that would give the accused a right to counsel from the moment he is suspected of having committed a crime, would be incompatible.

Mr. SPRATT. Case law rather than statutory law, isn't it?

Mr. BRADBURY. It is reflected in—it flows from article 1 of the UCMJ, and it is reflected in the manual for courts-martial.

Mr. SPRATT. Let me ask you this. The Justice Department issued a statement of facts on June 23, I believe, 2006, stating that it had prosecuted—brought to justice 261 terrorists or defendants engaged in terrorist-related activity. Are you familiar with that fact sheet?

Mr. BRADBURY. Not very familiar with it, but I am generally familiar with the issue.

Of course, the Department has a Counterterrorism Section in its Criminal Division, and other sections of the Criminal Division that are very, very focused on——

Mr. SPRATT. My point is that these 261 were apparently tried or the cases were processed under the existing rules of evidence and criminal procedure, applicable in the U.S. district courts; and by the same token under the UCMJ, we have cases pending now, battlefield cases where witnesses and evidence will have to be taken from the exigencies of the battlefield and brought back to some court.

We have got these cases being tried now—have been tried in the past successfully; 261 were prosecuted. How did you do it with respect to these defendants?

Mr. BRADBURY. Well, Congressman, obviously we will use every tool at our disposal to fight this war, and sometimes that means criminal prosecutions, many of those prosecutions are for—they are not for law-war violations, but for traditional crimes. Some of them are crimes like immigration violations, fraud, other things short of terrorism, because we will use every tool we can to bring the terrorists off the streets and if we can prosecute them for crimes, we will.

Mr. SPRATT. Has the Justice Department overstated the character of these particular defendants? Have you called people "terrorists" who really were——

Mr. BRADBURY. No, I don't think so.

I think that there are a lot of people who, we have reason to know, are involved in plotting terrorist activity. What you want to do is not wait until the terrorist act is complete necessarily in every case and prosecute them for a complete terrorism crime; but rather, get them, prosecute them, put them in prison for any crime that you can prosecute them for if that means you are actually preventing a terrorist action from ultimately occurring.

Mr. SPRATT. Let me ask you a bit different question because my time is limited.

If you had this additional chapter to the UCMJ, and dealing with and substantiating military commissions, I suppose you will have to create the procedural rules that accompanied this tribunal, in addition, will you restate substantive law? And if you do restate, reformulate, substantive law, is that an *ex post facto* problem here?

Mr. BRADBURY. Well, in the proposal that the President sent up, all of the substantive offenses that would be triable by military commission would be specified by Congress in the legislation, and the Secretary of Defense would not have discretion to define new substantive offenses.

All of these offenses, we think, are offenses that have preexisted under international law, laws and customs of war, and the evolving notion of what is a war crime or properly triable by military commission. We don't think there would be an *ex post facto* issue with any of them, and that is including a crime of conspiracy, which we would specify to clarify that that is a preexisting offense under the laws of war.

But to the first part of your question, absolutely, we would anticipate; and it would specify in the legislation that the Department of Defense would have to promulgate rules, including rules of evidence and other rules of procedure, for these trials and would have to submit those to this committee and the Senate Armed Services Committee. Within a certain number of days after the legislation is passed, you would have an opportunity to review those.

We would anticipate that these rules would be, in effect, a manual of military commissions, much as was described and just as exists for court-martial proceedings. There is a manual of courts-martial, and in fact in a lot of respects it will look quite similar, I think, with certain key differences in some of these areas that we have talked about today.

The CHAIRMAN. Thank the gentleman.

The gentleman from Texas, Mr. Conaway.

Mr. CONAWAY. Thank you, Mr. Chairman. I appreciate your holding this hearing today.

A quick look at the bill that is in front of us, section or subchapter 6 talks about post-trial procedures. Can you explain to us the difference between the appellate procedures that you contemplate under this bill versus the UCMJ; and also talk to us—it makes reference to a court of military commission review, and also the court of appeals here in the District of Columbia. Can you form all that in to how it is going to work once it is in place?

Mr. BRADBURY. Yes. What is envisioned in this legislation is an appellate process that in some respects is quite similar to that for courts-martial and but in other respects is different. It would create a court of military commission review, which would be parallel to a court of criminal appeals that hears appeals from courts-martial.

One key difference is, the court of military commission review would only hear and decide issues of law on appeal, just like a traditional appellate court that we are all used to in the article 3 context, whereas for courts-martial of our own troops, the court of criminal appeals in the court-martial process can review questions of fact as well as law, can essentially interpose a different view on questions of fact.

We don't think that is—that is not necessary, that—that is a procedural protection for our own troops that actually goes beyond what is provided in article 3 courts for regular criminal defendants. We don't think it is appropriate to provide that level and not necessary to provide that level of review and procedural protection here, but there would be a court of military commission review that could decide issues of law and overturn decisions of the military commission trial on questions of law.

In addition, because the government would not have a right to appeal a judgment of acquittal from the military commissions, the government, just as in traditional criminal prosecutions in article 3 courts, has to have a right of interlocutory appeal to this court of military commission review where, for example, the military judge has made a decision to exclude key evidence of the government or has decided a dispositive issue against the government. At that point, the government needs to have an interlocutory appeal up to this court of military commission review.

Then, from the court of military commission review, which is in the Department of Defense, we would provide an appeal as a right in all cases, from all convictions for the accused, to the U.S. Court of Appeals for the District of Columbia Circuit—the D.C. Circuit, pursuant to the scope or the standards of review that are in the Detainee Treatment Act that Congress already decided on and debated back in December; and that is, the court of appeals can review whether the military commission applied the correct standards and procedures and whether the trial proceeding and the conviction were consistent with the laws and Constitution of the United States.

And the Detainee Treatment Act (DTA) currently limits the appeal as a right to sentences that are longer than 10 years, or sentences of death; and if it is a sentence shorter than 10 years, it is a discretionary petition for review under the DTA. We would change that in this legislation and make it an appeal as a right from all convictions to the D.C. Circuit; and then, finally, of course, the accused could petition the Supreme Court for certiorari review from that.

So it is similar in some respects to the military commission review process, but differs because of the Detainee Treatment Act. We think it is appropriate not to reopen that debate, but to leave that review and those standards as set in the DTA.

Mr. CONAWAY. Thank the gentleman.

Mr. Chairman, thank you for the——

The CHAIRMAN. I thank the gentleman. The gentleman from Texas, Mr. Ortiz.

Mr. ORTIZ. Thank you, Mr. Chairman.

You know, we are going through very serious times, critical times; and we see where some of the Coalition members have either withdrawn, quit in Afghanistan, in Iraq. Have we consulted with our allies, those that have signed up in an agreement to what the Geneva Conventions do? And is this the right time to be doing this when we are in the middle of two wars?

Any of you that would like to answer that question.

Mr. BRADBURY. Well, I will jump in first.

There has been extensive consultation with our allies and the Coalition members by the Department of State, the Secretary of State, the President about all aspects of the joint effort in this war on terror. I actually think that the State Department would probably tell you that our allies, by and large, will welcome a move toward military commission prosecutions for these enemy combatants.

I think it is probably fair to say that our allies have favored that kind of treatment of enemy combatants rather than a situation where there is less definition and certainty about what is going to happen down the road. I think they will also favor generally the idea of a more elaborate and congressionally determined set of rules for the military commission process.

So I think there has been a lot of consultation on this, and I think this will be whatever Congress decides to do here; and once we get this process up and running, will probably be viewed as a significant move forward by the international community, I think.

Mr. ORTIZ. Would anybody else like to respond?

Admiral MACDONALD. Congressman I would just say that you asked the question about, is this the right thing to do, considering we have—we are currently engaged in a war in Afghanistan and Iraq.

I think I would agree with the President's comment yesterday: It is imperative that we move forward on military commissions. This is going to be a long war against terrorism, and we need—we need a set of procedures and rules to handle the unlawful enemy combatants that we are taking off the battlefield.

Colonel REED. Congressman, I would also add that this has been shared and discussed with the combatant commanders, specifically the geographic combatant commanders; and I cannot speak to the discussions that they may have with the various representative countries within the AOR, but generally speaking, the combatant commanders uniformly follow on the line that Admiral MacDonald just articulated.

Mr. ORTIZ. One of the reasons that I ask is because the Geneva Convention has been there for many, many years; and all of a sudden, you know, we have to do something like this. Maybe it is needed.

What a lot of people don't understand is the perception out there, and I just want to be sure that what we do is the right thing to protect our soldiers as well.

Admiral MACDONALD. Congressman, I think it is the right thing to do. I think one of the things that nobody anticipated was the Hamdan court's declaration that Common Article 3 applies in this conflict. I think nobody believed that these types of detainees, unlawful enemy combatants, would be afforded Common Article 3 rights.

We now have the Hamdan decision, the Supreme Court has spoken, and we need—we need to take action now to comply with the Supreme Court's decision; and passing legislation on military commissions will help us do that.

General DUNLAP. I agree with that, sir. We need to go forward with the commission process. We need to do it right and we need to have the right processes. But I do believe that it will facilitate

waging the Global War on Terror to be able to deal with the detainees that we have through the military commission process.

Mr. ORTIZ. Thank you. I don't have any further questions.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman. The gentleman from Minnesota, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. Thank you, gentlemen, for being here. Fairly confusing for those of us who aren't lawyers, don't watch enough TV to even pretend that we are.

But let me just—I will go to you, Mr. Bradbury, first, just very quickly, make sure that I understand. If this language were to pass exactly as it is, the government could choose when and if to bring somebody before a commission; is that correct?

Mr. BRADBURY. Yes.

Mr. KLINE. So, in theory, someone could not be brought before a commission for years——

Mr. BRADBURY. Correct.

Mr. KLINE [continuing]. If the government chose?

Okay. Fine. If someone is brought before the commission and is found guilty, we have this appeals process that you just explained to Mr. Conaway. If they are found not guilty, they are immediately released; is that correct?

Mr. BRADBURY. Not necessarily. They remain enemy combatants, and under the laws of war, we can hold them while the hostilities are going on.

Now, that is not for punishment purposes. So there is a very big difference, I think, certainly morally and in the sight of the victims of their war crimes between simply holding them as combatants under laws of war and punishing them.

Punishment, of course, can include up to and including the penalty of death for depending on the seriousness of their crimes. We are not in a position today to punish them for what they have done. We are simply holding them to protect the country, but we have a right to continue to do that.

Mr. KLINE. Even after they are found not guilty.

That sort of brings me to the point that the other gentlemen were talking about earlier. If you bring them before a commission, and in the process you determine, the government determines that there is some evidence that they cannot use, they can stop the process; is that correct?

Mr. BRADBURY. Well, that—that certainly—if that is the case, if there is evidence that is foreclosed from the government's case that is critical or essential to the government's prosecution, the government would be forced to drop the prosecution as an alternative or await the end of hostilities, whenever that might be.

Mr. KLINE. So the unlawful combatant would just continue to be detained and the trial process would stop, at least for that time under those circumstances?

Mr. BRADBURY. Yes. But the victim's interest in seeing retribution done and justice done would be thwarted.

Mr. KLINE. Exactly.

The CHAIRMAN. Would the gentleman yield on that?

Mr. KLINE. I would be happy to yield.

The CHAIRMAN. I thank the gentleman, because I think in his own talented way, he has gotten to—talked, reflected back on this problem that we talked about earlier, this challenge.

What you are saying, Mr. Bradbury, is that if the government has—if its major piece of evidence that would be necessary for a conviction would require the disclosure of an agent whom we can't afford to disclose, at that point the government would have a choice. The choice would be to try to proceed without the evidence.

But if it is apparent that it is not going to work, that that is a central piece, they would—rather than disclose the agent, they could simply continue to keep the person as a combatant, and the agent's testimony that, in fact, he saw the alleged terrorist undertaking actions which were indicative of his combatant status, that certainly could be considered in terms of simply holding him.

Now there is obviously going to be—at that point you are going to have habeas filings, you are going to have all kinds of attempts by the defense counsel to—I would think, at that point, to effect a release.

But if your answer to Mr. Kline's statement is, as I heard it, you could simply keep them warehoused, where they can't go back to the battlefield even though you can't proceed with the prosecution, is that accurate?

Mr. BRADBURY. That is true, but we would—we would ask that Congress keep the door open for the possibility that that prosecution could move forward under strict limitations and in order to guarantee fairness, because, I think, as the President said yesterday, he views it as unacceptable that we would simply have to warehouse them and hold them when we want to prosecute them. And in those cases where they have committed serious war crimes and we want to prosecute them, he thinks it is time to move forward, and then we have procedures that would enable us to do that.

Mr. KLINE. Thank you.

I was going to reclaim my time, but I see it just went away. I had some trial language.

The CHAIRMAN. You go right ahead.

Mr. KLINE. Let me just run this sort of trial language that we have been looking at here—I have been looking at for the last several minutes.

Going back to the issue of classified—we are really talking about classified material here. If you put language in that said, quote, "The admission of evidence that has not been provided to the accused that constitutes the sole evidence of a material fact in issue does not by itself deprive the accused of a full and fair trial."

That is—you know, that is why I am not a lawyer. I have to read this. But could I just whip down the line and get your comments, whether that language would be acceptable or not acceptable?

Mr. BRADBURY. Well, I am sorry, Congressman. Would that be a statement in the legislation from Congress to that effect?

Mr. KLINE. Yes. Insert it in the legislation.

Mr. BRADBURY. Or would that be a finding that the military judge——

Mr. KLINE. Insert in the legislation.

Mr. BRADBURY. Well, again, I guess I would say that I would discourage black-and-white rules being put in by a statute as to admissibility questions or questions like that. I would think that the military judge, under the circumstances in a particular case with a particular piece of evidence, may conclude that it is consistent with a full and fair trial for that to be the sole evidence of a particular fact.

