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DETAINEES

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UNITED STATES SENATE

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FIRST SESSION

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DETAINEES

WEDNESDAY, JUNE 15, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, DeWine, Sessions, Graham, Cornyn, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, and Durbin.

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

Chairman SPECTER. Good morning, ladies and gentlemen. It is 9:30 on the button. We will proceed with the Judiciary Committee hearing on the question of detainees.

The starting point of this issue is the Constitution of the United States. Under Article I, section 8, clauses 10 and 11, the Constitution explicitly confers upon Congress the power "to define and punish offenses against the laws of nations" and "to make rules concerning captures on land and water."

The executive branch issued on November 13, 2001, under the caption Presidential Executive Military Order, rules promulgated for detention, treatment, and trial of certain non-citizens in the war against terrorism. Then on July 7, 2004, 9 days after a trilogy of Supreme Court cases, the Department of Defense created Combat Status Review Tribunals.

The focus of today's hearing is going to be on the procedures used with detainees. We do not have within the scope of this hearing the issues of torture or mistreatment. The subject we have today is very, very complicated in and of itself, and there will be sufficient time for later hearings on other related matters.

The Supreme Court of the United States on June 28th of 2004 came down with a complex series of opinions in three cases, one of which only has a plurality opinion, which means four Justices agreed on an opinion so there is not an opinion of the Court. The two others were five-person majority opinions, and a total of some 13 opinions were issued in all, and I think any fair analysis would say that we have a crazy quilt which we are dealing with here, and that has been supplemented by three opinions in the United States District Court for the District of Columbia, two of which have said detainees' rights are being violated, one opinion saying detainees' rights are being upheld. They have been sitting in the court of ap-

peals for a very long period of time. They were decided, one before 2004 ended and the other two in early 2005, and the Judiciary Committee is going to consider—a touchy subject, but we are going to consider putting time limits on the disposition of these highly sensitive cases. Judges do not like that. We do not want to interfere with their judicial independence. But the Congress does have the authority to establish time parameters, which we have done in a number of situations.

The only unifying factor coming out of the multitude of opinions by the Supreme Court of the United States was that it is really the job of the Congress, and I think they made a pretty good case for that. Senator Durbin and I introduced legislation in 2002, and Congressman Frank introduced legislation, but none of it has gone anywhere, and there is a real question as to why Congress has not handled it. It may be that it is too hot to handle for Congress. It may be that it is too complex to handle for Congress. Or it may be that Congress wants to sit back as Congress, we, customarily do awaiting some action by the court no matter how long it takes, *Plessy* v. *Ferguson* in 1896 to *Brown* v. *Board of Education* in 1954. But, at any rate, Congress has not acted, and that is really what the focus of our hearing is today, as to what ought to be done.

Justice Scalia wrote in an opinion, joined by the Chief Justice and Justice Thomas, "Congress is in session. If it had wished to change Federal judges' habeas jurisdiction from what this Court held that to be, it could have done so." Which is certainly true. Then Justice Scalia turned his wrath on his colleagues in the Supreme Court of the United States, saying, "And it could have done so by intelligent revision of the statutes instead of today's clumsy, countertextual interpretation that confers upon wartime prisoners greater rights than domestic detainees."

I would ordinarily stop at 5 minutes, but this is a complex subject. I am going to take a very small amount of extra time, colleagues.

Then Justice Scalia went on to say, in certainly not subdued language, "For this Court to create such a monstrous scheme in time of war and in frustration of our military commanders' reliance upon clearly stated prior law is judicial adventurism of the worst sort." We constantly complain that the Court makes the law, and here we are having sat back with our constitutional mandate pretty clear.

In more circumspect language, Justice Stevens went on to make a point which is worth emphasizing here this morning. This opinion was joined in by Justice Stevens, in dissent in *Hamdi*, which may account for Justice Scalia's more temperate language. He wrote that he could not determine the "Government security needs" or the necessity to "obtain intelligence through interrogation," concluding, "It is far beyond my competence or the Court's competence to determine that, but it is not beyond Congress'. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of the Court."

As noted in the Congressional Research Service, the Supreme Court decisions leave many questions unanswered for lower courts: the definition of the term "enemy combatant," the scope of legal

procedures due persons designated as such. Would habeas corpus be foreclosed if a detainee is convicted by a military commission? Would a detainee have access to United States courts where held abroad by the United States military in locations where the United States does not exercise full jurisdiction and control? And then in Judge Green's opinion—and I will not take much more time—Judge Green puts on the line many, many other critical issues which have yet to be defined.

So that it seems to me that Congress has its work cut out for it as we look at a very, very tough issue on how we handle detainees. That is a very abbreviated statement of what I would like to say.

Senator Leahy?

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

Senator LEAHY. Mr. Chairman, I think it is a valuable one because it has been well over 3 years since the administration began to hold detainees at Guantanamo. The first batch of 20 arrived January 2002. There are now more than 500 there, although nobody seems to be able to tell us what the exact number is. So this is a welcome hearing for us to decide what we should do, and I commend the Chairman for holding it.

I think the amount of interest around the country in the hearing shows how the American people feel. This policy on detainees is clearly not working. We seem to have a difficulty in getting a coherent theory from the administration how to proceed.

In 2001, military commissions were defended by the then-Attorney General as tribunals that "can dispense justice swiftly, close to where our forces may be fighting, without years of pre-trial proceeding or post-trial appeals." Now, that was 3 years ago. But far from assuring swift justice, we have not seen any justice. There has not been a single military commission complete a hearing or convict a suspected terrorist in those 3 years.

Until a year ago, the administration seemed to hold tight to the notion that by detaining prisoners at Guantanamo Bay, a location where the prisoners had no right of access to the courts, it could shield itself from judicial challenge. But the Supreme Court in *Rasul* v. *Bush* rejected that legal theory.

Now we hold to the theory that they will be there until the end of the war on terror. All of us know that war will not end in our lifetime.

What has become clear is that the policies were poorly reasoned and apparently extremely short-sighted. The administration's insistence on unilateralism, a tendency and a problem that has colored and undermined so many of the policies, has led to poor decisions and poor practices and detention policies as well. What they have said to us from the start is, "Trust us. Trust us that we know the law and that we will comply with it. Trust us to treat detainees humanely, in accordance with our laws and treaties. Trust us that Guantanamo is going to make Americans safer."

Now, 3 years later, about the only thing we know for certain is that trust may well have been misplaced. Guantanamo Bay is an international embarrassment to our Nation, to our ideals, and it re-

mains a frustrating threat to our security. Our great country, America, was once viewed as a leader in human rights and the rule of law, and justly so. But Guantanamo has undermined our leadership and has damaged our credibility. It has drained the world's good will for America at alarming rates.

I was recently at a meeting of NATO parliamentarians. These are countries that are most closely allied with America. They have been our strongest supporters. The first question each of them asked is: What about Guantanamo? What about Afghanistan and Iraq? And they tell us—and I must agree—that these are not the policies of a great and just nation. They are not the American system of justice.

Now, the administration did not want to have Congress as a partner in the war on terror and insisted on acting unilaterally. From the start of combat in Afghanistan in October 2001, I urge President Bush to work with Congress to fashion appropriate rules and procedures for detaining and punishing suspected terrorists. That was not a partisan thing. Our Chairman, Senator Specter, did the same. We both noted at the time that Government is at its strongest when the executive and legislative branches of Government act in concert. That was rejected.

So now I say, What is the administration's plan for Guantanamo Bay, assuming there is a plan? What does the administration intend to do with more than 500 detainees still imprisoned there? How many are going to be released and when? How many are going to be charged and tried, and win?

The administration says that these detainees pose a threat to the safety of Americans. The Vice President said that the other day. If that is true, if they pose a threat to us, then there has to be evidence to support that, or the administration would not tell the world that. And if there is evidence, then let's prosecute them. Let's bring the evidence forward.

But we also know that some of these detainees have been wrongly detained, and I suspect that there are others who have not been released that have weak evidence at best. If they are being detained in accordance with Geneva Conventions, that is one thing. But that is not it. This idea of changing the focus, producing props of chicken dinners and such, seeming to argue this is more a Club Med than a prison, let's get real. These people have been locked up for 3 years, no end in sight, and no process to lead us out of there.

Guantanamo Bay is causing immeasurable damage to our reputation as a defender of democracy and a beacon of human rights around the world. I am proud of what our Nation has accomplished. I want us to be that beacon of human rights. But we are not being it with Guantanamo. We do not have a plan to repair the damage. Congress has abdicated its oversight responsibilities for too long. I think it is time for Congress to demand a way out.

Mr. Chairman, I applaud you for holding these hearings.

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

Chairman SPECTER. Thank you very much, Senator Leahy.

We turn now to our first witness, who is Rear Admiral James McGarrah. He has a very, very distinguished record, which will be incorporated into our hearing record. But suffice it to say for these

purposes he has been designated by the Secretary of the Navy as Director of the Administrative Review of the Detention of Enemy Combatants, going right to the heart of our subject.

Admiral, we have a standard policy of 5 minutes for opening statements. All of the statements will be made a part of the record, but that leaves us the maximum amount of time for questions and answers by members of the Committee, and you can see today that this is a hearing where there is a lot of interest and there will be a lot of questions. Thank you for joining us, Admiral McGarrah, and we appreciate the Department of Defense providing you and General Hemingway as experts, and the other witnesses who are here today, and we look forward to your testimony.

STATEMENT OF REAR ADMIRAL JAMES M. MCGARRAH, DIRECTOR OF ADMINISTRATIVE REVIEW OF THE DETENTION OF ENEMY COMBATANTS, DEPARTMENT OF THE NAVY, WASHINGTON, D.C.

Admiral MCGARRAH. Senator Specter, Senator Leahy, members of the Committee, I am Admiral Jim McGarrah, Civil Engineer Corps, United States Navy, and I really do appreciate the opportunity to be here today.