Now, the accused is always going to claim that every fact is material fact when it comes to that. At the same time, in a given case, the military judge may determine that it is not consistent with a full and fair trial under all the circumstances here for that to be the sole evidence of that particular fact. And that should be the military judge's judgment, based on the circumstances, based on the evidence, based on everything available to him; and it shouldn't be prejudged by Congress in statute. That is basically the message that I am suggesting.

Mr. KLINE. Okay. Thank you.

I see that the light is now bright red, so Mr. Chairman, thank you. I yield back.

The CHAIRMAN. Thank the gentleman.

The gentleman from Mississippi, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman. I am going to yield to the gentleman from Tennessee, Mr. Cooper.

Mr. COOPER. Mr. Bradbury, the last time you testified before this committee, I asked you about your quote that the President is always correct. And then you testified to this committee that you had been joking when you said that. I trust you are not joking today.

Mr. BRADBURY. I am not trying to be humorous. I think I learned my lesson that last time.

Mr. COOPER. What we and the American people are seeing today is one civilian Justice Department official, four JAG generals and a JAG colonel, and my constituents back home are more likely to believe the four JAG generals and the JAG colonel. In fact, trust in our uniform military is something that I think we have not seen enough of from this Administration, and all of the witnesses wearing a uniform have expressed misgivings, concerns about the legislation. I wish you had consulted them more in drafting this.

Today, in *The Wall Street Journal*, one of your predecessors at the Justice Department, John Yoo, is quoted as saying that basically the bill you are offering Congress today is no different from what you have been doing before. And how are the Supreme Court justices going to react to that, having overturned your procedures for the last 4 or 5 years, and here is the man who wrote those procedures saying, hey, what you are offering us is more of the same?

Mr. BRADBURY. I haven't seen that quote, but I find that an extraordinary statement, really, because this 85-page——

Mr. COOPER. Let me read it to you. If you haven't seen the quote, let me read it to you.

"it does not look like the procedures for these commissions differ in any significant way from the rules already in place before. The only difference is that the President is seeking Congress' explicit support." so in terms of the substantive law, Mr. Yoo is saying, no change. But let me get to some particular points here.

As our chairman began this hearing, our foremost goal should be to protect America and to protect the American people. I would like to ask you, what, if anything, in this legislation protects an American citizen who is accused of one of these crimes? Because the way I read the law, it is all about alien enemy combatants.

We have had American citizens detained for a period of over three years without charges. So I would like to ask you, what is the legal limit for holding an American citizen without charges? Is it one year? Is it two years? Is it three years?

Mr. BRADBURY. Well, two things. Number one, no American citizen would be subject to these procedures. None of these military commission procedures could be used with an American citizen, and that is clearly provided for in the law.

Mr. COOPER. So this law is doing nothing to protect the rights of an American who is being held without charges for a period of several years, as has been done by this government?

Mr. BRADBURY. Any American—consistent with this statute, any American citizen who is tried for war crimes or any other crimes would get the full protections of the Article 3 court in traditional criminal proceedings.

An American citizen or an alien, it doesn't matter who, engaged in armed conflict against the United States and is properly classified as an enemy combatant, may be held under the laws of war as an enemy combatant. That is not to punish that person, that is not for crimes committed; that is because of their involvement in hostilities against the United States. And the Supreme Court in the Hamdan case affirmed that general right of the government to hold enemy combatants, even including U.S. citizens.

But as you say, very, very few cases such as that.

Mr. COOPER. How long should an American citizen be held without charges?

Mr. BRADBURY. Well, any enemy combatant under the laws of war can be held during the pendency of hostilities.

As you have seen recently——

Mr. COOPER. Without charges, even if they are American citizens?

Mr. BRADBURY. As you have seen recently with the case of Mr. Padilla, he was being held as an enemy combatant and—had been designated as an enemy combatant by the President and was held, and then was transferred over to the custody of the Department of Justice and charges were brought. And he is down in Florida.

Mr. COOPER. So three years is okay, being held without charges?

Mr. BRADBURY. There isn't a hard and fast rule under laws of war. As you know, we have held some enemy combatants at Guantanamo Bay.

Mr. COOPER. I am talking about American citizens. So three years is okay?

Mr. BRADBURY. It depends on the circumstances and we are talking about——

Mr. COOPER. That is what the government has done.

Mr. BRADBURY. What the government has done——

Mr. COOPER. Three years is okay?

Mr. BRADBURY. The law of war says you can hold an enemy combatant for the duration of the hostilities. That is a right that every

country has, and the Supreme Court affirmed the ability of the United States to do that.

Again, there have been extremely few cases such as you described.

Mr. COOPER. Let me ask about the disclosure by the President of the extraordinary rendition program. If any other government official had done that, that would have been a security breach, right, without his permission?

Mr. BRADBURY. Well, of course the President has the authority under the Constitution to protect classified sources and methods and to make decisions about what should be classified and what shouldn't. And also the Director of National Intelligence can declassify information.

So the President has the ability to make decisions about disclosures of information when it is in the national interest of the United States that others who are not classifying authorities may not have.

Mr. COOPER. And his decision had nothing to do with the proximity of the upcoming election?

Mr. BRADBURY. I think he explained the timing of his decision in his remarks yesterday.

Mr. COOPER. Let me ask you about the President's signing a statement. When he signed the McCain anti-torture language into law, didn't the President reserve to himself the authority to interpret that language as he alone saw fit under his powers as commander in chief and as a unitary executive?

Mr. BRADBURY. Well, it is—one of the things I do is provide legal advice to the executive branch, and it is inherent in executive authority if you are going to carry out a law and execute a law, you will have to interpret what it means.

Mr. COOPER. If it is inherent, why did he have to state it?

Mr. BRADBURY. He didn't really have to state it.

Mr. COOPER. So it was unnecessary verbiage?

Mr. BRADBURY. I think that I am not going to say it is unnecessary, but it is not necessary for the President to provide a signing statement to legislation. We actually think it is helpful to Congress. It is part of the dynamic of a dialogue between the branches.

It is also helpful to—in many cases, to the executive branch when the President specifies how a particular piece of legislation is going to be interpreted or whether it raises certain issues that the executive branch needs to know about when it is carrying out the law.

Mr. COOPER. Final question with the indulgence of the chair. The term co-belligerent in your legislation, I haven't seen before. It doesn't seem like a very flattering term for our allies or our Coalition partners.

Why did you use a term like that, because normally the term belligerent is not a compliment.

Mr. BRADBURY. Well, it is actually a term of art that the gentleman to my left can probably explain better than I, but it is a term of art in the law of war and it really means another nation that is fighting in that war on your side. And, you know, we may have allies; they may not in all cases and with respect to a particular conflict be engaged in the conflict on our side, but may still be

our allies. They are not technically co-belligerent, so we wanted to use that——

Mr. COOPER. How about "Coalition partner," something friendlier sounding like that? You couldn't say that?

Mr. BRADBURY. Well, we just used a term that is consistent with the law of war, and it would be recognizable in that sense.

Mr. COOPER. I thank the chair for his indulgence.

The CHAIRMAN. Mr. Simmons.

Mr. SIMMONS. I thank you, Mr. Chairman.

And thank you, gentlemen, for your testimony. I had the opportunity a year or so ago to go down to Guantanamo Bay and be briefed on the methods and procedures and processes for holding detainees and for conducting questioning or interrogation. And what I was told at the time was that—and I should say by way of background, I have had some experience during my service in Vietnam with military methods of detention and questioning, as well as those of the Central Intelligence Agency, but what I was told at the time was, we are confronted with a new kind of war, with a new kind of rules or a lack of rules, new types of combatants that don't wear uniforms, they don't play by the rules. They—in fact, they flout the rules.

And so the detention and treatment of these folks does not fall primarily within what we might call the civil court system nor does it fall within the military system, and what we really need is a new kind of law for a new kind of war. It seems to me that what we are confronted with here today is just that, a new kind of law for a new kind of war.

Now, some years ago when I served as a staff director of the Senate Intelligence Committee, we oversaw the application of the Foreign Intelligence Surveillance Court under the Foreign Intelligence Surveillance Act, which was, in fact, a new kind of court for the situation that we faced back in that Cold War environment.

A colleague of mine, a Coast Guard attorney has written extensively on this subject, Commander Glen Sulmasy and has called for a new kind of court, for a new kind of judgment, namely a national security court, a hybrid between what we have had in the past.

Are any of you familiar with this proposal? Would any of you have any comments on it, or do any of you feel what is being proposed today does reflect that hybrid that reflects this new kind of war, that requires a new kind of law to apply justice? And I would open it to any of the members.

General BLACK. Sir, I am not familiar with the proposal that you have offered up, but I would suggest that your comments about the proposed legislation being—kind of fitting into that hybrid mode are very accurate. I think it does indeed do that. And I share or concur generally in the way ahead with respect to this legislative package.

Mr. SIMMONS. And have any of you had the opportunity to discuss this hybrid, or this new approach, with civilian attorneys, prosecutors, defense attorneys, civil and criminal lawyers, trial attorneys and others? And if so, what kind of feedback are we getting? Or is this really the first shot out of the box for this issue?

Admiral MACDONALD. Sir, this is really the first shot out of the box. The proposal is pretty new, and it has gone through a number

of iterations as we have worked with Justice, Department since probably the latter part of July, working on this proposal pretty closely with Justice Department on these rules. So I think it was premature to have discussed that with any of our civilian counterparts.

It would be interesting, I think, now that this is out and public to have that dialogue.

Mr. SIMMONS. And what would you consider to be the appropriate time frame?

Again, we have been in this situation, in this business, for a period now of several years, 9/11 will have its fifth anniversary next week. So it has been about five years.

I think that there is a sense on both sides of the aisle that we need to move forward expeditiously with this, that the current situation requires it, that this so-called "war on terror"—I would call it a war where terror is being used—is not going to end tomorrow or the next day. We are going to be with this problem for a long time.

How long do you anticipate it should take before we can put together a system of tribunals, commissions or national security courts that address this problem?

General DUNLAP. Sir, I would say that I do think it is imperative to move forward with a process to establish military commissions, and I agree while there is much new, it does build on the UCMJ. It builds on the manual for courts-martial, it builds on the history for military commissions.

That said, it is imperative, as well, that we do it the right way, and that is why, with the lead of this committee, I did express some very serious concerns about the proposal, even though I agree with the vast majority of it. But I do think that the sooner we can get legislation, the sooner we can move forward with the commission trials, and that will facilitate our relations with our Coalition partners, with the international community and moving forward with the Global War on Terror.

Admiral MACDONALD. Sir, I would add one point to that.

We currently have the process in place. We have the military prosecutors, the defense counsel in place. The overarching structure is there and waiting for a commissions package to be approved. So I think once legislation is passed, it will be—we can generate commissions trials pretty quickly, based on having those structures in place under the old commissions package.

General DUNLAP. If I could just add one point, it is very important, as one of my fellow panelists said, that the part of the Detainee Treatment Act on habeas be clarified, because obviously the Supreme Court had difficulty or had concerns about the application of that.

If we get bogged down with habeas petitions before we can get a commission case tried, then that could delay the actual trials of military commissions, in my judgment. That is my personal opinion, sir.

Mr. SIMMONS. Mr. Chairman, let me just conclude by saying that I read recently a new book that is out on the arrest and the prosecution of eight German saboteurs who landed in this country, on the East Coast of this country by submarine. Six of the eight were

electrocuted here in Washington, D.C., after the tribunal; none of them had carried out any aspect of their mission whatsoever.

But I would say that the so-called Administration of justice in that particular case was not a high point of the Roosevelt Administration even though we were at war and that, from my perspective, it is important that we come up with these new tribunals expeditiously.

Again, nobody has been treated as those eight were treated so many years ago. But Americans do have a basic sense of fairness even in these difficult times, and I would encourage that we move forward on this as quickly as possible.

Mr. WILSON [presiding]. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you.

Mr. Bradbury, so how many military commission convictions have we had?

Mr. BRADBURY. None, sir.

Mr. MEEHAN. And we have had 261 convictions through the Justice Department for our own criminal system; isn't that right?

Mr. BRADBURY. I don't know the exact number, but I know it is around there.

Mr. MEEHAN. Two hundred sixty-one related to terrorism. It just seems to me after 5 years since 9/11 that we would have been in a better position, stronger position. Particularly in view of who the President announced yesterday that we have in detention, that we would have anticipated how the Supreme Court might rule and that we should have been, in Congress, a lot earlier than this. I don't understand why the Administration didn't come to Congress to set up a military commission to deal with this earlier. I think it is unacceptable that 5 years from the anniversary of 9/11 and we haven't had a single military commission conviction when our own Justice Department has 261 terrorism convictions.

Mr. BRADBURY. Well, I think the President also views it as unacceptable in the sense that it is past time to move forward with these prosecutions. I think that what I have tried to communicate—last time I was here back in July following the Hamdan decision, this is quite extraordinary in the history of armed conflict for the executive branch to come to Congress to get legislation for military commissions for the trial of enemy combatants. This is an unprecedented——

Mr. MEEHAN. But we have had five years. You agree. And I agree with what General Dunlap says. We have to go through a process here. There are less than 20 days left before this Congress is scheduled to adjourn.

The President, as you say, he has a right to decide what is classified and what isn't.

And he unilaterally decided he will present all of this information with less than 20 days left on the calendar. Now we are asked to come up with something, frankly, we should have had a long time ago, and the proposal that I have seen essentially is a validation of what the Administration has been doing all along. It has been rejected by the Supreme Court. This policy is, seems to me, is not helping make America more secure. The fact there are so many JAGs here today that can point to serious flaws in the legis-

lation proves that the rushed nature of this flawed proposal is problematic.