In May of last year, Deputy Secretary of Defense Paul Wolfowitz named Secretary of the Navy Gordon England the Designated Civilian Official, or DCO, to supervise the process to review annually the cases of all detainees held under DOD control at the naval base at Guantanamo Bay, Cuba. Secretary England in turn appointed me as the Director of the Office for the Administrative Review for the Detention of Enemy Combatants, the organization that he charged with carrying out this review process. At the time we solicited input from the international Committee of the Red Cross, from non-governmental organizations, and from Ambassadors of the countries with detainees at Guantanamo Bay, and then worked across all U.S. Government agencies to develop a rigorous and fair review process called the Administrative Review Board, or ARB. The purpose of the ARB process is to assess annually whether each enemy combatant at Guantanamo continues to pose a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention. Based on this assessment, the ARB panel can recommend to Secretary England in his role as DCO that individual detainees be released, continue to be detained, or be transferred with conditions to their country of nationality. Secretary England, as the DCO, is the final decision maker for this process.

While the ARB procedures were being developed last summer, the U.S. Supreme Court issued three rulings related to detained enemy combatants. Among other things, the Court in one of those cases held that Federal courts have jurisdiction, under the Federal habeas corpus statute, to hear challenges to the legality of the detention of Guantanamo Bay detainees. In another one of those cases, a plurality of the Court cited Section 1–6 of Army Regulation 190–8 as an example of military regulations that might suffice to satisfy the due process requirements that the plurality indicated would apply to a U.S. citizen held as an enemy combatant in the United States. In light of those decisions, the Deputy Secretary of

Defense established the Combatant Status Review Tribunal, or CSRT, process to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to contest the enemy combatant designation. The CSRT process was based on Army Regulation 190–8, which provides policy, procedures, and responsibilities for handling of prisoners of war and other detainees. Specifically, it outlines provisions for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention, which requires a competent tribunal to determine the status of belligerents in cases where any doubt arises as to whether a belligerent satisfies the requirements for prisoner of war status.

The CSRT is a one-time process for each detainee and provides them opportunities:

The opportunity for review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their decisions by majority vote based on preponderance of evidence;

The opportunity to attend all open portions of the proceedings;

The opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available;

The opportunity to question witnesses called by the tribunal;

The opportunity to testify on his own behalf if he desires;

The opportunity to receive assistance of an interpreter, when necessary; and

The opportunity freely to decline to testify.

The CSRT process also provides more process and protections than Army Regulation 190–8:

The Detainee is given an opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for the hearing.

The CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal members.

The CSRT Recorder is obligated to search Government files for evidence suggesting the detainee is not an enemy combatant.

In advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant designation.

And the result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings, if appropriate.

Secretary England appointed me as the Convening Authority for this process. The tribunal panels were the decision makers in this process. In my Convening Authority review, I could either approve the panel's decision or I could return it for further deliberation. In less than 6 months, tribunal hearings were conducted on all 558 detainees under Department of Defense control at Guantanamo Bay. Of those 558 cases heard, the CSRT panels determined that 520 of those detainees were properly classified as enemy combatants and that 38 detainees no longer met the criteria for enemy combatant designation. Those found to no longer meet the criteria were processed for release. Twenty-three have been released, and

the Department of Defense continues to work closely with Department of State to effect the release of the remaining 15.

The first ARB was conducted in December of 2004. The ARB process is ongoing, with the expectation that we will complete the first annual review for all eligible detainees by the end of this calendar year. It provides each eligible detainee with opportunities.

Chairman SPECTER. Admiral McGarrah, could you summarize, please?

Admiral MCGARRAH. I will. The ARB process is intended to be similar to the CSRT process in that it is rigorous and fair and will assess on an annual basis whether or not the detainees continue to pose a threat to the U.S. or its allies. The DCO is the decision maker in that process and can decide to continue to detain, to release, or to transfer.

Because of the highly unusual nature of the global war on terror and because we do not want to detain any person longer than is necessary, we have taken this unprecedented and historic action to establish this process to permit enemy combatants to be heard while a conflict is ongoing.

Mr. Chairman, thank you again for the opportunity to provide this information. I would ask that the remainder of my remarks be submitted to the record, and I am happy to answer any questions that you or the Committee members might have regarding the CSRT process or the ARB.

[The prepared statement of Admiral McGarrah appears as a submission for the record.]

Chairman SPECTER. All of your statement will be made a part of the record, as will the full statements of all of the witnesses.

We will turn now to General Thomas L. Hemingway. He is the Legal Advisor to the Appointing Authority in the Department of Defense Office of Military Commissions. General Hemingway's responsibility covers providing legal advice to the Appointing Authority on referral of charges, questions that arise during trial, and other legal matters concerning military commissions.

Thank you for coming in this morning, General, and we look forward to your testimony.

STATEMENT OF BRIGADIER GENERAL THOMAS L. HEMINGWAY, LEGAL ADVISOR TO THE APPOINTING AUTHORITY FOR THE OFFICE OF MILITARY COMMISSIONS, DEPARTMENT OF DEFENSE, WASHINGTON, D.C.

General HEMINGWAY. Thank you, Mr. Chairman, members of the Committee. I am pleased to discuss the operations of our Office of Military Commissions.

America is at war. It is not a metaphorical war. It is as tangible as the blood, the rubble that littered the streets of Manhattan on September 11, 2001. The reality of this war could be seen in the faces of those who stood in stark horror as they saw helpless, innocent people fall and jump to their deaths from the Twin Towers. In response to the attacks on the United States on September 11, 2002, the President established military commissions to try those non-citizen members of al Qaeda and other persons engaged in specified terrorist activities who are alleged to have committed violations of the laws of war and related offenses.

The use of military commissions predates the formation of our Republic. Since the Revolutionary War, the United States has used military commissions to try enemy combatants for law of war violations. In the Mexican-American War, during the Civil War, following the Civil War, during and after World War II, military commissions were used to try enemy combatants for violations of the laws of war. In the President's Military Order establishing military commissions, he mandated that the accused shall be afforded a full and fair trial. The President also determined that the Federal Rules of Evidence are not practicable for military commissions given the nature of this conflict. This determination is based on the unique factors present in conducting judicial proceedings against suspected warm criminals at a time when the United States is actively engaged in an ongoing armed conflict. Instead of the Federal Rules of Evidence, military commissions have adopted the internationally accepted standard of admissibility of evidence—probative value.

The President's Military Order focuses on the unique factors of the current ongoing hostilities and affirms that national security interests require the continued application of U.S. national security laws in developing commission instructions and orders consistent with the accused's right to a fair trial. These orders, instructions, and regulations afford an accused the following rights: the presumption of innocence; trial before an impartial and independent panel of three to seven officers; notification of charges in language understood by the accused; call witnesses and present evidence; cross-examine witnesses and examine evidence; election not to testify with no adverse inference; appointment of military counsel at no cost to the defendant and the right to hire a civilian counsel at no expense to the government; privileged communications with defense counsel; adequate support and resources to defense counsel; appointment of interpreters and translators; open proceedings, except as absolutely necessary to protect national security; proof of guilt beyond a reasonable doubt; review of the record of trial by a three-member review panel.

The rules of evidence and procedure established for trials by military commission compare favorably to those being used in the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. These rules are consistent with our National commitment to adhere to the rule of law.

The Office of Military Commissions has taken key steps in moving the commission process forward. To date, the President has determined that 12 detainees currently at Guantanamo are subject to his order. The Appointing Authority, Mr. John D. Altenburg, has approved charges against four accused and referred these charges to military commissions for trial. Those trials commenced late in the summer of 2004. The Office of Military Commissions has been working diligently to convene military commissions; however, the trials are stayed pending an appellate court decision in the case of Mr. Hamdan. Military and civilian counsel for Mr. Hamdan brought an action in the United States District Court to review the legality of trial by military commissions. The district court affirmed the legality of military commissions to try violators of the law of war, and a review panel has an appeals mechanism. However, the

court raised concerns about the commission process whereby an accused may be excluded from the hearing to protect classified and protected information. Because this protection is essential to the continued effectiveness in our current war on terror, the Government has appealed this ruling. The delays to the commission process are directly attributable to the exercise of the accused's ability to challenge that process in Federal courts. While the appeal is pending, investigations and submissions of charges against additional accused continue.

This is the first time since World War II that the United States has had a need to convene military commissions. While it is important to move quickly back to trial, the Office of Military Commissions' movement forward is measured with full awareness and consideration of the rights of an accused and the needs of our Nation.

The ongoing global war on terrorism continues to pose many unique challenges in this asymmetrical battlefield. Neither the United States nor the international community contemplated a non-state organization having the capability to wage war on a global scale. Military commissions are the appropriate forum to preserve safety, protect national security, and provide for full and fair trials consistent with our standards and those of the international community.

Thank you, Mr. Chairman.

[The prepared statement of General Hemingway appears as a submission for the record.]

Chairman SPECTER. Thank you very much, General Hemingway.

Our next witness is Mr. J. Michael Wiggins, Deputy Associate Attorney General, having the responsibility for overseeing the Department of Justice Civil Division, civil rights and criminal matters within the civil litigating divisions covering the areas of concern here. His full resume of a very distinguished record will be included in our record overall, but we appreciate your coming in, Mr. Wiggins, and look forward to your testimony. The floor is now yours.

STATEMENT OF J. MICHAEL WIGGINS, DEPUTY ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. WIGGINS. Mr. Chairman, members of the Committee, I am a Deputy Associate Attorney General at the Department of Justice, and I am pleased to discuss the work of the Department and the current status of litigation involving the U.S. Government's detention of enemy combatants at Guantanamo Bay, Cuba, as part of the ongoing war on terror.

In response to the terrorist attacks of September 11, 2001, the President dispatched the U.S. Armed Forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of those hostilities, the U.S. captured or took custody of a number of enemy combatants. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention is not for criminal justice purposes and is not part of our Nation's criminal justice system. Rather, detention of enemy combat-

ants serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and to prevent additional attacks against our country. Some of those individuals are being held at Guantanamo Bay, Cuba.

Each Guantanamo Bay detainee has received a formal hearing before a Combatant Status Review Tribunal, a CSRT, for determining whether that individual remains properly classified as an enemy combatant.