You have come before us basically asking us to rubber-stamp yet another increase of executive power, with a deadline that is ticking away, with a proposal that seems to create another loophole by which the Administration can bypass the Geneva Conventions by approving abusive interrogation tactics after the fact, and by allowing coerced testimony aren't you saying that torture was okay in the past?

Mr. BRADBURY. No. The legislation makes clear that any statement determined to be obtained through torture wold be inadmissible in all circumstances. So we have an absolute bar on admissibility of any statements determined to have been obtained through torture. As to other statements not determined to have been obtained through torture, every accused is going to assert that many statements were obtained through coercion. And we think, again, it should be left to the military judge to determine whether the statement under the circumstances, hearing the arguments on both sides, is reliable and probative. If the military judge determines, based on all of the circumstances he has heard under which that statement was obtained, that it is unreliable or lacking in probative value, the legislation would provide that it would not be admissible.

So—and we think again those judgments should be made by the military judges and we shouldn't create by statute some new exclusionary rule.

Mr. MEEHAN. Wouldn't it be appropriate to craft a policy that would be able to withstand a Supreme Court challenge and prosecute all of the detainees rather than to rush this proposal through Congress at the last minute?

Let me just read a quote. Senator Levin of the Senate Armed Services Committee was quoted in *The New York Times* today and he said, quote: "If the Administration had behaved this way before Gitmo and the drafting of the—the drifting of Gitmo to Abu Ghraib, we would be a lot more secure country, our troops would have been more secure and our position in the world would have been more favorable."

Mr. Levin and others contested points in this proposal for tribunals in particular, denying the defense the right to see and therefore respond to classified information that is shown to the jury, and allowing the introduction of hearsay and coerced evidence.

I would like everyone to comment on this. Would you comment on the status of hearsay evidence in the President's proposal? I am interested in why the military rule of evidence 807 is insufficient when it comes to hearsay.

Mr. BRADBURY. I think I will let the JAGs really respond to that because I think there was unanimity here on the hearsay proposal in the legislation that it is appropriate, and I think they are probably——

Mr. MEEHAN. I am interested in why 807 is insufficient.

General BLACK. In the—go ahead.

Admiral MACDONALD. Congressman, you are talking about residual hearsay.

Mr. MEEHAN. I don't see why the rule of evidence 807 would be insufficient.

General DUNLAP. We do have a recent Supreme Court case. I think we have *Crawford* v. *Washington,* and we would have to evaluate what the impact of that case which does pretty significantly, I believe, limit the use of the residual hearsay rule. So in a military commission, setting the residual hearsay rule is in essence permissible. In other words, there is a lot more latitude to get in hearsay under the military commission process.

My personal view is that while I do appreciate the discussion in the proposed legislation about the military judge excluding it if the judge concludes it is unreliable or lacking in probative value, and there is an additional paragraph in there that is taken from I think Military Rule of Evidence (MRE) 403 that says that the judge can exclude it if there is danger of unfair prejudice. But I would suggest, respectfully, some additional language along the lines that—to make it perfectly clear that the military judge can exclude evidence if its admission, for whatever reason, is not in the interest of justice or compromises a full and fair trial. There are those who will argue that that is implicit in the notion of exclusion based on the danger of unfair prejudice, but in my personal judgment it would be helpful if we made that clear that that would be a basis for the military judge to exclude evidence.

General BLACK. I agree with his comments, sir, but I would add the provisions that have been incorporated into the legislation with respect to hearsay. They are consistent with the standard that has been applied in the international tribunals out there. I am very comfortable with this procedure.

Admiral MACDONALD. Yes, sir. I would concur with General Black. The International Criminal Tribunal of Yugoslavia, ICTY—this is to the hearsay rule that is in the commission package right now. That is the rule that is used and that is supported internationally by that particular court.

And, again, going back to the Hamdan decision where the Supreme Court applied Common Article 3 and particularly talked about those judicial guarantees that are common to all civilized people, that would satisfy that standard. The current formulation in the package for hearsay would satisfy that formulation under—about national law. On my personal opinion, I am very comfortable with the formulation that is in here. And a lot of this language was—it was a partnership between DOJ and DOD in coming up with the current language that is in this proposal.

Mr. MEEHAN. General, earlier you said you were surprised by the Supreme Court decision. Were you surprised at the decision?

Admiral MACDONALD. Yes, sir.

Mr. MEEHAN. I think you testified to that earlier, you were personally surprised.

Admiral MACDONALD. I think everybody was surprised that the Supreme Court for the first time would apply Common Article 3 in this type of a conflict. That is water under the bridge now, and now we are left with the Hamdan decision and Common Article 3 applies, so now what we have done in looking at the commission's packages due to specific evidentiary rules that are listed in here—hearsay, coercion and others—do they comply with that standard

as announced by the Supreme Court with respect to hearsay? I think we are in agreement that it does.

Mr. WILSON. In the absence of the Chairman, I am Congressman Joe Wilson from South Carolina. I am particularly happy to be here today. I served 28 years in the JAG Corps and so as I look out and see you today, I want to thank you for your service. Additionally, I truly have never been prouder of JAG. Traveling the world six times to Iraq, twice to Afghanistan, twice to Guantanamo Bay, I have been so impressed by the professionalism of the JAG officers that you are training and giving leadership to. They are making such a difference on the civil action projects. It is amazing to see the progress in developing a military justice system for Iraq, for Afghanistan.

The selflessness and dedication of JAG officers, I have never been more impressed. I am also very grateful. My oldest son served in Iraq for a year with the field artillery, and he has returned home and he has just done a branch transfer to JAG. So I am very, very grateful that he will have what dad didn't have, and that is combat arms experience. He is going to be an excellent JAG officer.

The question that I have, Mr. Bradbury, under the Administration's proposal, the standard for admitting evidence under your proposal is whether the military judge finds the evidence would have probative value to a reasonable person. Why did the Administration choose not to use the rules of evidence applicable in trials by general courts-martial?

Mr. BRADBURY. We chose to look to the same rule of evidence that is applied in the International Criminal Tribunal context. So that is exactly the kind of evidentiary threshold that is used in those international criminal tribunals. And that is what we are really talking about here is a criminal tribunal for war crimes under laws of war. So you need a more flexible and open standard generally for admissibility, subject again to the review by the military judge.

Mr. WILSON. The next question is the Administration's proposal states that all of the offenses codified in the legislation have traditionally been triable by military commissions. Of the 27 crimes codified in the Administration's proposal, which are considered a violation of the laws of war for those codified offenses not considered a violation of the laws of war, can you identify previous military commissions that have made these offenses triable?

Mr. BRADBURY. Well, the laws of war are not codified in some code somewhere. They are really based on the sort of common law, if you will, international customs and law of war. And it is a concept that evolves over time, and you have some offenses which are traditionally recognized for centuries or decades as violations of laws of war, and many of those are incorporated into treaties under laws of war, like the Geneva Conventions.

Many of the offenses that we have listed in the legislation are drawn from those treaties and reflect those traditionally recognized offenses that have been codified into treaties. But other offenses we think can be recognized in the laws of war, even if not codified previously into treaty. You are talking about the kind of modern warfare involving war with a terrorist organization. Offenses like hijacking, offenses like terrorism, material support of terrorism.

These are the kinds of tactics that the enemy is using in this new kind of war. And we think it is appropriate that the laws of war would evolve and reflect those kinds of offenses.

So we think you can call them all laws of—violations of laws of war. Of course, certain offenses that are in here that we have codified, like material support for terrorism, come from Title 18 of the U.S. Code that is an offense that has been on the books and these folks have been subject to that offense since 1992 for the United States. We think it is appropriate that when they use those tactics in this war against the United States, they could be subject to trial for those same offenses under the military commission process.

Mr. WILSON. And if you could provide at a later date what has been done we would appreciate it specified.

Mr. BRADBURY. Happy to do so.

Mr. WILSON. A final question I have, I don't mean to be picking on General Walker, but I am very impressed with his academic background, Clemson University, where I have a son attending and another son a graduate, and then he and I are both graduates of the University of South Carolina. But, indeed, a very serious question as a parent with four sons in the military: How likely would it be that our soldiers would be charged for violations of Common Article 3 under 18 United States Code (U.S.C), section 2441, the War Crimes Act? Parents have a great concern.

Mr. BRADBURY. Maybe I will start us off. Since 1997 the War Crimes Act has made a war crime any violation of Common Article 3. Now the United States has never been engaged and we never thought we were engaged in a Common Article 3 conflict, and we had in mind the sort of atrocities that were committed in Rwanda, for example, a classic Common Article 3 non-international conflict. And that is what we had in mind when we incorporated that into the War Crimes Act. It is not a requirement of the Geneva Conventions, by the way, that we make every violation of Common Article 3 a war crime. But Common Article 3 contains some vague language, as I have suggested. And so what the parameters of those violations might be are subject to uncertainty and also subject to evolving definition, because they can be interpreted by international courts and foreign governments. We think it is important to give it certainty and definition for our troops, for our intelligence officers who are on the front lines, in terms of handling detainees on the war on terror so that they have that certainty and that clarity.

So what we would do is substitute or replace this general reference to any and all violations of Common Article 3, whatever that might be, including humiliating and degrading treatment, an ill-defined phrase, substitute for that a set of very clear serious offenses that are well defined by statute that we can all recognize as the most serious violations of Common Article 3 and say those are the ones that are appropriate for prosecution as war crimes. So that all of our own personnel who are fighting in this war will have definite certainties as to what will and will not violate that war crime provision as a violation of Common Article 3.

General WALKER. Sir, I think it is important that we have this common definition. We have a definition of exactly what the offenses are, but in the end we must remember that as we try to pro-

tect our Nation, if a son or daughter of ours commits a crime, a war crime against the United States, they need that common definition, application of standards, and they too would need to be punished.

General DUNLAP. Could I add something to that?

Mr. WILSON. Certainly.

General DUNLAP. As a practical matter in the military, many times we will—we will prosecute something which might be a war crime under one of our traditional military offenses: murder, rape, and so forth. One of the things that this country does better than many other countries is bring to bear exactly what you spoke about earlier, the fact that we have a robust Judge Advocate Corps in all of the services, because the evaluation of the specific facts and circumstances of a combat situation is informed, I think very hopefully, by the experience of a military lawyer. So that when the decisions are made whether or not someone needs to be held accountable, the convening authority and so forth has the benefit of that kind of advice, and that is why someone who has the combat arms badge becoming a Judge Advocate is especially valuable in these kinds of conflicts which are very confusing in chaos on the battlefield. Thank you, sir.

Admiral MACDONALD. Sir, I—I would add, the parents can rest assured that the military has trained to Common Article 3 standards for quite some time. So it is—I mean, that is another area that we spend an awful lot of time and effort in making sure that our soldiers, our sailors, our Marines and our airmen are well trained before they go in to combatants, the standards of treatment that are expected of them when they handle detainees.

Mr. WILSON. Again, thank you all for your service. And at this time, Mr. Snyder.

Dr. SNYDER. I want to make a quick comment. We had a conversation with another member, who over the recess had met with a young Marine who had returned from Iraq and very eloquently talked about the importance of the rule of law; that he had had multiple discussions with Iraqis who knew that Americans sometimes made mistakes, but that we had a system that made it much more likely that people would be brought to justice, our people would be brought to justice, and he talked about how important the rule of law was.

Mr. Bradbury, I do want——

Mr. SAXTON [presiding]. Dr. Snyder, will you yield for a minute? I am told it would be nice to have a five-minute break here. So we will go ahead and do that and hurry back.

[Recess.]

Mr. SAXTON. The time is yours. Dr. Snyder, the floor is yours.

Dr. SNYDER. Mr. Bradbury, I wanted—I don't want to ask this as a question. I want to pick on you a little bit. You quoted the President. I read your written statement this morning. You said the time has come. That is a—I found a very disconcerting statement to hear the President say it and to be picked up by the Administration for a variety of reasons. One of them is on this side of the aisle, this issue had been attempted to be addressed for the last year. Congressman Sanchez filed a bill June 23rd, 2005 that dealt with this and it was ignored by the Administration. You have

had multiple people from within the Administration make comments saying you were going to get into trouble with this. It was predicted the Supreme Court was going to have problems with the route the Administration chose.

So now to have the President, 60 days before an election, very dramatically, with a packed house at the White House, talk about the time has come, it is very discouraging for us who think that what we need to do as a Nation is to be tough, thoughtful, and bipartisan and united and come up with a system that reflects our American values and not to use these kind of issues as a—as political pawns in an election year.

I wanted to get some specific issues and I think I will make some comments and let the military people respond if they would.

First of all, this is an ongoing issue. Mr. Buyer is here because he is a JAG, as you know, in the Army Reserves. We don't have much time, and usually when we ask questions for the record or anything written, because of the process it will be months before we get them. But I would like to direct a question to our folks representing the JAGs today. I would like you to provide written information to all members of the committee on recommendations that you would like to see—have seen included in this that were not incorporated into this draft. It would be helpful, I think, as we are trying to sort through this.

One of the issues that—Chairman Hunter is not here, but you all went back and forth several times with Mr. Bradbury, the JAGs, about well, what if you actually get down to a scenario with a piece of information that is classified and the prosecution could not move ahead without that piece of information. Would you all address this? What if that were on—the shoe was on the other foot and it was one of our folks that was captured by somebody and was being tried? Would we want our folks—would you all want to be tried if you were captured by somebody with a piece of classified information that you could not confront? I would like you to respond to that.

I would also like you to respond to the specific question Mr. Bradbury addressed. I am not sure I heard each one of you address it. Do you feel that the draft we have here—and I assume you all got it before we did last night—do you feel it adequately addresses our legal obligations under the Geneva Conventions?