During the CSRT proceedings, each detainee received substantial procedural protections. In addition, a subset of combatants have been designated for trial by military commission. Since the founding of our Nation, the United States military has used military commissions during wartime to try offenses against the laws of war. The Supreme Court has repeatedly upheld the use of these military commissions.

Against this backdrop of legal authority and historic practice, on November 13, 2001, the President ordered the establishment of military commissions to try a subset of the detainees for violations of the laws of war and other applicable laws. Under the military order, a military commission may not exercise jurisdiction over a detainee unless certain preconditions have been met, always including status as an alien and generally including a determination of connection to the violent enemies of the United States and a specific violation of the laws of war.

On June 28, 2004, the Supreme Court issued a trio of decisions that defined the landscape for future litigation involving military detention of enemy combatants: *Rasul*, *Hamdi*, and *Padilla*. In the aftermath of the decision in *Rasul*, a large number of habeas petitions have been filed on behalf of Guantanamo Bay detainees. As of today, approximately 95 cases have been filed on behalf of approximataly 200 detainees.

While the Government has taken unprecedented steps to allow private lawyers access to these detainees and has produced factual returns consisting of the records of the CSRTs, including classified information, it has moved to dismiss Guantanamo Bay detainee habeas cases on the grounds that alien enemy combatants detained abroad lack rights under the United States Constitution. And even if Guantanamo Bay detainees do enjoy some rights under the Constitution, the Due Process Clause, the CSRTs provide all the process that is required. Litigation in this area presents a number of important issues. The first is whether the Due Process Clause of the Fifth Amendment is applicable to aliens captured abroad and detained at Guantanamo Bay. The Government believes that a long line of Supreme Court and D.C. Circuit precedents foreclose such application.

The second issue is, assuming that aliens detained by the military at Guantanamo Bay enjoy some constitutional rights, what is the scope of those rights and how are they to be implemented in a judicial proceeding in the United States courts? Again, it is crucial to remember that preventive detention of enemy combatants has never been thought of as a criminal matter in which a full-blown trial would be held.

The CSRTs exceed the procedural requirements that were laid out in *Hamdi* for detention of citizens. It surely cannot be the case that non-citizen enemy combatants whose only connection to the United States is membership in a terrorist organization dedicated to destroying it are entitled to more process than that which the Constitution requires for citizens.

As for the military commissions, the Government believes that the judge who enjoined them committed several legal errors, and we hope that the trials before military commissions for detainees will be permitted to proceed after the appeal is resolved. The President's Military Order is fully consistent with the Constitution, treaties, and laws of the United States and the regulations established to govern the commissions reflect proper balancing of the twin objectives of protecting the security of the U.S. and providing captured fighters a full and fair trial.

In sum, the unprecedented situation created by *Rasul* in which alien enemy combatants detained at Guantanamo Bay by the military have been permitted to pursue habeas claims against their custodians in the United States courts has posed a number of challenges and a number of substantial legal issues that await resolution by the courts.

At this time, Mr. Chairman, I would be happy to address any questions you or other members of the Committee may have.

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

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

Our final witness on this panel is Inspector General of the Department of Justice. Mr. Glenn A. Fine has had that position since the year 2000. We will include in the record his distinguished resume.

We have asked Mr. Fine to come in today. Although not directly related to Guantanamo, it does related to detainees. And there is a concern about the 723 aliens who were detained right after September 11th with respect to the basis for their detention. And here, again, the Committee is fully aware that you do not have to have the evidence to proceed with probable cause for a prosecution or any necessarily high standard, but some reason for detention which has some overlapping import with respect to the detainee issue generally. Again, very flexible standards for what you need, depending upon the risks involved, and we know what those risks are for terrorism. But we have asked Mr. Fine to come in on that subject where we did have a hearing in 2003, but the Bureau of Prisons has been investigating the matter for a year and a half, and we thought this would be a good occasion for this Committee to be informed as to what is happening now.

Thank you for joining us, Mr. Fine, and we look forward to your testimony.

STATEMENT OF GLENN A. FINE, INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FINE. Mr. Chairman, Senator Leahy, and members of the Committee, thank you for inviting me to testify at this morning's hearing regarding two Office of the Inspector General reports which examined the treatment of aliens detained on immigration

charges in connection with the terrorism investigations after the September 11th attacks.

My written statement summarizes the findings and recommendations from the OIG's June 2003 detainee report as well as our December 2003 supplemental report on the treatment of detainees at the Metropolitan Detention Center in Brooklyn, New York.

Given the focus of today's hearing, my testimony will highlight the major findings from these reports that relate to due process issues for these immigration detainees.

The OIG determined that the Department of Justice detained 762 aliens on immigration charges in connection with its terrorism investigation in the first 11 months after the September 11th attacks. Although our report recognized the difficulties and challenges that confronted the Department in investigating the attacks, we found significant problems in how these detainees were treated.

The FBI pursued thousands of leads in the terrorism investigation ranging from information obtained from a search of the hijackers' cars to anonymous tips called in by people who were suspicious of Muslim or Arab neighbors who kept odd schedules.

Outside of New York, the FBI attempted to screen out cases in which aliens showed no indication of any connection to terrorism. We found that, in contrast, the FBI in New York did not attempt to distinguish between aliens who were suspected of having a connection to the September 11th attacks or terrorism in general from aliens who were simply encountered coincidental to a terrorism lead.

We also found that after their arrests, many of these September 11th detainees did not receive timely notice of the charges against them. These delays affected the detainees' ability to understand why they were being held or to obtain legal counsel.

With regard to the detainees' conditions of confinement, our review found serious problems in their treatment at the Metropolitan Detention Center in Brooklyn. We found that the Bureau of Prisons imposed a total communications blackout on the detainees for several weeks after their initial detention and then designated them as witness security inmates, which frustrated efforts by the detainees' attorneys, families, and even law enforcement officials to determine where they were being held.

The MDC's restrictive and inconsistent policies on telephone access also prevented many detainees from obtaining legal counsel in a timely manner. The MDC permitted detainees only one legal call per week, and calls that resulted in a busy signal or calls answered by voice mail counted as their single call. We found that many detainees could not obtain counsel for months after their arrest.

We also found that MDC staff videotaped and audiotaped some detainees' meetings with their attorneys. In addition, we found that some correctional officers physically and verbally abused some September 11th detainees at the MDC. While the detainees were not brutally beaten, some officers slammed detainees against the wall, twisted their arms and hands in painful ways, punished them by keeping them restrained for long periods, and made slurs and verbal threats against them.

We recommended that the BOP consider taking disciplinary action against approximately 15 MDC employees. Yet more than 18

months after our report, the BOP still has not imposed discipline on any individual for any action we described in our report. In my view, this delay is inappropriate and unacceptable.

While I am told that the BPO's review of these matters is now in its final stages, I urge the BOP to complete its review expeditiously and take appropriate action.

In addition to recommending discipline for individuals, our two reports made a series of recommendations to address systemic problems in how the Department, the FBI, and the BOP handle immigration detainees. We are pleased that the Department, the FBI, and the BOP have agreed with most of our recommendations and have taken steps to implement them. However, two recommendations still have not been sufficiently address. The first is the BOP's delay in implementing discipline for any MDC employees, which I have discussed. The second involves our recommendation that the Department of Justice and the Department of Homeland Security enter into a memorandum of understanding to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees.

Finally, one other matter that I wanted to note for the Committee is the ongoing OIG review that is examining FBI employees' observations and actions regarding alleged abuse of military detainees in Guantanamo Bay, Abu Ghraib, and Afghanistan. The OIG is examining whether FBI employees participated in any incident of detainee abuse in military facilities at these locations, whether FBI employees witnessed incidents of abuse, how FBI employees reported any observations of abuse, and how these reports were handled by the FBI. We recognize these are critical issues, and we have allocated substantial resources to conducting this important ongoing review.

I thank the Committee for inviting me to testify about these OIG reviews, and I would be pleased to answer any questions.

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

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

We now turn to the questioning by members of the Committee, which, in accordance with our tradition, is 5 minutes.

Before proceeding to the first question, just a comment or two about some consideration which had been given by the Committee to using the Foreign Intelligence Surveillance Court as the court to consolidate these cases. Regrettably, an early draft was circulated and has led to a lot of speculation as to what might be done on that, and we are not going to proceed with the FISA Court. The initial thought had been that the Foreign Intelligence Surveillance Court had a lot of experience with classified information. And had we gone in that direction, it would not have been a secret court, but there is such an overtone of secrecy about FISA that it sounds too much like a star chamber. But we are going to take a look at consolidating these matters so we do not have a proliferation of opinions by the district court and the very long delays to the circuit court and the very long delays to the Supreme Court as well.

Turning now to the first question, I note, Admiral McGarrah, that among those who have been released from Guantanamo, custody has been given up after the detainees sign pledges renouncing

violence and promising not to bear arms against the United States forces or its allies. I note that Vice President Cheney made a speech earlier this week identifying some ten Guantanamo detainees who had been found in combat. Other estimates have gone as high as 25, and I think we really do not know the number. And while procedural due process is obviously important, we ought to be as sure as we can what steps are being taken so that we do not release detainees from Guantanamo who turn up on battlefields killing Americans. And what is the value of a promise not to bear arms against the United States or its allies?

Admiral MCGARRAH. Senator, the process that I oversee, the CSRT process, is a rigorous process to look at all the evidence in the Government's possession and to make a determination as to enemy combatant status. It is the most recent and the most formalized review process and follows a number of prior processes that made prior determinations. The released that you referred to were made under the prior processes, and so I am not aware of the details—

Chairman SPECTER. Are we not now releasing detainees on their promise not to go back to war? It does not seem to me that kind of a promise is worth anything. Is it?

Admiral MCGARRAH. I believe that that is one of the considerations that is in the decision-making process. Once these decisions are made—

Chairman SPECTER. Well, why? What is the value of a detainee's promise not to go back to war? What indicators do we have—this goes to the point which a number of the opinions, especially Judge Green picks up, as to what is the information that these people are connected with al Qaeda. And she cites in her opinion dialogue in the court where there is an assertion that this person is a member of al Qaeda, and the person comes back and says, "Well, who says I am a member of al Qaeda? I am not."