And then my last question is the preamble, the findings; we members of Congress, we love findings. We always put stuff in there. A lot of times they are not factually accurate. We love findings, but it seems to me it is somebody's op-ed piece that got included on a piece of legislation that is going to be problematic. Is it necessary that we have that set of findings? I would think that we may be able to put together broad support for a bill like this if we left off the findings.

Those are my questions, if we can have the JAGs respond. Start with General Black.

General BLACK. With respect to your question on classified evidence, I think I articulated my position early on. I think we need two protections built into the legislation, the first of which would provide that evidence should be excluded if it is the sole evidence that is necessary to prove a material fact for conviction. And the

second recommendation or the second change I would make would be to add a provision—would be to require instruction from the judge to the effect that if the accused has at the end of the trial been excluded from seeing classified evidence, that the panel members, the members of the commission itself, the triers of fact, be advised that that evidence was excluded and be advised that they should accord appropriate weight to it. So I would make those two changes.

With respect to your second question, overall I am satisfied that the legislative package as it exists right now satisfies our obligations under international law.

And your third question I think is out of my lane, sir.

Admiral MACDONALD. Sir, I would agree with General Black with just, I guess, a couple of caveats. First, with respect to classified evidence. I think you—your first question alluded to how would we feel if such a rule were applied against one of our own service members. And we have actually testified to that before in front of the Senate Judiciary Committee and we have testified with the former Chairman of the Joint Chiefs who mentioned—General Myers mentioned that the issue of reciprocity was an issue for him, and it is an issue, in my personal opinion, for me as well that we would be the first country that would allow evidence to be presented against an accused that he would not be able to view. And I would be very concerned as a matter of policy that such a rule could be applied against one of our service members by another country that is out there.

Dr. SNYDER. And their defense would be, hey, this is how you treat our guys.

Admiral MACDONALD. Yes, sir. So to your second question, I am generally pleased with the commission package I would say, with two caveats, the first one being the classified evidence that I just mentioned, and the second being that provision that talks about coerced statements and that you could admit coerced statements as long as they were reliable and probative. And you could have a statement that was determined to be reliable by a military judge based on other evidence that was introduced that was nevertheless coerced. And I am concerned about that.

The legislation right now bans the use of statements obtained by torture. That is a good thing. I would recommend that you look to the Detainee Treatment Act which you passed for additional standards, and I would recommend that you look to—and I think I mentioned this earlier to the Chairman—that you look to the cruel and inhumane and degrading treatment. If statements were obtained in violation of the Detainee Treatment Act, I would recommend that those statements be excluded. And I think that goes to not necessarily because you couldn't make out that they were reliable or probative, but because I think that goes to the underlying fairness of our process and our proceedings. So with those two caveats, I am generally pleased with the commission's package.

Dr. SNYDER. Mr. Dunlap.

General DUNLAP. I completely agree with Admiral MacDonald in all of the particulars. My main concerns about the legislation as it is written are those that he has articulated in the exact same way. I feel that the proposal is deficient in those respects that he has

outlined as to whether or not we would want to be tried, or any servicemen. I wouldn't want any American citizen or any citizen of the world tried under a circumstance where the finder of fact would have evidence that the accused never sees. I don't think that that process would meet Common Article 3 or fundamental notions of justice. We are a better country than that.

So, and as to the third item, I do think it is out of my lane, and I respectfully defer on that one.

General WALKER. Sir, in my opening statement I said I had two concerns. The first of those dealt with trying an individual where he does not have the ability to see the evidence against him. I simply believe that there can be no full and fair trial absent the accused's ability to see the evidence against him and to be present when that evidence is presented. I think that is one of those baseline principles that are fundamental and considered indispensable to a system of justice among civilized people.

As to the issue of reciprocity, it is really tied with that one, sir. I think we have to understand as Congress debates these important issues that what we do, how we treat these individuals, can have an impact upon how other countries treat our servicemen and women as they go to foreign shores in future conflicts in future years. So that reciprocity is important.

Generally, I believe we have addressed in this proposed legislation—it does address and comply with the Geneva Conventions in my opinion, with the exception of the right to see the evidence against you, even if it is classified. As to whether the findings of the preamble to the bill are necessary, I concur that fortunately that is my decision to decide those.

Dr. SNYDER. Thank you. One final comment, Mr. Chairman. I have had some concerns and maybe this can get cleaned up. I have read through this thing quickly a couple of times and it seems like it is still pretty rough. I mean at one point in there, we refer to appellate counsel, appellate government counsel, and appellate military counsel. I assume they are all the same, but maybe they are not. There is a phrase, section here, that says that there may be no disclosure to the defense, the defendant, if the defense receives exculpatory evidence. Now, I don't know why—why would we have a provision in there. Does that make sense?

Mr. BRADBURY. Congressman, I believe that relates to only classified.

Dr. SNYDER. No, it doesn't. That is what I mean by the shoddiness of the way it is drafted. It says notwithstanding any provision of law, any defense counsel who receives evidence under this subsection shall not be obligated to and may not disclose that evidence to the accused. And the title of the section is Disclosure of Exculpatory Evidence. That is what I mean by—while I encourage you to look at that, it can be cleaned up, but it doesn't say that it reads very clearly that it refers to all exculpatory evidence.

Mr. BRADBURY. I think the subsection refers to classified evidence. That was certainly the intent, that it is limited to that classified evidence that is determined under those very, very extraordinary and limited circumstances by the military judge not to be appropriate for sharing with the accused. And the reason we put that provision in that, specified by Federal statute, that the de-

fense counsel could not share that with the—with the accused is actually in response to comments from the JAGs and other military lawyers that we wanted to have something very clear in that event that would override the State bar requirements of those counsel. Because if you did—if you left it silent, State bar rules might be interpreted to require that counsel not to participate in those proceedings.

And so we think you can override that by Federal law and that would actually give a protection to the counsel participating in those proceedings and enable it to go forward.

Mr. SAXTON. Dr. Snyder, I want to thank you for bringing those last issues to our attention in particular and we will make sure that our legal people will go through them.

Dr. SNYDER. I encourage you to read that section.

Mr. BRADBURY. We absolutely will, Congressman. Thank you.

Mr. SAXTON. Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman. And thank you, gentlemen, for being with us today. You know I have been very concerned about this issue for several years now. I actually introduced a bill in 2004 that dealt with this issue in particular, since I had been to Gitmo and with the Padilla case and the whole issue of rights of these people that we were supposedly trying, and of course with some of the lower appeals court decisions that came forward out of the D.C. court and also the Supreme Court decision. So it was no surprise to me that Hamdan came along and the Supreme Court basically said Congress hasn't been doing its job. And that is really where it is. I mean, the Administration walked on this and went and did their stuff simply because this committee in particular of jurisdiction didn't address this issue.

Article I, section 8, is pretty clear. It is our job to do it and our counterpart in the Senate. So I am glad we are at this point now, but we really could have done this several years ago in my opinion.

I have been looking at the President's proposal and one of the main issues that I have is this whole issue of an appeals process, because I think that is an incredibly important piece of this.

The existing military appeals court under the UCMJ commands wide respect, whereas the ad hoc review that the Administration has provided for in the DOD military commission orders has failed to command this kind of respect out of the commentators who have been looking at this.

Mr. Bradbury, if the military appeals process that we have under UCMJ is so revered, can you explain why the Administration proposes to put in the Court of Military Commission review? In other words, why set up a new system when you have got this system that works, that everybody likes, that everybody has respect for, where we have the experience. Why not use that existing process?

Mr. BRADBURY. Well, we have tried to create a parallel process. So we have used the model of the UCMJ Code of Criminal Appeals. But one of the things I think that has been very important, as I tried to stress to the President, in all of this is that this be a separate and distinct process for military commission trials, separate and distinct from the courts-martial trials that are used for our own troops. So we just—we are simply creating a separate process that is modeled on the UCMJ.

Ms. SANCHEZ. But doesn't it go out of the military and go to the U.S. Court of Appeals, to the District of Columbia Circuit and the Supreme Court? So it is into the Federal court system. It is not using the existing military system which is, you know, which is what my point is, and appeals process that is tried and true under a commission that is sitting—that is basically sitting under UCMJ.

Mr. BRADBURY. Well, I think you are referring to the Court of Appeals for the Armed Forces which hears appeals from the Court of Criminal Appeals, which in turn hears the appeal of the court-martial proceeding. And we simply chose to retain the appeal process that Congress had decided on and the Detainee Treatment Act and decided not to open that door again for redebate and reconsideration. We think it is a—in fact, in some respects gives more protection in the sense that it is an appeal to an Article 3 court as opposed to an appeal to a court that is not an Article 3 court: the Court of Appeals for the Armed Forces.

The Court of Appeals for the Armed Forces is steeped in the precedence and decisions of the courts-martial, and we felt it was important that—and in fact a law would stipulate that the precedents that have developed for courts-martial are not binding in this procedure on military commission. Of course, the courts can look to them as a persuasive precedent or useful precedent but they are not binding. This, again, is a separate proceeding with separate standards, and we thought it was appropriate to have an Article 3 court that is—that is separate from those precedents and those traditions taking a fresh look at the issues as they come up on appeal for the first time, because we haven't conducted military commissions in this country for a long time.

And so this will be a novel set of circumstances, and we just sort of wanted the whole process to be fresh and to develop as cases evolve under this new proceeding fresh, and to make it clear that it is distinct and separate from the court-martial traditions and the court-martial process.

Ms. SANCHEZ. May I have one more question?

General Black, in your testimony before the Senate Armed Service Committee in July, you seemed to endorse the idea of using existing military appeals court to review military commission cases. Do you agree with that approach or do you still have—do you agree with the approach that the Administration is putting forward, or do you still have lingering concern with the appeals process? And don't you think it would enhance the credibility of the military commissions process to place them under the appellate jurisdictions of an established and respected military appeals courts? And of course I would invite any comments from the rest of the JAGs here.

General BLACK. Let me begin, ma'am, but I am comfortable with the appellate process that exists in the legislative package that is put forth for three reasons, the first of which is since my testimony before the Senate Armed Services Committee (SASC) in early July the procedures have been drafted and we have incorporated a number of remarkable safeguards, the first of which is the proceedings will be presided over by a uniformed, certified, and qualified military judge. And I am confident that the presence of such trained

and certified individuals in the presiding role will ensure a full and fair trial at the trial level.

Second reason, though, is in getting right to the heart of your question with respect to the—to whether the appellate military courts would be an appropriate forum here, I think not. I think that the interim courts that have been suggested here with the follow-on appellate process that provides for review by the D.C. Court of Appeals is a good way to go. And I say that because our military appellate courts are, as Mr. Bradbury suggested, steeped in the rules and procedures for the Uniform Code of Military Justice. They are indeed experts in that and the foremost experts in this.

This is a different process right from the beginning. And frankly, you know, their expertise is, while perhaps related, isn't as related as might be hopeful or in terms of an appellate process. So I don't see that they are necessary. I think the interim appellate court with a follow-up from the D.C. courts is an acceptable alternative.

And the third reason I think that is appropriate is the responsiveness. Our military appellate court system right now is chock full of cases. They are working very hard and staying up with our workload, but adding this additional burden would not be—would not be helpful at this time.

Ms. SANCHEZ. So you feel comfortable having it be 47A of the Uniform Code system, but at the same time having the uniformed judge in a Federal court system doing this?

General BLACK. Yes, ma'am, I am.

Mr. SAXTON. The gentlelady's time has expired.

Ms. Tauscher.

Ms. TAUSCHER. Thank you, Mr. Chairman. Thank you, General and Admirals. I have to tell you that as much as I listen to this, both sitting here and in my office—I am not a lawyer, but I have watched *Law and Order* for as long as it has been on TV so I consider myself to have a law degree by TV. I think many Americans do. And I think that what many of us consider to be one of the keystones of being in our system and being, frankly, the envy of the world when it comes to our ability to deal with justice in this country are three simple things: fairness, swiftness, and certainty. And up until now, as we approach the fifth anniversary of September 11th, we have been none of those. We certainly haven't been swift, we haven't been certain, and the fairness issue I think is something we are trying to work on now.

What troubles me is the environment that this is all coming down on, and none of you play in the dangerous game that we play on this side. You play on a dangerous game in the military. We play on one called politics. This is now being foisted on us and, Mr. Bradbury, I am—I am impressed by what you said. You worked with people—I think you actually said something like both sides of the aisle—but I can promise you, you didn't work with any House Democrats on this.

And as as we sit here, we are now finding out what the Administration's plan is, and I guess we are being told that this has got to be done swiftly, and there has been no justice for the 9/11 families in the four-plus years since September 11th, but we have got to do this right now. And believe me, I stand second to no one in wanting to get these bad guys. I stand second to no one in wanting

to be sure that we can excrete from them in all possible manners, in things other than we all know is wrong, the information we need to protect ourselves, the person, people, and our allies.

But it is deeply troubling to me that in a very political environment this thing gets dropped on our heads and we are told we have got to take it or leave it. And believe me, that is what is going to happen. This is not going to be the kind of process that we should have a deliberative process. Yesterday at eight o'clock I was at a briefing with some of your colleagues on the new amendments to the Army Field Manual. Took 18 months. We expected to have it last February. We weren't even told on February 28th that it wasn't coming. But there are lots of real good excuses why we didn't get it until yesterday. But it took 18 months. But we are meant to do this in five legislative days.

So I don't really have a question. What I really have is a sense of frustration. We have already gotten it wrong once doing it just this way. And I will tell you that I have got lots of problems with the President's proposal. That doesn't mean I am weak. It doesn't mean that I am an appeaser. It just means I am trying to do it right. I would like to be able to really believe that if we found Osama bin Laden we could actually prosecute him and get justice for the American people. I am not sure we can under the circumstances that we have now.