I think you have to have the tribunal make that decision beyond any question, and you cannot accept a blanket denial. And the question is what you know, and we will obviously get into that in some detail. But where you have these detainees, there is presumptively some basis for having them to start with. And I am at a loss to see why there would be any weight attached to a promise not to go back to war.

Admiral MCGARRAH. Yes, sir. The process examines all the evidence and information available within the U.S. Government, in the Government's possession, and it makes a determination based on the preponderance of that evidence. A statement of that sort in and of itself would not necessarily be sufficient for a determination—

Chairman SPECTER. Admiral, would you supplement your answer with the other factors? I want to come to General Hemingway with a question, and my time is almost up, and I intend to observe my time limit here.

General Hemingway, Article 5 of the Third Geneva Convention provides that, "Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, such a person shall enjoy the protection of the present Convention until such time as their status has been deter-

mined by a competent tribunal." The court then concluded that the Combat Status Review Tribunal was not established for that purpose. And the Government said, well, the President has decided that these are al Qaeda and not prisoners of war under Geneva, and the court came back and said, "The President is not a tribunal," which obviously the President is not. So where you have the President's conclusion, weighty as it is under our view, what do you anticipate with respect to compliance with the Geneva tribunal requirement?

General HEMINGWAY. Senator, I think that is a question that is more appropriately addressed to the Department of Justice, but as far as the military commissions are concerned, I think that we are in full compliance with the Geneva Convention in the manner in which we are conducting them. We are holding people who have been caught on the battlefield, given the broad definition of "battlefield," and we are holding them humanely.

Chairman SPECTER. Well, my time has expired, and I am going to yield to Senator Leahy. They have started the vote. I am going to excuse myself and go vote, but I will be back as promptly as I can. So let's retain the witnesses in place, and we are going to try to proceed even through the votes we have this morning.

Senator LEAHY. Tell them I am on my way over. I want to finish mine first.

Chairman SPECTER. Okay. I will tell them you are on your way.

Senator LEAHY. Let me ask, General, the Department of Defense says there are approximately 520 detainees currently at Guantanamo. How many are there? I do not want an approximate number. Give me the actual number.

General HEMINGWAY. Senator, that is outside my scope of responsibility.

Senator LEAHY. It seems to be outside the scope of everybody's responsibility at DOD. We ask that question of everybody from the Secretary on down. Is there anybody who knows? Give me the name of the person who knows how many are being detained.

General HEMINGWAY. Well, I would suggest that you direct your question to the Secretary of Defense.

Senator LEAHY. The Secretary of Defense does not seem—we get an approximate from the Secretary of Defense. Is there anybody else other than the Secretary of Defense—because he will not give us an answer, you will not give us an answer. Is there anybody who knows the number?

General HEMINGWAY. I have given you my best answer, Senator.

Senator LEAHY. Give me your best answer.

General HEMINGWAY. I have.

Senator LEAHY. How many do you think are there?

General HEMINGWAY. In excess of 500.

Senator LEAHY. Are any of the detainees being held at Guantanamo in the custody of Government agencies other than the DOD?

General HEMINGWAY. Not to my knowledge.

Senator LEAHY. None being held in the custody of Government agencies such as the CIA?

General HEMINGWAY. Senator, not to my knowledge. You would have to direct your questions in that regard to some other agency.

Senator LEAHY. How many of the detainees were not captured during combat in Afghanistan and Iraq but were picked up from other battlefields, such as Bosnia?

General HEMINGWAY. As I say, that is outside the scope of my responsibility. I have not been given that information.

Senator LEAHY. Admiral, can you answer any of these questions I have asked?

Admiral MCGARRAH. Sir, I do not have the specific numbers, but there were some that were picked up outside Afghanistan.

Senator LEAHY. Where?

Admiral MCGARRAH. I do not have the locations at my fingertips, but I can get back to you on that, sir.

Senator LEAHY. Other than Afghanistan or Iraq.

Admiral MCGARRAH. Sir, the Guantanamo detainees do not include detainees from Iraq. We are talking about the global war on—

Senator LEAHY. Okay. Do you have any idea what these other countries are? You will supply it for the record?

Admiral MCGARRAH. Yes, sir. We will get back to you.

Senator LEAHY. Countries other than Afghanistan.

Admiral MCGARRAH. We will get back to you, sir.

Senator LEAHY. But there were countries other than Afghanistan?

Admiral MCGARRAH. Yes, sir, there were.

Senator LEAHY. Do you know if there is anybody being held there in custody by a Government agency other than DOD?

Admiral MCGARRAH. No, sir, I am not aware of any held outside DOD control.

Senator LEAHY. Mr. Wiggins?

Mr. WIGGINS. I cannot answer the question.

Senator LEAHY. You cannot answer because you do not know?

Mr. WIGGINS. I do not know, Senator.

Senator LEAHY. Okay. Mr. Fine?

Mr. FINE. I do not know, Senator Leahy.

Senator LEAHY. Okay. General Hemingway, you said earlier the Attorney General has defended military commissions on the ground they could deliver swift justice. That was back in 2001. Of course, now it has been nearly 4 years since 9/11. There has not been a single trial that has been completed. I realize 3 years after that, in November 2004, a Federal court declared the current regulations for military commissions unlawful, and you are seeking to overrule that.

Why weren't any prosecutions begun for nearly 3 years? I mean, we were told that this would be swift and it would be the quickest way to go, but for 3 years, nothing.

General HEMINGWAY. Senator, I think that we have moved with considerable dispatch. A lot of people think that all we did was dust off World War II procedures. We—

Senator LEAHY. That is not my question. Why wasn't anything—

General HEMINGWAY. We have—

Senator LEAHY. —done for 3 years?

General HEMINGWAY. We have built a whole judicial system to try these cases, and the Appointing Authority, John Altenburg, came on in the spring of 2004, and by August we were in trial. And

the only reason we are not in trial today is because of the exercise of the defense counsel and the detainees' rights in Federal courts. We are under a restraining order, or we would be trying cases right now down at Guantanamo.

Senator LEAHY. Those pesky rights and they—

General HEMINGWAY. Well, you asked—Senator, you asked me about delay, and that is the reason for the delay.

Senator LEAHY. I was a prosecutor, General, and I have some idea of what is involved. And a 3-year delay does seem rather strange with so many people being held because it is vital to our security that they be held. Now, do we have a plan? I mean, do we have a plan of how much longer these people could be held without any charge?

General HEMINGWAY. Senator, we have charges against four people. I cannot tell you how long an unprivileged belligerent is going to be held because I do not know how long this war is going to last. I do know that we are in compliance with the law by holding them.

Senator LEAHY. Most say that the war will last throughout our lifetime. Does that mean that we will always face, as most other countries have faced, terrorist actions as long as you and I live? Does that mean we could hold them that long without any charges?

General HEMINGWAY. I think that we can hold them as long as the conflict endures, but we have, as Admiral McGarrah has already pointed out, a very detailed process for releasing them if they no longer present a threat.

Senator LEAHY. Well, we now have a government in Afghanistan, yet the conflict continues. Is that what you are saying?

General HEMINGWAY. The conflict is not with the government of Afghanistan. The conflict is—

Senator LEAHY. The prisoners are from there.

General HEMINGWAY. —with a non-state organization.

Senator LEAHY. The prisoners are from there, though.

General HEMINGWAY. They are from all over the place. You know, we have citizens of 40 different countries, I think has been publicly released.

Senator LEAHY. Can you give me the list then of what other countries they are from?

General HEMINGWAY. I do not have that—

Senator LEAHY. The same question I asked Admiral McGarrah.

General HEMINGWAY. The citizenship, the countries, we will get back to you for the record.

Senator LEAHY. Please. Thank you.

Senator Kyl?

Senator Kyl. [Presiding.] Thank you. I think in view of the fact that the vote is now about half over and probably Senator Leahy and I should both go to vote, on behalf of the Chairman I am going to recess the Committee until Chairman Specter returns, in which case then he can reconvene the hearing. So for the moment, the hearing is recessed.

[Recess 10:24 to 10:33 a.m.]

Chairman SPECTER. The hearing will resume, and we will, in accordance with our custom, alternate—if I could have the attention of Senator Cornyn? If I could have the attention of Senator Cornyn,

we are alternating, and with all these empty chairs—people are out voting—it means you are next.

Senator CORNYN. Well, thank you very much. That is an unexpected pleasure, Mr. Chairman. Thank you for letting me ask a few questions.

We have concluded all the statements of the panel. I was out for part of it, but I caught most of it. I just want to ask—maybe I will start with Mr. Wiggins. You know, time after time after 9/11, we heard experts talk about how we needed to change our framework to adapt to a post-9/11 environment. We heard in the intelligence arena that we needed to do more information sharing. We remember testimony of former Attorney General Janet Reno and others about bringing down the wall that separated the ability to share certain critical intelligence between our counterterrorism officials and law enforcement officials. And I wanted to ask you in particular, a lot of the concerns that I hear expressed about detention and interrogation start from the perspective of a law enforcement framework. In other words, the framework, the procedures, the constitutional requirements for someone who is accused of a crime are pretty clearly spelled out over 200 years of decisions by the Supreme Court and other courts, and spelled out by Federal statute.

But could you explain to us how this is a different paradigm based on the President's authority under Article II, section 2 of the Constitution as commander in chief and why it is important for us to understand that we have a new post-9/11 paradigm that we need to deal with?

Mr. WIGGINS. I will try, Senator. The Supreme Court has made plain that the President's commander in chief powers include all those powers necessary and proper to conduct war, to win war, and to defend the country. Not only does he have the power, he has the duty to do that. An incident, a necessary and important incident of that power, also confirmed by the Supreme Court, is the power to detain enemy combatants for the duration of the hostilities, most recently confirmed by the *Hamdi* decision, including those enemy combatants who are United States citizens, and as commander in chief of the military, the necessary and proper and essential authority to hold for trial those combatants who are unlawful belligerents or unprivileged belligerents for those crimes that violate the laws of war or other crimes that are regularly tried before military commissions. That power is not only resident in the Constitution, it has been confirmed by this body in the Uniform Code of Military Justice, which expressly recognizes and approves the military commission aspect of that authority, and it has been recognized and confirmed by the Court.

Senator CORNYN. Let me interject. In other words, the people who are currently detained at Guantanamo Bay are not accused of a crime per se, but are enemy combatants, unlawful combatants, most who do not wear a uniform, recognize the laws of war, aren't a representative of a nation's military. So they fall into a unique category under Article II, section 2 of the Constitution, and the President's power as commander in chief to conduct military operations. Is that a rough summary?

Mr. WIGGINS. That is correct, Senator.

Senator CORNYN. Okay. Thank you.

Let me ask maybe both Admiral McGarrah and General Hemingway to respond to this question. The people who are at Guantanamo now have been categorized as terrorist trainers, bomb makers, recruiters and facilitators, terrorist financers, bodyguards of Osama bin Laden, and would-be suicide bombers. And I have been apprised that the U.S. has actually learned through interrogating these terrorists that the organizational structure of al Qaeda and other terrorist groups, the extent of terrorist presence in Europe, the U.S., and the Middle East, al Qaeda's pursuit of weapons of mass destruction, methods of recruitment and location of recruitment centers, terrorist skill sets, general and specialized operative training, and how legitimate financial activities are used to hide terrorist operations.

I would like perhaps for you to comment on to what extent has using every lawful means available to the United States to secure actionable intelligence from detainees at Guantanamo Bay made America safer and saved American lives.

Admiral MCGARRAH. Sir, I think the primary basis for detaining individuals, whether it be at Guantanamo or elsewhere, is there determination as enemy combatant and the authorization under the law of armed conflict and the acceptable laws of war to keep those combatants from returning to the battlefield.

In addition to that, the interrogation that might provide us information to avoid future attacks and to understand our enemy is important. But the primary basis is to detain the combatants and to prevent them from returning to the conflict.

General HEMINGWAY. Senator, I cannot comment on what the intelligence community has gained through this particular process, but I can tell you that—and I am somewhat limited, since I am on the Government side of the house, in discussing evidence of cases that have not been brought to trial yet. But I think it is safe to say that the evidence that the Government will present in the trials by military commission will be consistent with the statements that you have made.

Senator CORNYN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Graham has commented that he is due in the chair at 11 o'clock, and I am going to go to Senator Biden next on our alternate approach. But I just wanted to ask Senator Kyl, who has been here from the very start, and Senator DeWine if they would mind yielding to Senator Graham so that he can question next and then fulfill his obligation to the chair.

Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman. Thank you for holding this hearing, and thank you for the way you characterized the purpose of the hearing. I think it is overdue, and I cannot think of anybody to be in better hands to try to work out—I mean it sincerely—the Congress's responsibility and role in dealing with these issues. And I am glad you are in the chair, and I am glad you have called the hearings. And the only thing I can say that I do not miss about being in the majority is having to sit in that other chair on the floor of the Senate.

Gentlemen, we have a legitimate need for a facility to deal with enemy combatants, and there is no question about that in my

mind. We also have a real problem, though, guys. We have a war, as you said, General, but we have two wars going on. We have a war that actually relates to people who are trying to do bad things to us and strapping bombs on themselves and planning on how to run planes into buildings, et cetera. We also have a war for the hearts and minds of those folks because you know, your staff, colleagues, they point out you cannot win that war by a military response alone. We have to dry up those pools where they recruit, and we have 1.2 billion Muslims in the world. And guess what, General? We are doing real badly. We are doing real badly on that part of the war. As a matter of fact, it is a disaster.

My concern—and I know it is broader. We will get back to it hopefully in another context. My concern relates to the fact that, rightly, wrongly, good, bad, or indifferent, the reality is that the vast majority of the rest of the world, and particularly the Muslim world, thinks what we are doing at Guantanamo is very bad. All you have to do is hear an article written in a thing called Periscope about the treatment of the Koran, and you have got 100,000 people in our allies' street—in our allies' street in Pakistan.

We got ourselves a problem, as they say in those old movies. We got ourselves a communications problem. So we better figure something out. Whether or not it is totally appropriate under every international law and constitutional prescription that we do exactly what we are doing in Guantanamo, we have got a problem. I realize it is above each of your pay grades. In a sense, it is above my pay grade. I am not the President. None of us here are. Not much you can do about it, but that is why I have called for an independent commission. The first bill introduced, S. 12, we called for an independent commission to be set up so we take it out of the partisan realm, move it into a realm where we have a group like the 9/11 Commission, give us some real live recommendations about how we should proceed from here, what we should do, because anybody who thinks it is not causing us some difficulty around the world I think is not reading the press or traveling around the world, as I have been and many of us up here have been.

So I want to let you know that is the backdrop of my questions here. I am not going to spend the remaining 4 minutes, or whatever I have, on the detail that we are going to have to go into in terms of how to rewrite legislation consistent with our desires, as the Court has suggested.

But the first question I have—and as briefly as you can answer, I would appreciate it. This is an ongoing conflict. What is the definition of when the conflict ends? Because if there is no definition as to when the conflict ends, that means forever. Forever. Forever these folks get held at Guantanamo Bay. That is part of the problem here.

And I realize it is difficult, General. You point out this is not the same kind of war. Before, you would end a war with an armistice. There is an agreement. War is over, detainees go home.

Has anybody at Justice defined when there is the end of conflict?

Mr. WIGGINS. No, sir.

Senator BIDEN. Now, does that mean that it is the administration's position that the folks who we consider a danger, 550 or so folks at Guantanamo, will be held in perpetuity?

Mr. WIGGINS. It is our position that legally they could be held in perpetuity, what in fact is happening is the annual review boards, the CSRT process. In fact, many have been released and prior to the institution of those proceedings.

Senator BIDEN. Well, I think for the record it would be useful—my time is up—that if not in this Committee, through the Intelligence Committee, if they tell us we cannot do it here—we should know what the criteria of a threat is. The Admiral answered the question absolutely accurately asked by my colleague from Texas: What is the reason we are holding these people? They are enemy combatants. Not that they are terrorists, not that they present an extraordinary danger. The rationale is they are enemy combatants.

I thought my colleague was telling me to stop, but I should stop anyway.

At any rate, I would like to know at some point, if it means even in a classified context, what is the definition applied for the criteria as to why we are keeping these folks, if it anything beyond the fact that they are designated as enemy combatant, because we use a lot of rhetoric that gets the American people all juiced up that they are terrorists who are going to do these horrible things to us. You do not have to get to that point, I don't think, to hold them. I think all you have got to do is determine they are enemy combatants. So I would like to know what the criteria is, and I thank the Chair. My time is up.

Chairman SPECTER. Thank you very much, Senator Biden.

Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Sort of building on what Senator Biden said, one thing we have learned in this war is that what happens at Gitmo and Abu Ghraib does not stay at Gitmo and Abu Ghraib. It is kind of like the old rule, what happens TDY stays TDY. We have learned that if Newsweek gets it wrong, people can get killed. So image is very important.

And there is a side to Gitmo that you probably cannot tell us about. I do believe we are safer by having a Gitmo. There are three goals that I would like to articulate here and see how we can come up with a legislative buy-in.

Number one, there should be a place where you can gather good intelligence to make this country safer, and I think you have done a pretty good job of doing that, but some of the techniques have seeped out and created problems. The idea of physical or psychological stress to get good information to me is acceptable in the international norms, and we need to look at a way to standardize that, because I worry about some of our own troops getting prosecuted under our own laws if we do not have standardization

Accountability. An enemy combatant in this war almost is a per se assumption that you are involved in terrorist activity. So once the determination that an enemy combatant status has been conferred upon someone, to me it is almost impossible not to envision that some form of prosecution would follow. I think it is very important for the people who join up with these terrorist organiza-

tions to know that their day of reckoning is coming, either on the battlefield as a casualty or in some courtroom somewhere, that they cannot do this without some accountability. So I do hope that we do not lose sight that accountability is very important, and there is some information down there that would be good for the world to hear about who we have, and the best way to hear it is through an open process called a military tribunal.

And the third is that we can do this and be a rule of law nation. We can prove to the world that even among the worst people in the world, the rule of law is not an inconsistent concept.

So my question basically goes to this proposition: There is not enough buy-in by the Congress to what is going on at Gitmo. There is a buy-in on my part, and I think many others, that we need this place desperately to protect us in this war on terror, to hold people accountable, to get good intelligence, and the rule of law aspects of how it is working is not well known or is not hitting on all cylinders because we are in court arguing about this.

Do you believe, each of you, that if the Congress developed some statutory provisions defining enemy combatant status and standardizing intelligence-gathering techniques and detention policy it would help our cause, it would help what you are doing? What is your view of the Congress's involvement in this? We will start with the Admiral, go to the General, and all the way down.

Admiral MCGARRAH. Sir, I have no idea what you meant about TDY.

Senator GRAHAM. Good answer.

[Laughter.]

Admiral MCGARRAH. Sir, I do think we need an internationally accepted definition of enemy combatant, and I think the definition we are using has precedent. I was not involved in—

Senator GRAHAM. Do you think if the Congress got involved to write a statute defining enemy combatant, that if the Congress bought into this whole concept, it would help your effort or not?

Admiral MCGARRAH. I think the concept already exists in international law. I think anything that can be done to help clarify this would help.

Senator GRAHAM. General? For disclosure, he was my first boss in the Air Force.

General HEMINGWAY. Senator, I think it is fair to say that the Department of Defense is always willing to consider anything that Congress wants to propose.

Senator GRAHAM. Thank you, sir.

Mr. WIGGINS. I agree with General Hemingway. We are happy, as always, the Justice Department would be, to review any proposed legislation, Senator.

Mr. FINE. I do not have a position on that. I am going to have to defer to the Department of Justice on that. That is not really within my jurisdiction, Senator.