I applaud all of you for your hard work. I know that you are trying to do the best you can. We are, too, on this side. I am not sure we are winning. I yield back.

Mr. SAXTON. I thank the gentlelady.

Mr. Bradbury, did you meet with Mr. Skelton? Did you have a meeting with them on this subject?

Mr. BRADBURY. Yes, sir.

Mr. SAXTON. Thank you. Susan Davis.

Ms. DAVIS OF CALIFORNIA. Thank you.

Ms. TAUSCHER. Mr. Chairman, can I make a point? We never saw the proposal until last night, even though he might have met with Mr. Skelton.

Mr. BRADBURY. I did show draft legislation to Mr. Skelton.

Mr. SAXTON. It is Mrs. Davis' time.

Ms. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman. Can I follow up on that for a second, because I know you all have had input, and perhaps you would be willing to share that process with us and how much input you actually had. But we could go down the line. When did you all see the final language of this? Could you share that with us? Mr. Bradbury, I assume you saw it. When was it complete, I guess?

Admiral MACDONALD. We were given it last Friday. Actually, I am sorry, a week ago Wednesday we received what was the final draft to take a look at. The proposal that you received, we did not receive until day before last.

Now I think also, Congresswoman, you asked about our involvement in the process. I would say that we had a very robust discussion with Department of Justice beginning in late July, which included setting up a working group between DOD and DOJ that met over about three or four days, working on going back and forth with different proposals and adding language.

So what you see reflected here in this package, there was a lot of language that DOJ took from the military departments in putting this together. They didn't take all of our suggestions, but that is the interagency process at work. They are not required to take all of our suggestions.

Ms. DAVIS OF CALIFORNIA. Right. I understand. Is there any difference among the rest of you in terms of when you saw the material, basically?

General DUNLAP. No, ma'am. I saw the material exactly as Admiral MacDonald has testified. I would, just to make it clear, there were some meetings at the end of July and in the beginning of August. But to my knowledge, there have not been discussions since the beginning of August to a few days ago. I will say that many of our suggestions were incorporated. Not all of them. And as you have heard before, I have at least one very serious reservation about the proposal.

Ms. DAVIS OF CALIFORNIA. Thank you. I appreciate that.

Just in the interest of time I am just going to go on, because I think the two areas that you have all identified dealing with classified information and also with coerced testimony, what do you see, what implications do you feel exist if in fact those concerns which you have addressed—and I understand that some of your concerns have been incorporated—but what are the implications of that to you? It sounds to me like those are very serious and you would want us to certainly take that under advisement.

Admiral MACDONALD. Yes, ma'am. I go back to the reciprocity issue that we raised earlier, that I would be very concerned about other nations looking in on the United States and making a determination that if it is good enough for the United States it is good enough for us, and perhaps doing a lot of damage and harm internationally, if one of our servicemen or women were taken and held as a detainee. I think that the reciprocity issue really gets to the heart of it.

Colonel REED. I think there is another part of the legislation that goes to the reciprocity issue. And, again, understand that the legislation as proposed applies to unlawful combatants, basically terrorists.

There is a section in the legislation that is critical, that says for the folks who follow the law of war—the lawful combatant, our men and women in our Armed Forces and the other men and women in other armed forces of other countries—that they will not be subject to this legislation, that they would in fact be tried under the UCMJ. That is a critical point, because if the argument is going to be made that we need to be treated as we would treat others, we are going to treat lawful combatants under the processes and procedures of the UCMJ.

General DUNLAP. I slightly differ from my colleague there. I think the reciprocity issue is very important because, even taking that argument at face value, there are other American citizens in other government agencies, and whoever might be subject to this kind of procedure—and I don't believe personally that it meets Common Article 3 standards—to have a trial where someone can be executed, where they don't get to see the evidence that is presented against them before the trier of fact. We can have proce-

dures with the judges to determine what the summary is and so forth and what gets to go. But once it goes to the trier of fact, in my personal judgment, it must be available to the accused so that he or she can rebut it.

Ms. DAVIS OF CALIFORNIA. Thank you. My time is up, Mr. Chairman. I was going to follow up with a quick question about the response of the Supreme Court to that; if you think that would be an overriding concern as well which has been identified in the Hamdan decision; is that correct?

General DUNLAP. Yes, ma'am. I think it would be very problematic.

Ms. DAVIS OF CALIFORNIA. Which could delay justice in many instances.

Mr. SAXTON. Thank you. Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman. It seems to me if we would listen to the JAGs, not in July of 2006 but perhaps in January of 2002, we would not be sitting here today. And you talked about your involvement in the process in putting this legislation together. Again, it seems to me that the reason we are here today is because of the lack of involvement or the lack of listening by this Administration from military judge advocates back when they were first putting together this military commission, and as a result we have had no trials, commission trials, for terrorists. We have had no convictions, and we have had no justice for Americans. And we have been waiting five years for this. And frankly the American people should be very tired of waiting for this. And then the President says the time is now but.

Mr. Bradbury testified earlier that there is no guarantee that these 14 guys they rolled out yesterday are going to be prosecuted under the system anyway. And so it seems to me that we ought to try to get this thing right so that we do prosecute these folks.

There is a level of justice for Americans. I don't really—I don't really care about the lives of these terrorists. I care about some justice for the Americans who have been victims of these terrorists. But then we hear that they may not be prosecuted anyway under the system that—under some bill that we pass. We need to get something passed. We have been waiting long enough, and I hope we don't get bogged down in some, you know, bickering by the Administration over the reciprocity issue of classified evidence or coerced testimony.

It seems to me that there are definite concerns from uniformed judge advocates that if those issues are not addressed adequately, it may not pass muster again with the Supreme Court. Admiral MacDonald, would you say that is an accurate statement?

Admiral MACDONALD. Sir, given the Hamdan decision and that we had four justices who came down and said that excluding an accused from trial when evidence is presented against him, four of them said that they would have real difficulty with that. Justice Kennedy who would be the fifth, and who would give them a majority, said that he would be concerned. He would view excluding an accused detainee from the trial with concern. And after the fact on appeal if it—if it prevented the accused from getting a full and fair trial, he indicated in his opinion that he would—he would reverse. So I think the law is unsettled on this point, but you can

draw your conclusions from where the justices came down on that point in the Hamdan decision. And they tied it directly to Common Article 3.

Mr. LARSEN. Would you agree with that assessment?

General DUNLAP. I agree it would be very problematic before the Supreme Court. I don't think the Supreme Court, for example, would ever affirm a decision to execute an individual who was tried—the trier of fact relied upon evidence that the accused never saw and never had a chance to defend himself against.

Mr. LARSEN. General Walker, is this your opinion about the Supreme Court?

General WALKER. I would really concur with that based on the findings or the writings of the specific justices in the Hamdan decision that it would be problematic where they would approve a procedure where the accused did not have access to the evidence against him.

Mr. LARSEN. General Black.

General BLACK. I agree with General MacDonald's assessment.

Mr. LARSEN. Seems to me we ought to get that part resolved if that ever gets back. We wouldn't have a bunch of cases thrown out again because the Administration didn't do the right thing the second time, much less the first time.

I want to make a point about the findings as well.

You all—it is out of your lane, I appreciate that. You don't have to make amends. I will make a comment. Finding number three, as an example: on page three it says the President's authority to convene the military commissions arises from the Constitution's investing in the President the executive power and the power of the Commander of Chief of the Armed Forces. I hope we don't pass that finding. The Supreme Court of the United States decision contradicts that finding directly. It says no, you have to come to Congress to get approval of this kind of commission. We have to put our stamp on it, whether it is this proposal or something closer to the UMJC minus provisions. The Administration lost at the Supreme Court. And as a result, the American people are left in limbo on the prosecution and conviction of these terrorists.

So, just as an example of the findings that are just totally out of whack with it and inconsistent with the Supreme Court, we have to, you know—we need to take a full vetting of the findings in this. Mainly just focus, probably, on what we need to do, a process in place to get prosecutions and convictions of these—of these terrorists.

Mr. BRADBURY. Well, Congressman, I will say, obviously, findings in legislation are the business of Congress. We are offering these up as proposed findings. I don't think that one is out of whack. I would say this is an area where, very clearly under the Constitution, the branches share substantial responsibility and power, because Congress does have the express authority under Article I, section 8, to define and punish violations of the law of nations.

Mr. LARSEN. But you have been using the authority to use military force and you account for any and all justifications. We pass something like this, who knows what you would use this for in the future or this Administration or the next one or the next one beyond that. We have to be very careful it isn't proven over the last

five years. The Congress has to be very careful how it crafts legislation, in providing legislation, in providing authority to an administration, whoever it is, because of how they might use it in the future.

Mr. SAXTON. Thank you, Mr. Larsen.

Mr. Bradbury and Colonel Reed, Mr. Larsen instigated a great conversation on the attitude of the Supreme Court. Would you two gentlemen comment?

Mr. BRADBURY. Well, I will say that it is the case that Justice Stevens and the four members of the plurality opinion looked to just glance at the idea that classified evidence may be used outside the—considered by a commission outside of the presence of the accused. I think Justice Kennedy reserved judgment on that point, did express some concern but said he would wait to see how it is applied and how it unfolds in a particular case and on appeal.

Again, we are suggesting that—like Justice Kennedy, we would suggest that Congress not prejudge that issue and foreclose that possibility, because the circumstances of the particular prosecution may necessitate it. And a military judge may be able to do it under all of the protections and safeguards we have put in, which have been—a lot of protections and procedural requirements and hurdles have been added to this legislation over the course of our very productive discussions with the JAGS, not fully to the satisfaction of the JAGs, obviously, but a lot of additional procedural safeguards have been put in place. We think those go a long way toward protecting the fairness of the trial in these circumstances, and we would just ask that that door not be closed on that possibility because it could be very important and serve for prosecutions.

Mr. SAXTON. Thank you. Colonel.

Colonel REED. I would agree with Mr. Bradbury. I have full faith and confidence in our military judges that are certified under article 26 to be able to look at these issues, to be able to use the parameters that are provided for in the legislation and come to a full and fair decision in terms of particular evidence.

I think that often if you paint a particular fact pattern where the sole evidence of an accused's guilt maybe a classified piece of evidence they never see, you may very well end up in the result that Colonel Dunlap said. But I think the judge ought to be allowed the opportunity to make that call; and I am confident that the procedures here, at least from my perspective, offer a full and fair ability to get to that result.

Mr. SAXTON. Mr. Larsen's time has expired.

Mr. Butterfield.

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman.

Let me join my colleagues in thanking each and every one of you for your testimony here today. While I have not heard all of the questions and answers throughout the day, I did hear your opening statements and thank you very much for your testimony.

Let me talk with Mr. Bradbury for just a second. And I realize that I am probably the last member to address you, and I may be standing between you and some food, and so I will try to be as brief as I can, but let me get back if I can, Mr. Bradbury, to the reciprocity issue. Did you speak to reciprocity at any time during the day? I know some of the generals did, but would the Administration find

these procedures that you put forward to be acceptable to one of our members if they were being tried by a foreign government?

Mr. BRADBURY. I think probably not, and I think that—I would say, we think that the procedures are fair and that they comply with Common Article 3. When you are talking about your own troops, you would like to see as many procedural safeguards as possible. Reciprocity is a legitimate concern and one that merits a lot of attention and——

Mr. BUTTERFIELD. If Lieutenant John Smith was captured on the battlefield by another government and put on trial, we would not want these same rules to apply. Is that the Administration's position?

Mr. BRADBURY. We think these procedures are fair, but we would like to see for him, under the Geneva Conventions, he is entitled to the same kind of procedures that that nation would apply to its own armed forces. So just as we use courts-martial for our own troops, we would like to see those troops tried by court-martial-like procedures with all those protections if captured by a foreign nation.

Mr. BUTTERFIELD. I am sorry. Go ahead.

Mr. BRADBURY. That aspiration and that international standard does not mean that these procedures are unfair or inadequate.

Mr. BUTTERFIELD. I have not had a chance to review this, and I am anxious to read the detail of your proposal, but do you suspect that you will build a good support base of the body with this bill? Do you think the Senate is going to support this? Do you have any indications at this point?

Mr. BRADBURY. Well, I think some senators have indicated support for it. I think that there is generally very broad support for—just as I think you have seen from this panel today—95 percent of what is in this legislation. I think the one or two issues that everybody is going to focus on in both Houses of Congress are the issues that have been the focus of much of this hearing.

Mr. BUTTERFIELD. Tell me if I am right or wrong on this, Mr. Bradbury. Under the President's authority as he perceives it, a suspected terrorist can be held indefinitely, even though he may be acquitted of a war crime. Is that the Administration's position? If we put someone on trial, they are found not guilty, are we obligated to release them to their home country?

Mr. BRADBURY. If the person has been determined to be an enemy combatant, lawfully detained in this—under the laws of war, under those laws of war we can detain that enemy combatant for the duration of the hostilities.

Mr. BUTTERFIELD. Even though they are acquitted?

Mr. BRADBURY. Even though they are acquitted for a prosecution of a particular war crime they may have been alleged to have engaged in. This procedure is a separate procedure from that that allows the United States to hold enemy combatants. This is a procedure for the trial and punishment of enemy combatants for war crimes that they may have committed. That is separate from our right under the laws of war to hold them as be an enemy combatant.

Mr. BUTTERFIELD. I have in my hand, Mr. Bradbury, what appears to be 14 charges of conspiracy for the 14 individuals who

were being transferred to Guantanamo Bay; and it appears that the charge is conspiracy. Wasn't conspiracy specifically excluded by the Supreme Court in Hamdan?