Senator GRAHAM. Well, I am going to yield back my 50 seconds by concluding with this: I think it would be tremendously helpful is the Congress and the administration came together with some general statutory language to help define what is going on at Guantanamo Bay, to better define what an enemy combatant is, to make sure that due process is affordable. But the main goal of this

war is to protect Americans, and it is not inconsistent with the rule of law. The more buy-in, the better, so that would be my recommendation to this panel and to the Committee that we jointly work on this problem, because if we do not have the buy-in across the country in all three branches of Government, we are going to lose this war if we do not watch it.

Chairman SPECTER. Thank you, Senator Graham.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman. I am going to make a brief comment and then just have a question or two for my time.

I first of all want to commend you, Mr. Chairman, for calling this hearing. For too long we have had no genuine inquiry into the abuses of Guantanamo and how they happened, and those abuses have shamed the Nation in the eyes of the world and made the war on terror harder to win. And in many parts of the world, we are no longer viewed as the Nation of Jefferson, Hamilton, and Madison. Instead, we are seen as a country that imprisons people without trial and degrades and tortures them. Our moral authority went into a free fall.

The FBI has reported the use of torture as an interrogation tool at Guantanamo and complained to the Justice Department and the Defense Department about its use. And the Red Cross has documented scores of abuses at Guantanamo and elsewhere. Top officials in the administration have endorsed and defended interrogation that we have condemned in other countries, including forcing prisoners into painful stress positions for hours, threatening them with dogs, depriving them of sleep, using so-called water-boarding to simulate drowning. We have degraded and exploited our own female military personnel by encouraging them to use sexually degrading methods of interrogation. We have locked people away without creating an adequate process to distinguish who belongs and who should be released. Detainees have been held year after year under the worst possible conditions, and we fail to provide any way to determine whether they are guilty of anything.

The endless detention without safeguards is an additional shameful abuse that has to be corrected. there is no question that Guantanamo has undermined our efforts in the war on terrorism. It has stained our reputation on human rights. It has inflamed the Muslim world, and it became a powerful recruiting tool for terrorists. Its continued existence only makes it more likely that Americans will be attacked by terrorists at home or in other nations throughout the world.

Closing Guantanamo makes sense. It has become a symbol of U.S. hypocrisy on human rights, but merely emptying the prison and bulldozing its walls will not cure the illegality. We need a thorough investigation of what happened there and at other detention and interrogation facilities around the world. In particular, we need to know whether it was approved at the highest levels of our Government.

Closing the facility without a full investigation only makes it easier to pretend that the executive branch is above the law. We also need to make sure that the administration does not send these

and future detainees to places unknown that are even more difficult to monitor.

Guantanamo was conceived and created to be a place beyond judicial review, and the administration tried to ensure that it would be accountable to no one in deciding who should be detained and how they would be interrogated. The resulting physical abuses and denial of due process were the direct result of this misguided policy that thumbed its nose at the rule of law.

One of the great tragedies of Guantanamo is that the consequences were so foreseeable and avoidable if the administration had simply chosen to use the existing legal framework already in place both to protect our security and to grant due process. William Taft, the State Department's legal advisor in President Bush's first term, recently called it a source of amazement and disappointment that the Justice Department severely limited the applicability of the Geneva Conventions to the detainees. In an address at American University, he said, "The decision to do so unhinged those responsible for the treatment of detainees from the legal guidelines for interrogation embodied in the Army Field Manual for decades. Set adrift in uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far. That is why we have checks and balances in our democracy. What happened at Guantanamo is proof of the famous truth that power corrupts and absolute power corrupts absolutely."

Laws enacted long before the 9/11 tragedy authorized effective interrogation and legitimate detention of prisoners. The Geneva Convention permits interrogation. The criminal laws permit interrogation. The Army Field Manual provided long-standing guidelines for interrogation. But indefinite and unreviewable detention to interrogate prisoners is not permissible, and we have learned how dangerous it is to our ideals and our respect in the world.

The administration tried to redefine torture to make many abuses permissible. They rejected the Geneva Convention over the objections of Secretary of State Colin Powell. They abandoned traditional military justice in favor of a system that experts warned would be unworkable and unjust. We cannot stay silent while the administration prosecutes a few low-level soldiers and tells us that no one else that no one else bears responsibility for the abuses or while CIA planes fly detainees in secret to other countries that we know engage in torture.

It is wrong to hold detainees indefinitely, deny them the same rights that we would want for our own captured servicemen and -women. Guantanamo symbolizes reprehensible policies and a set of values that are unacceptable and un-American and that reflect the standards of behavior well below what we have tried to achieve for 200 years, and those who are responsible for designing the system must be held accountable.

I realize my time is up, Mr. Chairman. I will wait until the next round.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

I would like to, before I pose a question, get back to a couple of basics. We are talking, first of all, about people who have been captured on the battlefield right after they have been shooting at our soldiers. And we all like to immediately join in healthy applause when someone mentions our young men and women that we have sent into battle. It is the thing to do. It is heartfelt. And yet for some reason, immediately after doing that, we are prepared to jump to conclusions that U.S. officials, including people in the military, are prone to violate people's human rights. They have been shot at. People have been captured on the battlefield. And you have got to have a place to hold them. There has to be some place to do two key things: prevent them from causing further damage, killing American service people, among other people; and, secondly, to use the appropriate interrogation techniques to learn everything you can in order to save additional lives. And so that is the basic thing we are talking about here.

I want to ask a question based upon a declaration of Vice Admiral Lowell Jacoby, who is the Director of the Defense Intelligence Agency, and I ask unanimous consent, Mr. Chairman, to put this entire declaration into the record.

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

Senator KYL. Thank you. Just a couple of provisions of it.

He says, "Interrogation is a fundamental tool used in the gathering of intelligence. Interrogations are vital in all combat operations, regardless of the intensity of the conflict. When done effectively, interrogation provides information that likely could not be gained from another source."

He points out that after World War II, 43 percent of all the intelligence produced in the European theater was from human intelligence and 84 percent of that was from interrogation, and that the majority of everyone surveyed agreed that interrogation was the most valuable of the collection techniques.

He points out that insertion of things which disrupt the trust and reliance which the captors need to establish with regard to detainees prevents the effective gathering of intelligence, a process that he notes can take a long period of time. Just one quotation, he says, "Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example, even if only for a limited duration or for a specific purpose, can undo months of work and may permanently shut down the interrogation process."

There is much more in this declaration, but he concludes by saying, "In summary, the war on terrorism cannot be won without timely, reliable, and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool, especially with respect to enemy combatants associated with al Qaeda, would undermine our Nation's intelligence-gathering efforts, thus jeopardizing the national security of the United States."

Now, colleagues have talked about other aspects of the war on terror, how it is important to win hearts and minds, and we all agree that that is important, too. It is important to win on the battlefield. There are a lot of things that are important. But Admiral Jacoby points out that the war cannot be won without good intelligence, much of which comes from these very combatants that have been captured on the battlefield.

My question, beginning with you, Admiral, and then General, and Mr. Wiggins, if you would like to respond, is whether you agree or disagree with what Admiral Jacoby has said with respect to interrogation and the problems that interruption of that interrogation can cause.

Admiral MCGARRAH. Senator, I think it is always important for operational commanders to have a situational awareness of their enemy and of their battlefield, and anything that can provide the kind of intelligence that we need to do the right thing is important.

Senator KYL. General?

General HEMINGWAY. Senator, the Admiral is far more capable of making that point than I, and I agree with everything he said.

Senator KYL. Thank you, sir.

Mr. Wiggins?

Mr. WIGGINS. Senator, I have no basis, no legal basis to judge the Admiral's declaration. I will point out, however, that it was a part of the record in the *Padilla* case—

Senator KYL. I am sorry?

Mr. WIGGINS. It was a part of the record in the *Padilla* case at the Supreme Court.

Senator KYL. Yes, indeed. And, in fact, he specifically noted the problems that would arise in the *Padilla* case itself were this interrogation system to be disrupted.

I gather, Mr. Fine, this is not something you want to discuss based on your responsibilities.

Mr. FINE. No, sir.

Senator KYL. And I understand that very much.

Mr. Chairman, I just think it is important to establish that you have got to keep the people off the battlefield if they are going to go right back and kill you, as approximately 5 percent of these folks have when they have been released. To your important question, what makes you think that their promise of not wanting to kill you again is going to be kept? And, secondly, that this interrogation process is very important to saving American lives, both on the battlefield and here at home, and that we have to be mindful of the situations in which we can preserve that kind of legitimate interrogation technique.

Chairman SPECTER. Thank you very much, Senator Kyl.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Thank you also for holding this hearing.

I would just like to respond to Senator Kyl's analysis of the battlefield and prisoners after shooting, all of whom are shooting at our soldiers. I would submit that the battlefield is a very varied place in this war on terror. And I would also submit that people can be swept into the battlefield and be arrested and detained who are not necessarily terrorists.

In any event, I have written a letter to the Department of Defense, asked 12 questions, have a response to four. I would like to submit that for the record, with an additional letter sent to the Intelligence Committee.

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

Senator FEINSTEIN. Thanks, Mr. Chairman.

This letter says there are approximately 520 detainees at Guantanamo; 750 have been processed through the facility. As of April of 2005, Defense has released 167 and transferred 67 to other Governments subject to conditions, and there have been no detainee deaths at Guantanamo.

I also asked questions about other places—Bagram, everywhere that we have detainees sequestered. I have not had answers to these questions. I hope they will be forthcoming.

I would like to call everybody's attention to the testimony about to come from Lieutenant Commander Swift. It is very brave testimony, and let me preface my remarks with the hope that there is no reprisal against Lieutenant Commander Swift.

I think his testimony in writing is eloquent. It points out what is wrong, and it also points out what a remedy has to be. I am going to try to very briefly synthesize his testimony, and I would like to ask General Hemingway to respond.

Lieutenant Commander Swift is a 17-year Navy veteran, 11 years a member of the JAG Corps. He was assigned to represent a Salim Ahmed Hamdan, a Yemeni national facing trial before this military commission. Let me quote from his remarks.

"At the onset of my representation * * * I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of 'negotiating a guilty plea' to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea."

Now, I am skipping around, but it is all in the record here, and everyone can read it.

"I knew that I had to tell Mr. Hamdan that if he decided not to plead guilty, he may never see me again."

"Upon meeting with [him] I was * * * confronted with the fact that the realities of his pretrial confinement did not live up to * * * promise of humane conditions * * * Mr. Hamdan was held in isolation for more than 7 months in violation of the Geneva Convention. [His] cell lacked both natural light and ventilation. For * * * the first 60 days of that pretrial detention, [he] was only permitted * * * a half-hour of exercise and then only at night * * * [He] was not permitted any reading material beyond * * * the Koran" or "free exercise of religion."

"Despite Attorney General Ashcroft's assurances to Senator Edwards that the President's Military Order would not be used to detain a person for an unlimited period of time, General Hemingway rejected Mr. Hamdan's request for a speedy trial, finding that he had no right to a speedy trial and could be held indefinitely."

"Mr. Hamdan's request for independent medical evaluation was rejected in favor of a cursory twenty minute psychiatric examina-

tion * * * the extent of damage done to Mr. Hamdan by the conditions of his confinement and the methods utilized in his interrogation was able to be determined * * * Mr. Hamdan suffered from Post Traumatic Stress Disorder as a result of the abuse he had suffered during his detention and had experience of major depression during his solitary confinement."

"After 4 months in solitary * * * [he] was on the verge of being coerced into a guilty plea or deteriorating mentally to the point that he would be unable to assist in his defense if he ever came to trial."

The attorney goes on to say that he has filed a petition for writ of mandamus and habeas, challenging both the lawfulness of procedures and the jurisdiction of the proceeding.

"After the Supreme Court determined that detention in Guantanamo Bay was not a bar to Habeas Corpus, the Prosecution hastily referred a single charge of conspiracy against Mr. Hamdan."

And then it goes on to show the deterioration. "The Department of Justice maintains that three military officers, two of which have no legal training or experience, are better suited to determine a commission's lawful jurisdiction than a Federal court." And it goes on and on.

I would like to ask, General Hemingway, since you were mentioned, I would like to ask for your response.

General HEMINGWAY. Well, we could be here all afternoon. It is a fairly lengthy statement on Lieutenant Commander Swift's part.

In the first place, the chief defense counsel is the individual who appointed Lieutenant Commander Swift to defend Mr. Hamdan, not the prosecutor. And I am unaware of any threats whatsoever that were ever made through Mr. Swift to Mr. Hamdan of the nature that he recounts in his statement.

As far as the demand for a speedy trial is concerned, he sent a letter to me last fall invoking Article 10 of the UCMJ, and I responded by informing him that Mr. Hamdan was held as an unprivileged belligerent and that Article 10 did not apply under those circumstances.

As far as his mental health is concerned, he was seen by a mental health professional, a psychiatrist, at Guantanamo Bay, and he accepted weekly mental health visits, and the information that has been provided to me by those people is that his mental health is satisfactory.

As far as referral is concerned, I can guarantee you that that was not done hastily in response to any Federal court decision. The timing might have been coincidental, but the office of the chief prosecutor had been working that for quite some time.

He also asserts that he was not given the names of the people who had interrogated or interviewed Mr. Hamdan. He signed a receipt on the 27th of September last year acknowledging receipt of the names of all of those people.

My time is up.

Senator FEINSTEIN. Was his representation conditioned on pleading guilty?

General HEMINGWAY. No.

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

Chairman SPECTER. Senator Feinstein, if you want to pursue this, you may.

Senator FEINSTEIN. Well, what you have said to me, General, is that this man has no rights at all, essentially. He is charged with conspiracy. That is it. He has been there, 4 months in isolation, contrary to Geneva Convention, and he could be there essentially forever. That is how I interpret what you have said. If it is different, please tell me.

General HEMINGWAY. Well, he is not being held contrary to the Geneva Convention. He is being held humanely—

Senator FEINSTEIN. The isolation for—

General HEMINGWAY. —and it is my understanding that he is in the general population at Guantanamo Bay. As far as his rights are concerned, I have mentioned in some detail the rights that all of these people would have available before a military commission: the presumption of innocence, the appointment of an attorney free of charge, proof beyond a reasonable doubt, the right to call witnesses, the right to cross-examine, the right to review. And as far as resources are concerned, we have provided extraordinary resources to both Lieutenant Commander Swift and to the Office of the Chief Counsel, Chief Defense Counsel.

Senator FEINSTEIN. Well, that is not what this statement says, and this—

General HEMINGWAY. Oh, I understand that is not what it says, but his recollection of these events and my view of the procedures are considerably different than what he represents in that statement.

Senator FEINSTEIN. Let me ask you this: So pre-commission, housing in solitary for 7 months is not a violation of the Geneva Convention?

General HEMINGWAY. I would not consider the conditions under which he was held to be solitary confinement. I have seen the facilities. From what the people at Guantanamo Bay have told me about the conditions and the treatment he received, I would not call it solitary confinement. He was removed from the general population, but I would not call what he was in solitary confinement.

Senator FEINSTEIN. Would you call it "isolation"?

General HEMINGWAY. I would call it "segregation."

[Laughter.]

Senator FEINSTEIN. Well, I think, Mr. Chairman, if I might, Lieutenant Commander Swift is going to come before us. I mean, this is a case study and everything that we have read it is a case study and what Time magazine has just written about. If I understand the Supreme Court decision correctly, detainees do have habeas corpus rights. They do have a right to be brought before a process, and I would be rather surprised that Lieutenant Commander Swift would say that he had to plead guilty to get counsel if he did not, because that is a rather dramatic statement.

Chairman SPECTER. Senator Feinstein, as you noted, Lieutenant Commander Charles Swift will be on the second panel, and if it is not inconvenient, General Hemingway, we would appreciate it if you would stay. There may be a follow-up. I have allowed you more time.

Senator FEINSTEIN. I appreciate that.

Chairman SPECTER. It took your full amount of time to pose the question, and understandably because you went through a very detailed record.

Senator FEINSTEIN. You are very generous. Thank you.

Chairman SPECTER. One of the difficulties of the whole hearing process is that we have many witnesses. We have a second panel. We have a lot of interest by members, and in 5 minutes you do not get a whole lot done. But when you had raised the issue in those details, it seemed to me appropriate to have that extra latitude. But Lieutenant Commander Swift will be present.

General Hemingway, would your schedule permit you staying through his testimony?

General HEMINGWAY. Yes, Senator.

Chairman SPECTER. Thank you.

Okay. Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Admiral and General, I have just one question for each one of you. Maybe you can clarify something for me.

Admiral, I do not quite understand. How does a detainee go from being an enemy combatant to not being an enemy combatant? I mean, presumably this person has been detained all this time. What changes? How does the status change? Was a mistake made originally or what changes the status?

Admiral MCGARRAH. Senator, my process is the latest and most formalized of the determinations of enemy combatant status. Prior determinations were made based on the information that was available at the time that determined that these detainees were enemy combatants. There are a variety of things that might change. There could be some additional information that is made available. These cases, for the most part, are not black and white. There are ambiguous facts, and the panels take the information, all the information available to the Government at the time, and make the best determination that they can at the time.

That does not mean the prior determinations were wrong. It means that based on the information available to us, our panels made the determination.

Senator DEWINE. Well, I appreciate that. I heard you say two things, and I want to make sure I have got it correctly, and you can tell me if I am wrong.

You indicated that your process was different. You also indicated that in some cases the facts were different. Now, is that correct? We have a different process, we have new facts.

Admiral MCGARRAH. I am not familiar with the details of the prior processes, but my understanding is that ours is the most formalized of the determinations that are made. The different facts would relate to information obtained subsequent to the original apprehension.

Senator DEWINE. So your answer is that it could be because we have new facts, it could be because we have a new process. Could be.

Admiral MCGARRAH. Yes, sir, those are all factors, and the members of the tribunal look at all the information available and make the best determination they can at the time.

Senator DEWINE. And you are not familiar with the previous process?

Admiral MCGARRAH. No, sir, I am not familiar with the detailed mechanics of the previous processes.

Senator DEWINE. You said that, I believe, 12 of the 520 detainees have been referred for trial before a military commission. Obviously, that leaves the question about what about the other detainees, and I may have missed this in your testimony. I was voting. I apologize. But what happens to the other ones, and what is the process? What can we expect?

General HEMINGWAY. Well, you can expect that the office of the Chief Prosecutor will be sending more information forward for Presidential determinations as t whether or not there is a reason to believe that there are people subject to trial by military commission. There are three currently in movement, and I know that the office of the Chief Prosecutor is working on more. And as the investigators present more and more evidence to the office of the prosecutor, they valuate them to determine whether or not charges can be brought for violations of the law of war.

Senator DEWINE. General, is this a case of not being able to process them fast enough, in other words, you do not have enough people? Or what is the situation? It is kind of hard for a lay person sitting here to understand what is going on and not only—

General HEMINGWAY. Well—

Senator DEWINE. Let me just finish, if I could, sir. You know, this is the Judiciary Committee. We are lawyers here. I am a former prosecutor. We have got other former prosecutors up here. And, you know, our whole training, our whole system is that people determine what the facts are, you charge them, and you move ahead. And I understand that your life is not that simple. I appreciate that. But explain to me, you know, what is going on here. This seems to be a horribly slow process.

General HEMINGWAY. Well, in the first place, the primary reason that we hold people is to get them off the battlefield and, secondarily, to gain intelligence.

Senator DEWINE. I understand.

General HEMINGWAY. Until the intelligence effort has concluded on any particular detainee, the law enforcement effort really does not commence. Once we know that the intelligence people have finished in their analysis of the individual, we look at what they have collected and make a determination whether or not this individual is a candidate for trial by military commission.

As far as the current status is concerned, we are under a restraining order.