Mr. BRADBURY. Excuse me. No, Congressman. Justice Stevens and the four members of the Court in a plurality opinion concluded that conspiracy was not a substantive offense that could be separately charged under the laws of war, but that was not part of the majority decision for the Court that Justice Kennedy joined in. Justice Kennedy declined to reach that issue, and it is our view that conspiracy is something that has been recognized previously as an offense under the laws of war and something that Congress would be within its right to recognize in this legislation.

Mr. BUTTERFIELD. Finally, let me ask you, Mr. Bradbury, aren't there currently courts-martial cases against our own military personnel for crimes that have been committed in the theater of operations?

Mr. BRADBURY. Yes, I believe that is right; and the JAGs can certainly speak to that.

Mr. BUTTERFIELD. Tell me—and how are the witnesses being gathered in those cases? And how is the evidence being handled?

Mr. BRADBURY. Congressman, I will defer on that question to the experts who know better than I to my left.

General BLACK. Yes, sir. We are indeed trying cases both in Iraq and in Afghanistan and back here at home. We have brought troops and units back. We gather the evidence and the witnesses just as we do in any other criminal prosecution.

Mr. BUTTERFIELD. Do you find it problematic?

General BLACK. It is difficult, sir, yes. At times when you are on a battlefield, it is difficult to find the witnesses on occasion.

Mr. BUTTERFIELD. But we are doing it?

General BLACK. We are doing it. Yes, sir.

Mr. BUTTERFIELD. Well, again, thank each one of you for your testimony.

Mr. BRADBURY. Thank you, Congressman. Appreciate it.

Mr. BUTTERFIELD. Yield back, Mr. Chairman.

Mr. SAXTON. Thank you very much.

Mr. Buyer, thank you very much for your patience. It is, after three and a half hours, your turn.

Mr. BUYER. Thank you, Mr. Saxton. It has been six years since I sat beside you.

I want to thank you gentlemen for being here. I am going to ask some questions about process, and then we will go to substance.

So, on process, I would—I am trying to get a better picture here on the participation of the JAGs in the process. So, as I understand it, you were convened to be participating in a working group in July. Is that correct?

Admiral MACDONALD. Yes, sir.

Mr. BUYER. And that lasted four or five days?

Admiral MACDONALD. Yes, sir.

Mr. BUYER. And did you have any other contact since July?

Admiral MACDONALD. No. But when we got the final package, we reviewed it, and it hadn't changed substantively from the proposal that we received after the working group met.

Mr. BUYER. So as—speaking to the JAGs now, as you look at what is before us, the bill, and as you flip through the bill, you could do what we do here in Congress. All of a sudden you recognize your words, you recognize your provisions. When you go through this, how much of this are your words and your provisions? If I asked you to pull out a highlighter and highlight what are your provisions in your words, could you do that? Or would that be difficult to do?

Admiral MACDONALD. I think we could do a decent job of doing that. For example,——

Mr. BUYER. Let's just cut to the chase. Is this your work product? Or is this Department of Justice work product?

Admiral MACDONALD. I think it is a combined work product.

Mr. BUYER. How much combined? Give me a percentage. You can't do it? Or you are hesitant to do it?

Admiral MACDONALD. No. No. I can talk generally about some of the provisions that I have seen, some of our changes.

Mr. BUYER. I will tell you what, if I partner with you in working something, I think I know how much is my work product and how much is your work product, wouldn't you? You and I must have a different consistency then, because I am going to know.

I guess here is what my problem is. I am going to go to Mr. Larsen. He complimented all of you. He complimented the JAGs. The JAGs should be included more in the process. I concur. I agree. So I am a huge advocate of the JAGs here.

So I just want to know, you see, this is going to be called military commission. You are about to be used. So if you are about to be used, I want to know how much of the military has been involved in the process. So please answer my question. How much of this is military work product?

Your silence is killing me.

General DUNLAP. Congressman, I believe that the draft was prepared by the Department of Justice.

Mr. BUYER. Okay.

General DUNLAP. There was input by judge advocates and our representatives, our folks, at the end of July. I believe the Attorney General came over and spoke with the Judge Advocate Generals. I think that was on the 28th of July.

I am informed that the last e-mail exchange was around the 9th of August, and Admiral MacDonald testified when we got the no kidding draft that you have, which was a few days ago, and the draft that I looked at last night was the draft that I knew that you were going to have, because I wanted to be 100 percent certain that I was looking at exactly the same thing that you all had. I will say that, in my judgment, many of the concerns that we had were included in the Justice Department draft.

I need to say that——

Mr. BUYER. In their opening draft? Or the draft subsequent to the working group?

General DUNLAP. Subsequent to the working group, sir.

Admiral MACDONALD. I would agree with that, the draft subsequent to the working group.

Mr. BUYER. All right. What role did the General Counsel in DOD and with regard to the services play in this process?

Admiral MACDONALD. The DOD General Counsel put together the DOD portion of the working group that went over to Justice Department over that three- or four-day period to work with Mr. Bradbury's attorneys on that, the draft that eventually came out of the working group.

Mr. BUYER. Okay. Mr. Saxton, can I have some latitude, if I may, please?

Colonel Reed——

Colonel REED. Yes, sir.

Mr. BUYER [continuing]. Earlier you said—with regard to classified evidence, you said, quote, in my opinion, classified information is okay. Is that your personal opinion or is that the opinion of that reflecting the chairman?

Colonel REED. The chairman and I have discussed it. He is as comfortable with the draft written as I am.

Mr. BUYER. So when you say "my opinion," is it your personal opinion or does it reflect the opinion of the chairman?

Colonel REED. I can only——

Mr. BUYER. Are you here to reflect the opinion of the chairman?

Colonel REED. No, sir. I am here as his legal counsel. Obviously, I cannot speak for the chairman. Sir, you will have to ask the chairman that question. But in my discussions with him, we have discussed this, we have discussed that particular provision, and in those discussions I believe he is comfortable with that provision.

Mr. BUYER. All right. With regard to the habeas corpus petitions that are pending presently, if we adopt this process, what impact does that have on the present pending cases?

Mr. BRADBURY. It would extinguish the habeas cases and it would limit the review as the Detainee Treatment Act provided for to appeals from Combatant Status Review Tribunal determinations of enemy combatant status and final judgments of the military commissions. Other than that, all the habeas cases would be extinguished by this legislation.

Mr. BUYER. Major General Black, if we were to adopt your position, the position also endorsed by some of the other JAGs, with regard to the sole evidence to convict, defendant cannot confront the evidence that it may violate a fundamental or indispensable judicial guarantee; therefore, the case should not proceed. Then if we are not—if we have got an individual we know is one of the conspirators of 9/11, but we have got some particular sole evidence that the Administration believes should—they don't want to show them that evidence, we then hold that individual for as long as we are involved in the war on terror?

General BLACK. Yes, sir.

Mr. BUYER. All right. With regard to discovery and following the rules of discovery, so the American taxpayers are going to be paying for all of this discovery by the defense, would they not? The American taxpayers are going to be paying for the defense costs of the September 11 terrorists.

General BLACK. Roger.

Mr. BUYER. They are, aren't they? All the JAGs are nodding their heads in the affirmative.

General DUNLAP. It is possible that some civilians—of funds to fund the defense, and there are many groups out there that I believe will want to defend——

Mr. BUYER. I just want to make sure. You are absolutely correct. They can hire their civilian counsel. They can do their own defense. But if they cannot hire or if they do not have the means, the American taxpayers are going to be paying for that defense just like indigent counsel, right?

General DUNLAP. Yes, sir.

Mr. BRADBURY. I would say, Congressman, that the military defense counsel are already going to be employees of the Federal Government whose salaries are paid. But, yes, you are right. We would be providing defense counsel, appointed military defense counsel, to these individuals, but we would not be paying for their private counsel.

Mr. BUYER. Well, I just want the world to know and understand, as we are putting together a process that gives judicial guarantees, that the American taxpayer is going to be providing not only the counsel but also the discovery process here.

With regard to the United Kingdom and Spain, do we know how they are treating these individuals who are also al Qaeda and committed terror acts against their own people? Mr. Bradbury, do we know what they are doing and how they treat them and the status by which we give what we call these unlawful combatants?

Mr. BRADBURY. Well, we do know how they treat criminal defendants who have been taken up under their new terrorism laws, for example, in the U.K. But with respect to those who are not charged, that are just held perhaps by intelligence services, I have no personal knowledge of that.

Mr. BUYER. All right. The reason I ask that question—and I appreciate the latitude of the Chair—is that status is everything here. So I agree with the JAGs, and I am not going to incorporate my feelings with some of the feelings of my colleagues that are upset here over a delay of time or whether victims of September 11 are finding their justice because I am just as shocked at the Supreme Court. I would be in the three in the Supreme Court, applying Common Article 3 of the War Crimes Act to this.

It blows my mind. I mean, I got it wrong at the JAG school. I just didn't get that. So now I look at this and go, what happened? How are we going to treat saboteurs now? Or status is going to be everything now. If we are going to create this process, that is that access. So now that article 5 hearing is pretty doggone important on where we go from here and who gets access into this new court of jurisdiction. This is really interesting.

Mr. SAXTON. Mr. Buyer, unfortunately, some——

Mr. BUYER. I understand.

Mr. SAXTON. The Subcommittee on Intelligence of the Homeland Security Committee is waiting for this room and have been since 1. So under other circumstances——

Mr. BUYER. Can I look through my notes real quick?

Mr. SAXTON. Real quick.

Mr. BUYER. All right. Hold on. All right, I think I have got enough for now. I am going to see you afterwards.

Mr. SAXTON. We thank you for your participation and your patience; and if you would be kind enough to make yourself available to this committee as we work through this process, we would appreciate it.

Mr. BUYER. Thank you. Look forward to working with the gentlemen of the committee.

Mr. SAXTON. Thank you.

I asked a short question earlier today regarding how this process would treat members of other terrorist organizations other than al Qaeda who have engaged in hostilities against the United States; and I wonder, Mr. Bradbury, if you would perhaps put something in writing to us that would help us clarify this in our minds.

It seems like there are so many—it seems to me as a nonlawyer that there are so many sets of circumstances that we will eventually have to make determinations on, prior acts prior to the time that we were engaged in hostilities with al Qaeda, with the bombings in Africa, with the bombing of the Cole, with the Saudi Arabian activities carried out by al Qaeda or other groups, and of course the question of other groups such as Hezbollah. All of these are separate, different kinds of circumstances, and we need to understand——

Mr. BRADBURY. Yeah.

Mr. SAXTON [continuing]. The circumstances, the language and the law that we are going to put together to deal with these types of situations.

Mr. BRADBURY. Yes.

Mr. SAXTON. I am not looking to prolong the hearing today further, but if you could just put something in writing.

Mr. BRADBURY. I would be happy to do that. The legislation is intended to be flexible for future circumstances, and it is intended to apply to at-war crimes committed by al Qaeda members prior to 9/11.

Mr. SAXTON. Good. And how long do you think it would be before we might expect to receive something from you on that? Because we need to proceed next week with——

Mr. BRADBURY. We will try to get you something next week.

Mr. SAXTON. Thank you.

Thank you all for your participation. We appreciate your patience and participation as well, and the committee is adjourned.

Mr. BRADBURY. Thank you.

[Whereupon, at 1:48 p.m., the committee was adjourned.]

A P P E N D I X

SEPTEMBER 7, 2006

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

SEPTEMBER 7, 2006

Department of Justice

STATEMENT

OF

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

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

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

PRESENTED ON

SEPTEMBER 7, 2006

STATEMENT OF
STEVEN G. BRADBURY
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COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

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

SEPTEMBER 7, 2006

Thank you, Mr. Chairman, Ranking Member Skelton, and Members of the Committee.

I am pleased to appear here today on behalf of the Administration to discuss the proposed legislation that we believe Congress should put in place to respond to the Supreme Court's decision in *Hamdan v. Rumsfeld.*

Earlier this week, the President transmitted to Congress a legislative proposal reflecting the outcome of two months of discussions within the Executive Branch and between the political Branches of Government. In early July, I testified before this Committee on these issues together with Principal Deputy General Counsel of the Department of Defense, Daniel Dell'Orto. I and others within the Administration have testified before other congressional committees, and we have engaged in numerous informal consultations with Members of Congress and their staffs. These discussions have been equally extensive within the Administration, and they have included detailed discussion with and input from the military lawyers in all branches of the Armed

Services, including the TJAGs who are here today. They and their staffs have been active participants in our deliberations, and many of their comments, as well as the comments from the Hill, are reflected in the legislative package that the President has recommended for the consideration of Congress.

Military Commission Procedures

Mr. Chairman, first and foremost, the proposed legislative package responds to the Supreme Court's decision in *Hamdan* by establishing statutory military commissions to try captured terrorists for violations of the laws of war. Shortly after the atrocities of 9/11, President Bush directed the Department of Defense to establish military commissions for trying the terrorists responsible for those and other war crimes. The path to those prosecutions has not been easy, however, as the procedures have been challenged in litigation over the past several years. Now that the Supreme Court has decided *Hamdan*, we believe it is time to establish military commissions as a matter of statute that will satisfy the issues raised by the Court and that will enable the United States to prosecute and bring to justice members of al Qaeda and the Taliban for their war crimes.

We therefore would propose that Congress enact a new Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice, or "UCMJ," but adapted for use in the special context of military commission trials of terrorists. The proposed legislation would create a new chapter for military commission procedures in title 10 of the U.S. Code, which would follow immediately after the UCMJ. These military commissions would have jurisdiction to try alien unlawful enemy combatants—that is, members of groups, such as al Qaeda and the Taliban, who wage war against the United States in disregard of the established law of

war.

In many respects, the new Code of Military Commissions would track closely the procedures and structure of the UCMJ. We have proposed a system of military commissions, presided over by a military judge, with commission members drawn from the Armed Forces. The prosecution and defense counsel would be appointed from the JAG corps with the ability of the accused to retain a civilian counsel, in addition to assigned military defense counsel, and with the possibility that some prosecutors may be experienced prosecutors from the Department of Justice. Trial procedures, sentencing, and appellate review would largely track those currently provided under the UCMJ (albeit with federal court review in the D.C. Circuit, as Congress provided in the Detainee Treatment Act of 2005, or "DTA").

Because of the specific concerns raised by the Supreme Court, and because of comments from the Hill and within the Pentagon, the new Code of Military Commissions would differ in significant respects from the military-commission procedures established before *Hamdan*.

In particular, the presiding officer would be a certified military judge with the traditional authority of a judge to make final rulings at trial on law and evidence, just as in courts-martial. And as with courts-martial, the military judge would not be a voting member of the commission.

We also propose increasing the minimum number of commission members to five, from three, and require twelve members of the commission for any case in which the death penalty is sought. As is the case under the current military-commission procedures, and just as under the UCMJ, the Government would bear the burden of proving the

accused's guilt beyond a reasonable doubt, and a conviction would require a vote of two-thirds of the commission members in a non-death penalty case. As under the UCMJ, the death penalty would require a unanimous vote of all 12 commission members.

In addition, the Code of Military Commissions would establish a military appeals system that parallels the appellate process under the UCMJ. The draft legislation would create a Court of Military Commission Review within DoD to hear appeals on questions of law. The legislation would provide for judicial review of final military commission decisions in the D.C. Circuit, the same Article III court that currently hears those appeals and other detainee actions under the DTA. The bill would give all convicted detainees an appeal as of right, regardless of the length of their sentence, as opposed to the pre-*Hamdan* system, which provides for discretionary review of sentences under 10 years. The Supreme Court could review the D.C. Circuit's decisions through petitions for a writ of certiorari.

While the proposed military commissions would track the UCMJ in many ways, the Code of Military Commissions would depart from court-martial procedures in those instances where applying the UCMJ's provisions would be inappropriate or impractical. This is critical, because military necessity would not permit the strict application of all court-martial procedures, and because there are relevant differences between the procedures appropriate for trying our service members and those appropriate for trying the terrorists whom they fight.

For instance, the UCMJ provides *Miranda*-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit evidence obtained during the interrogation of terrorist detainees. I do not believe that anyone

contends that terrorists should be given *Miranda* warnings before interrogations. The draft legislation therefore would not include such *Miranda* requirements. At the same time, it would provide the accused with counsel once charges are brought and would grant the accused a privilege against self-incrimination during the trial.

The military-commission procedures also would not include the UCMJ's Article 32 investigation, which is a pre-charging proceeding that is akin to, but considerably more protective than, the civilian grand jury. Such a proceeding is appropriate when applied to U.S. military personnel, but is unnecessary and inappropriate for the trial of captured unlawful combatants, who are already subject to detention under the laws of war.

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence, where such evidence is reliable. Like a civilian judge, the military judge may exclude such evidence if the probative value is substantially outweighed by unfair prejudice. But the Code of Military Commissions must provide a standard of admissibility broader than that applied in court-martial proceedings.

Court-martial rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions arise from every-day violations of the military code of conduct, far from the battlefield. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not

amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. In this respect, the Code of Military Commissions follows the practice of international war crimes tribunals, which similarly recognize the need for broad evidentiary rules when dealing with evidence obtained under conditions of war.

Court-martial rules of evidence also require that classified evidence, if it is to be used at a court martial, be shared with the accused. In the midst of the current conflict, we simply cannot consider sharing with captured terrorists the highly sensitive intelligence that may be relevant to military-commission prosecutions. In the court-martial context, the Government must choose between disclosing the evidence to the accused or allowing the accused to evade prosecution. Putting the Government to that choice may be entirely appropriate when it comes to the trial of members of our own Armed Forces, but the Administration does not believe that imposing that dilemma is either necessary or appropriate when it comes to trying alien unlawful combatants for violations of the laws of war. We therefore believe it critical to ensure that military commissions have the discretion, under defined and limited circumstances, to admit classified evidence not shared with the accused.

To this end, the proposed legislation would require that before any classified evidence is to be introduced outside the accused's presence, the head of the executive department or agency that has classified the evidence must certify that sharing the evidence would harm national security and that the evidence has been declassified to the maximum extent possible. The military judge then would be required to make specific findings that the exclusion is warranted, is no broader than necessary, and would not

compromise the accused's right to a full and fair trial. At least one defense counsel, properly cleared, would be able to represent the accused at all proceedings where evidence is offered against the accused. Additionally, the proposed legislation provides the accused with an unclassified version of the classified information introduced against them, consistent with national security concerns. These procedures, properly administered by the military judge, would strike the appropriate balance between safeguarding our Nation's secrets and ensuring a fair trial of the accused.

Common Article 3 of the Geneva Conventions

Mr. Chairman, the Administration also believes that the draft legislation must address the Supreme Court's ruling in *Hamdan* that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists.

In my previous testimony before the Committee, I discussed with the Committee the problems caused by the vagueness of some terms in Common Article 3, particularly its prohibition of "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," a phrase that is susceptible of uncertain and unpredictable application. If left undefined by statute, the application of Common Article 3 will subject those who fight to defend America from terrorist attack to an uncertain legal standard that may be influenced by foreign tribunals.

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, without the bill's provisions, the meaning of Common Article 3—the standard that now applies to the conduct of U.S. personnel in the War on Terror—would be informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the War on Terror should be certain, and that those standards should be defined clearly by U.S. law, consistent with our international obligations. The draft legislation therefore would define our obligations under the relevant treatment provisions of Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress in the McCain Amendment, which are fully consistent with United States international obligations.

Last year, after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists, Congress adopted the McCain Amendment as part of the Detainee Treatment Act. That Amendment prohibits "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the established meaning of our Constitution, for all detainees held by the United States, regardless of nationality or geographic location. Indeed, the same provision was used to clarify similarly vague provisions in another treaty—the Convention Against Torture. Congress rightly assumed that the enactment of the Detainee Treatment Act settled questions about the baseline standard that would govern the treatment of detainees by the United States in the War on Terror.

The Administration further believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that legislation addressing the *Hamdan* decision

brings clarity and certainty to the War Crimes Act. To that end, the proposed legislation sets forth a definite and clear list of nine offenses serious enough to be considered "war crimes," punishable as the most serious breaches of Common Article 3, including clear and serious "outrages upon human dignity," such as rape, sexual assault, and conducting Nazi-like human experiments.

Judicial Review of Detainee Claims

Finally, Mr. Chairman, the draft legislation would clarify how the judicial review provisions of the DTA apply. Some have argued that *Hamdan* makes the DTA inapplicable to the hundreds of habeas petitions brought by the Guantanamo detainees to challenge their detention as enemy combatants. While we disagree with that reading, the proposed legislation would make clear that alien detainees held as enemy combatants by the United States in the War on Terror may not challenge their detention or trial in advance of a final judgment of a military commission or a final order of a Combatant Status Review Tribunal.

We believe that that was Congress's original intent under the DTA, and we believe that it makes sense, as in the civilian justice system, to restrict the accused's ability to pursue appellate remedies until after the trial has been completed. Our courts should not be misused to hear all manner of other challenges by terrorists lawfully held as enemy combatants in wartime.

* * *

I look forward to discussing these subjects with the Committee this morning.

Thank you, Mr. Chairman.

# # #

RECORD VERSION

STATEMENT BY

MAJOR GENERAL SCOTT C. BLACK

BEFORE THE

ARMED SERVICES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

SECOND SESSION, 109TH CONGRESS

SEPTEMBER 7, 2006

NOT FOR PUBLICATION

UNTIL RELEASED BY THE

COMMITTEE ON ARMED SERVICES

Thank you, Mr. Chairman, Ranking Member Skelton and members of the committee. I'd like to thank you for the opportunity to appear before you today and for the committee's timely and thoughtful consideration of these significant issues.

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

At the outset, I will tell you that military commissions, in some form, are a necessary forum for the trial of enemy combatants captured in the Global War on Terrorism. They are legally viable and pragmatically vital. They allow us to maintain the maximum flexibility in coping with those combatants we find on the current battlefield. Military commissions are well grounded in history and the Uniform Code of Military Justice and provide an indispensable tool to ensure justice under the rule of law.

The Hamdan decision has reinforced our need to ensure military commissions are reflective of American values such as due process and the rule of law. Our task is to balance the utility of the military commissions with these values that are foundational to our democratic society. We have been working within the Government to assemble a product that will do this—that will not only protect this great nation from those who are committed to destroy it, but that will simultaneously uphold the principles that distinguish this nation from those who attack it.

Current military commission procedures reflect a good start, but we can make the system better. While still maintaining the utility and flexibility of military commissions, we can utilize principles and provisions from the Uniform Code of Military Justice. We

also can and should borrow from other sources, such as international law, including the international criminal tribunals when it is appropriate to do so. By doing so, we can create what I believe would be a perfect blend of rights and responsibilities that would make us, literally, the envy of not only the people of our country but the people in the world in terms of the judicial process.

We are prepared to work together with the Congress and look forward to being participants in the process of creating such a system.

NOT FOR PUBLICATION UNTIL
RELEASED BY THE SENATE
HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

REAR ADMIRAL BRUCE MacDONALD, JAGC, USN

JUDGE ADVOCATE GENERAL

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

7 SEPTEMBER 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

RADM Bruce MacDonald

Judge Advocate General's Corps, United States Navy
Judge Advocate General

Rear Admiral MacDonald was born in 1956 in Cincinnati, Ohio. He graduated from the College of the Holy Cross in 1978 with a Bachelor of Arts degree in English, and entered the Navy in May of that year.

Rear Admiral MacDonald was commissioned an Ensign in the Unrestricted Line through the Naval Reserve Officer Training Corps. Following the normal Surface Warfare pipeline, he reported to the USS HEPBURN (FF 1055) in October 1979 where he served as Main Propulsion Assistant and Navigator. After a two-year tour at Fleet Combat Training Center, Pacific where he served as Intermediate Combat Systems Team Training and Advanced Multi-Threat Team Training course director, he was selected for the Law Education Program in 1984. He received his degree of Juris Doctor from California Western School of Law in 1987.

In 1987, Rear Admiral MacDonald reported to Naval Legal Service Office San Diego where he served as Senior Defense Counsel, Trial Counsel, and Medical Care Recovery Act Claims Officer. In 1990, he reported aboard USS INDEPENDENCE (CV 62) as the Command Judge Advocate. After receiving a Master of Laws degree from Harvard Law School in Cambridge, Massachusetts, in 1992, he was transferred to Seoul, Korea, where he served as Chief, Operational Law Division, on the staffs of United Nations Command, Combined Forces Command, and United States Forces Korea. He also served as Staff Judge Advocate on the staff of United States Naval Forces Korea.

In August 1994, Rear Admiral MacDonald reported aboard Naval Legal Service Office Northwest as its Executive Officer. In November 1996, he became the Officer in Charge of Trial Service Office West Detachment Bremerton. In July 1997, he reported to Commander Seventh Fleet in Yokosuka, Japan as the Fleet Judge Advocate. Rear Admiral MacDonald assumed command of Naval Legal Service Office Northwest in August 1999, serving as commanding officer until June 2002. He was assigned to the Pentagon as the Special Counsel to the Chief of Naval Operations from June 2002 through October 2004. In November 2004, Rear Admiral MacDonald became the Deputy Judge Advocate General and Commander, Naval Legal Service Command. In July 2006, Rear Admiral MacDonald assumed his current position as Judge Advocate General of the Navy.

Rear Admiral MacDonald is admitted to practice before the courts of the State of California and the United States District Court for the Southern District of California. His military decorations include the Legion of Merit with two Gold Stars, the Defense Meritorious Service Medal, the Navy Meritorious Service Medal with Gold Star, the Navy Commendation Medal with Gold Star, and the Navy Achievement Medal with Gold Star. He and his wife Karen have one daughter, Erin.

Chairman Hunter, Ranking Member Skelton, members of the Armed Services Committee, good morning. Thank you for the opportunity to testify today on the subject of military commissions.

Congress' establishment of a permanent, legal framework for military commissions (a Code of Military Commissions) would be a welcome addition to American military jurisprudence. My view is that existing courts-martial rules are not practical for the prosecution of unlawful enemy combatants, now or in future conflicts. Yet, our military justice model (the Uniform Code of Military Justice) can provide an appropriate starting point for the drafting of Commission legislation.

We have been working with others in the Executive Branch to formulate precisely such legislation. I recommend that legislation establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe all substantive offenses. The legislation should further authorize the President to promulgate supplemental rules of practice, similar to the Manual for Courts-Martial or, in this case, a Manual for Military Commissions. The legislation proposed by the President generally accomplishes those goals.

Within that context, my personal opinion is that some of the most important legislative sections would provide for:

- Jurisdiction that permits prosecution of all unlawful enemy combatants who engage in or attempt to engage in hostilities against the United States.

- Independent military judges who preside and have authority to make final rulings on all matters of law.

- Defense counsel with an independent reporting chain of command, free from both actual and perceived influence of prosecution and convening authorities.

- Introduction of hearsay evidence so long as the evidentiary standard is clarified to exclude information that is unreliable, not probative, unfairly prejudicial, confusing, or misleading, or when such exclusion is necessary to protect the integrity of the proceedings. Such an approach would be consistent with the practice of international war crimes tribunals supported by the United States in Rwanda and the former Yugoslavia.

- The presence of the accused, perhaps crafting a process similar to Military Rule of Evidence 505, which permits a military judge to conduct an *in camera, ex parte* review of the Government's interest in protecting classified information and encourages the substitution of unclassified summaries or alternative forms of evidence in lieu of the classified information.

I and other military lawyers have worked with many others in the Administration to incorporate these ideas into the draft legislation recently submitted before you. The draft legislation reflects many of our comments, although there are some issues, particularly the use of classified evidence, where I would stand by the approach similar to that taken by the

Uniform Code of Military Justice. It is Congress that will make the final decision on these issues, however. I am confident in so doing that we can achieve the necessary and appropriate balance between affording an accused the judicial guarantees recognized as indispensable by civilized peoples on the one hand, and our valid national security interests on the other.

Thank you again for this opportunity to appear today. I look forward to answering your questions and working with the Committee on this important endeavor.

DEPARTMENT OF THE AIR FORCE

PRESENTATION TO THE COMMITTEE ON ARMED SERVICES

UNITED STATES HOUSE OF REPRESENTATIVES

SUBJECT: STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

STATEMENT OF: MAJOR GENERAL CHARLES J. DUNLAP, JR.
DEPUTY JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

SEPTEMBER 7, 2006

NOT FOR PUBLICATION UNTIL RELEASED
BY THE COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

BIOGRAPHY

UNITED STATES AIR FORCE

MAJOR GENERAL CHARLES J. DUNLAP JR.

Maj. Gen. Charles J. Dunlap Jr. is Deputy Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C. General Dunlap assists the Judge Advocate General in the professional oversight of more than 2,200 judge advocates, 350 civilian attorneys, 1,400 enlisted paralegals and 550 civilians assigned worldwide. In addition to overseeing an array of military justice, operational, international and civil law functions, General Dunlap provides legal advice to the Air Staff and commanders at all levels.

General Dunlap was commissioned through theÂ ROTC programÂ at St. Joseph's University in May 1972, and was admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania in 1975. HeÂ has deployed to support various operations in the Middle East and Africa, including Provide Relief, Restore Hope,Â Vigilant Warrior, Desert Fox,Â Bright Star and Enduring Freedom. He has led military-to-military delegations to Uruguay, the Czech Republic, South Africa and Colombia.Â

The general speaks widely on legal and national security issues, and he is published in Air and Space Power Journal, Peacekeeping & International Relations, Parameters, Proceedings Military Review, the Fetcher Forum of World Affairs, the Air Force Times, the Wake Forest Law Review, the Air Force Law Review, the Tennessee Law Review, and the Strategic Review, among others. Prior to assuming his current position, General Dunlap served as the Staff Judge Advocate at Headquarters Air Combat Command.

EDUCATION

1972 Bachelor of Arts degree, St. Joseph's University, Philadelphia, Pa.
1975 Juris Doctorate, Villanova University School of Law, Villanova, Pa.
1979 Squadron Officer School, Maxwell AFB, Ala.
1984 Armed Forces Staff College, Norfolk, Va.
1989 Air War College, by correspondence
1992 Distinguished graduate, National War College, Fort Lesley J. McNair, Washington, D.C.
1996 National Security Program, Maxwell School of Citizenship and Public Affairs, Syracuse University, N.Y.

ASSIGNMENTS

1. January 1976 - April 1977, Assistant Staff Judge Advocate, 2nd Combat Group, Barksdale AFB, La.
2. April 1977 - May 1978, Assistant Staff Judge Advocate, 51st Combat Group, Osan Air Base, South Korea
3. May 1978 - December 1978, Chief, Civil Law Division, 20th Combat Group, Royal Air Force Upper Heyford, England
4. December 1978 - March 1980, Chief, Military Justice Division, 20th Tactical Fighter Wing, RAF Upper Heyford, England
5. March 1980 - July 1983, faculty member, Air Force Judge Advocate General School, Maxwell AFB, Ala.

6. July 1983 - January 1984, Chief, Military Justice Division, Air Force Judge Advocate General School, Maxwell AFB, Ala.
7. January 1984 - July 1984, student, Armed Forces Staff College, Norfolk, Va.
8. July 1984 - July 1987, Staff Judge Advocate, 97th Bombardment Wing, Blytheville AFB, Ark.
9. July 1987 - June 1989, Circuit Military Judge, Air Force Legal Services Agency, Bolling AFB, Washington, D.C.
10. June 1989 - August 1991, Chief, Personnel Action Law Branch, General Law Division, Headquarters U.S. Air Force, Washington, D.C.
11. August 1991 - July 1992, student, National War College, Fort Lesley J. McNair, Washington, D.C.
12. July 1992 - January 1995, Deputy Staff Judge Advocate, U.S. Central Command, MacDill AFB, Fla.
13. January 1995 - July 1998, Staff Judge Advocate, U.S. Strategic Command, Offutt AFB, Neb.
14. July 1998 - July 2000, Staff Judge Advocate, 9th Air Force, Shaw AFB, S.C.
15. July 2000 - February 2002, Staff Judge Advocate, Headquarters Air Education and Training Command, Randolph AFB, Texas
16. February 2002 - May 2006, Staff Judge Advocate, Headquarters Air Combat Command, Langley AFB, Va.
17. May 2006 - present, Deputy Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C.

MAJOR AWARDS AND DECORATIONS
Defense Superior Service Medal with oak leaf cluster
Legion of Merit with two oak leaf clusters
Meritorious Service Medal with four oak leaf clusters
Air Force Commendation Medal
Armed Forces Expeditionary Medal
Southwest Asia Service Medal with two bronze stars
Humanitarian Service Medal
Air Force Overseas Ribbon - Short
Air Force Overseas Ribbon - Long
Small Arms Expert Marksmanship Ribbon

OTHER ACHIEVEMENTS
1984 Outstanding Judge Advocate of the Year, Strategic Air Command
1992 U.S. Air Force Outstanding Career Armed Services Attorney
1996 Thomas P. Keenan Award for international and operations law

EFFECTIVE DATES OF PROMOTION
Second Lieutenant May 14, 1972
First Lieutenant June 9, 1975
Captain Jan. 20, 1976
Major Jan. 1, 1983
Lieutenant Colonel Sept. 1, 1988
Colonel Aug. 1, 1993
Brigadier General Sept. 1, 2002
Major General May 3, 2006

(Current as of August 2006)

STATEMENT OF
MAJOR GENERAL CHARLES J. DUNLAP, JR.
THE DEPUTY JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

BEFORE THE
HOUSE ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
CONCERNING THE SUPREME COURT'S DECISION
IN *HAMDAN v. RUMSFELD*

September 7, 2006

Thank you, Chairman Hunter, Ranking Member Skelton, and members of the committee. Major General Rives, The Judge Advocate General of the Air Force, is currently overseas. Accordingly, I appreciate the opportunity to appear before you today as this committee carefully considers the authority of the United States to prosecute suspected terrorists, consistent with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S.Ct. 2749, (2006).

I start from a premise that legislation is appropriate. As the Supreme Court noted again in *Hamdan*, the President's powers, especially in wartime, are at their greatest when specifically authorized by Congress. While different approaches are feasible, I believe our Nation will be best served by a fresh start to the military commission process.

The United States is more than a nation of laws, it is a country founded upon strong moral principles of fairness to all. Moreover, our country -- to the delight of our adversaries -- has been heavily criticized because of the perception that the pre-*Hamdan* military commission processes were unfair and did not afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."

Now is the time to correct that perception and clearly establish procedures and rules that meet that standard. It will do more than merely correct legal deficiencies; it will help affirm the United States as the leading advocate of the rule of law.

The Uniform Code of Military Justice (10 USC §801 *et. seq.*) (UCMJ) and the Manual for Courts-Martial (MCM) provide superb starting points for the development of a revised commission process. There will, of course, necessarily be differences between current courts-martial procedures and the rules and procedures for military commissions.

However, many of the processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and at the same time meet the requirements Common Article 3 of the Geneva Conventions. The proposal submitted to Congress by the President reflects an attempt to adapt the UCMJ to the military commission process. I support many of its provisions.

A revised approach to military commissions is not only the right thing to do; it also serves the pragmatic military purpose of helping us win the war on Global War on Terrorism.

Success in this war requires the cooperation of many nations around the world. Addressing the Supreme Court's concerns about military commissions will reaffirm our position on the moral and legal high ground. A process fully compliant with Common Article 3 will enhance our standing internationally and empower our allies to embrace the legal reasoning and architecture behind our prosecution of military commission cases. Doing so is plainly in our warfighting interests.

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

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

BRIGADIER GENERAL JAMES C. WALKER

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

7 SEPTEMBER 2006

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

Brigadier General
James C. Walker
MilSec to Staff Judge Advocate to the Commandant

BGen Walker was born on 1 July 1954 in Laurens, South Carolina. After graduation from Clemson University with honors in May 1976, he was commissioned through the PLC program. BGen Walker then enrolled in law school at the University of South Carolina, and received a Juris Doctorate degree with honors in May 1979.

BGen Walker reported for training at The Basic School, Quantico, Virginia in August 1979. After graduation in February 1980 he was ordered to MCAS, Beaufort, S.C. In June 1980 he attended the Lawyer's Course at Naval Justice School where he graduated first in his class. At Beaufort, BGen Walker served as a defense counsel, trial counsel, and legal assistance officer. He was promoted to Captain in February 1981.

In July 1982 BGen Walker was transferred to the Military Law Branch, Judge Advocate Division, HQMC. During this tour he chaired a national committee of the American Bar Association and graduated with honors from Georgetown University School of Law with a Master of Laws in Taxation.

In April 1985 BGen Walker was transferred to marine Barracks, 8th and I, where he served three years as Adjutant for the oldest post in the Corps. After promotion to Major in 1988, he attended the U.S. Army Judge Advocate Advanced Course in Charlottesville, Virginia and earned a Master of Laws degree in military law.

In June 1989 BGen Walker was transferred to Okinawa, Japan. There he served as Officer in Charge of Legal Services Support Team, Camp Hansen. After one year on Okinawa he reported to MCAS, El Toro, California. From July 1990 until July 1992 he served as the Military Justice Officer, Deputy SJA, and finally as SJA for the 3rd Marine Aircraft Wing.

In July 1992 BGen Walker assumed command of Headquarters and Headquarters Squadron, MCAS, El Toro. He commanded the squadron until June 1994 when he was reassigned to Camp Pendleton where he served as Officer in Charge of the Legal Services Support Section. In June 1995 he was selected for top level school. After graduation as a distinguished graduate from the Naval War College in June 1996, BGen Walker reported to HQ USEUCOM where he served as the Operational Law Advisor until June 1998.

BGen Walker returned to Camp Pendleton to serve as SJA for I MEF from June 1998

until June 2000. In July 2000 he assumed command of Security Battalion, Marine Corps Base, Camp Pendleton and concurrently served as the Assistant Chief of Staff, Installation Security and Safety until June 2002. In July 2002 BGen Walker assumed duties at HQMC as Deputy SJA to the Commandant and Deputy Director of the Judge Advocate Division. BGen Walker next served as the Military Secretary/Executive Assistant to the Commandant from June 2003 until August 2006. He became Staff Judge Advocate to the Commandant and Director, Judge Advocate Division in August 2006.

BGen Walker's personal decorations include the Legion of Merit with two gold stars, Defense Meritorious Service Medal, Meritorious Service Medal with three gold stars, Navy Commendation Medal with gold star, and Navy Achievement Medal. He resides in Springfield, Virginia with his wife and son.

Chairman Hunter, Ranking Member Skelton, members of the Committee, good morning. I wish to thank you for the opportunity to appear before you today, and for this Committee's interest in the military commissions process. I assumed duties as Staff Judge Advocate to the Commandant on 25 August, and look forward to working with the committee on this and future matters.

Military commissions are a necessary forum for the trial of unlawful enemy combatants captured in the Global War on Terror. They can provide the flexibility essential for dealing with these individuals in the construct of a war with no readily identifiable end.

Since the Supreme Court's decision in *Hamdan v. Rumsfeld* in June, a significant amount of effort has been devoted to drafting a legislative proposal to address shortfalls with the commissions identified by the Court, as well as the concerns of Congress and the American people. While this work occurred during my predecessor, Brigadier General Sandkuhler's tour, I am aware that military judge advocates provided feedback in response to drafts circulated via the Department of Defense. Additionally, following a meeting between the Attorney General and The Judge Advocates General, uniformed attorneys met with Department of Justice representatives to discuss the proposed legislation and participated in subsequent discussions. The draft legislation submitted by the President incorporates a number of comments presented by the military judge advocates in those meetings.

The *Hamdan* decision underscores the necessity of ensuring that military commissions reflect American values such as due process and the rule of law. In previous hearings on this very topic, the word "balance" has been used repeatedly to describe the nature of the challenge before us. Striking the balance between individual due process and our national security interests, while maintaining our nation's flexibility in dealing with terrorists and unlawful enemy

combatants we encounter on the battlefield is the end we all seek. At the end of the day, the system we create must provide the "judicial guarantees which are recognized as indispensable by civilized peoples," as required by Common Article 3 of the Geneva Conventions.

In determining what would constitute "indispensable judicial guarantees," a plurality of the Court looked to the "fundamental guarantees" listed in Article 75 of Additional Protocol I to the Geneva Conventions of 1949. These Article 75 enumerated rights include, among others, the presumption of innocence the right against self-incrimination, and the right to presence during one's trial. Throughout the drafting process I previously described, the Judge Advocates General steadfastly maintained that a system which would permit the introduction of evidence against an accused, outside of his presence, is objectionable. I join them in this regard, and in their enthusiasm in continuing to work with Congress to create a system which will simultaneously help to defend our nation from those who seek to destroy it, while upholding the values which have set us apart for over 230 years.

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