Senator DEWINE. I understand that, but should we assume that in most of these cases you would be telling us that the intelligence gathering is continuing on most of these 500-and-some individuals?

General HEMINGWAY. I would have to say that is probably correct. When we get files—

Senator DEWINE. I want to—

General HEMINGWAY. When we get files from—

Senator DEWINE. Excuse me, sir. Is it probably or is it? I mean, do you know? If you don't know, that is fine.

General HEMINGWAY. I don't know.

Senator DEWINE. You don't know.

General HEMINGWAY. I don't know exactly how many people that they are done with, but I do know that the office of the Chief Prosecutor aggressively collects information to develop cases.

Senator DEWINE. But as far as the question of how many of them they have actually gotten all the intelligence they think they can get, you don't know what that figure—

General HEMINGWAY. I couldn't give you a good figure.

Senator DEWINE. Well, my time is up, Mr. Chairman. Thank you.

Chairman SPECTER. Thank you very much, Senator DeWine.

Senator Durbin?

Senator DURBIN. Mr. Chairman, let me thank you personally for holding this hearing. I have been hoping for such a hearing for a long time, and I think you show extraordinary courage in holding it, and I appreciate it very much.

Let me say at the outset here that I am troubled by what has happened at Guantanamo, and I am troubled by the recent debates about whether we need to close this piece of real estate. I don't think this hearing should be about a piece of real estate or where it is located. It should be about the conduct of the United States wherever prisoners are in our control. And I think that really gets to the heart of the issue, whether it is in Guantanamo, in Iraq, Afghanistan, or in undisclosed locations.

Before 9/11, we had signed on with the rest of the world to certain standards of conduct. We said civilized nations, even in the course of war, will play by certain rules to a certain level. And then, of course, we know what happened after 9/11. Without consulting Congress, this administration unilaterally set aside many of the provisions of these treaties that we had said were part of the law of the land, and they created a detention policy that violates many of those treaties. They claimed the right to seize anyone, including an American citizen, anywhere in the world, including the United States, and to hold them until the end of the war on terrorism, whenever that may be.

There were dissenters to that point of view, and it was not from civil libertarians. The dissension came first from Colin Powell, former Chairman of the Joint Chiefs of Staff, who warned this administration that this was a bad idea. Colin Powell said to the administration it will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of law of war for our troops, both in this specific conflict and in general.

But the administration persisted in this new approach—persisted until it reached the point where it came to the Supreme Court, and the Supreme Court ruled that the administration is wrong.

The question I would like to ask Mr. Wiggins is this: Last year, in two landmark decisions the Supreme Court rejected the administration's detention policy. The Court held that detainees at Guantanamo have the right to challenge their detention in Federal court. I am troubled by your response, the administration's response to these decisions. Your approach seems to be to interpret them as narrowly as possible, even when the interpretation does not withstand close scrutiny.

Let me give you an example. The administration now acknowledges that Guantanamo detainees can challenge their detention in Federal court, but you still claim that once the detainees get to court, they have no legal rights. In other words, you believe a detainee can go to the courthouse but cannot come inside. One Federal court has already rejected your position.

Mr. Wiggins, the Supreme Court held that Guantanamo detainees' claims that they were detained for over 2 years without charge and without access to counsel, and I quote, "unquestionably describes custody in violation of the Constitution or laws or treaties of the United States."

If the administration's position is that detainees have no legal rights, as you claim, how could the Court say that the claims of the detainees described violations of their rights?

Mr. WIGGINS. Senator, the text that you quoted is from a footnote, Footnote 15 of the *Rasul* decision. The Supreme Court said numerous times during the course of the decision, including at the end, that the only issue they were deciding was the jurisdiction of the United States courts to hear habeas petitions. That footnote says what it says. It is appended to a paragraph that says that we—it talks about facts pled for jurisdictional purposes. We think, and we have told the court in our pleadings that we think that the most logical reading of that decision, of that footnote, is that it describes jurisdictional facts and it makes sense in that context. It would not make sense in the context of the paragraph overruling years of precedent in the *Eisentrager* case—

Senator DURBIN. Mr. Wiggins—

Mr. WIGGINS. —the *Verdugo* case, the *Zadvydas* case, all of which said—

Senator DURBIN. Mr. Wiggins, I am not carping on a trifle. I am not sitting on a footnote here. How can you have a habeas right if you don't acknowledge that the detainee has some rights? I mean, that is what it boils down to. And I cannot understand the administration's position of ignoring what the Supreme Court has said, even if it is from a jurisdictional viewpoint.

Let me go to another example. You claim that you are complying with Supreme Court decisions because you have created military tribunals, the CSRTs. These tribunals are supposed to determine whether a detainee has been accurately designated as an enemy combatant. The detainee is not entitled to an attorney. The CSRTs rely upon secret evidence that the detainee is not allowed to review. That does not seem like due process by any stretch.

In fact, two Federal courts have already held CSRTs fail to comply with Supreme Court rulings. One court concluded they deprive the detainees of sufficient notice of the factual basis for their detention and deny them a fair opportunity to challenge their incarceration.

How can a detainee challenge the grounds of his enemy combatant designation if he does not have access to the evidence supporting that designation?

Mr. WIGGINS. Senator, he does have access to the information. The procedures that are set up for the CSRT are procedures that the Supreme Court in *Hamdi*, the plurality, expressed the view that those procedures would be sufficient—more than sufficient, ac-

tually. They expressed the view that an Article 5-type hearing or a hearing set forward in the military regulations that provided very basic due process rights was all that was required. The CSRT procedures, as established by the military order, provide that the detainee will have the factual basis for his detention disclosed to him before the tribunal—

Senator DURBIN. Mr. Wiggins, my time is running out, and I would like to read to you from the decision so you understand what you just said is not true, and I quote—

Chairman SPECTER. Senator Durbin, would you make this brief, please?

Senator DURBIN. I would be happy to, Mr. Chairman. Thank you. And I quote: "In sum, the CSRT's extensive reliance on classified information in its resolution of enemy combatant status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual basis of their detention and deny them a fair opportunity to challenge their incarceration." And what I just read to you is not in a footnote.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Durbin.

Senator Feingold, I think I erred in not calling on you earlier. It is a little hard. We go by the early-bird rule about people who come and leave, and you were on the earlier list, so you will be recognized next after we turn to Senator Coburn, who I think has early bird—

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator LEAHY. I should also apologize to Senator Feingold. I did not have the list until after—

Senator FEINGOLD. Don't worry about it.

Chairman SPECTER. It is a juggling act under the early-bird rule and seniority and people who come and go, but I think you should have been recognized earlier.

Senator Coburn, you were here earlier. Senator Sessions came a little later. Both of you have been in and out. Senator Sessions, will you yield to Senator Coburn?

Senator Sessions. I would be pleased to.

Senator COBURN. I just want to clarify for the record a couple of things on the IG report in terms of the Manhattan Detention Center. Mr. Fine, all these individuals were illegal aliens. Is that correct?

Mr. FINE. All but one had violated immigration law in some context, either by overstaying their visa or entering the country illegally. That is correct.

Senator COBURN. All right. And some of them had not come back for detention hearings. Is that correct?

Mr. FINE. Some of them had not been—had absconded from detention—

Senator COBURN. So they were twice violators of the law.

Mr. FINE. They were violators of the law. That is correct.

Senator COBURN. Multiple times.

Mr. FINE. I don't know how many of them were in that category, but I believe there were some in that category.

Senator COBURN. But the fact is they had already proven a disdain for the law.

Mr. FINE. They had violated immigration law. That is correct.

Senator COBURN. Okay. I do not see that any different than any other law. They had demonstrated a disdain for the law because they had, in fact, violated the law. Is that correct?

Mr. FINE. That is correct. They had violated immigration law.

Senator COBURN. I don't have any other questions, Mr. Chairman.

Chairman SPECTER. I was talking to Senator Kyl about asbestos. Every now and then we have another matter we have to be concerned with.

Senator COBURN. I have no additional questions.

Senator LEAHY. Boy, do I miss those hearings, Mr. Chairman.

[Laughter.]

Chairman SPECTER. Well, it has been a busy Committee. Senator Kyl and I are coming to grips with one of the tough issues on asbestos, and pardon me for taking 10 seconds out.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman, and thank you for holding this hearing. I believe that the long-term detention of so-called enemy combatants at Guantanamo Bay is one of the most important national security and civil liberties issues facing us today. I have been concerned for a long time that Congress has not done as much oversight on this issue as it should, so I do appreciate hearing from these witnesses.

Mr. Chairman, the situation at Guantanamo Bay has become so troubling that a growing chorus of people are calling for that facility to be shut down entirely. Now, it may be that the word "Guantanamo" has become so synonymous in the Arab and Muslim world with American abuses that we must close the prison down. But we did not have to reach this point. If the administration had not argued that these detainees were not subject to the Geneva Conventions, if this administration had not argued that these detainees had no right to counsel or to make their case in Federal court, if this administration had not insisted on trying the few of these detainees who are charged with crimes in military commission lacking basic due process, if this administration had not sought to exploit every single ambiguity in the law to justify its unprecedented actions, we would not be where we are today. We would not even be talking about closing Guantanamo.

So when we talk about closing down this facility, let us remember that the problem is not just Guantanamo. The problem is an administration that thinks it does not have to play by the rules. Wherever these detainees are held, they must be accorded basic due process rights and treated humanely, pursuant to universally respected standards. And I would ask, Mr. Chairman, that my complete statement be included in the record.

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

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

Senator FEINGOLD. Admiral McGarrah, many of the prisoners at Guantanamo Bay were first detained by the U.S. Government 3

years or more ago on the theory that they are enemy combatants subject to indefinite detention. In Judge Joyce Hens Green's recent decision finding the procedures of the Combatant Status Review Tribunals unconstitutional, she noted that the Government did not formally define the term "enemy combatant" until July 2004.

If the U.S. Government did not formally define who was an enemy combatant until 2004, on what basis did it detain the hundreds of individuals picked up and transferred to Guantanamo Bay prior to that time?

Admiral MCGARRAH. Senator, I cannot comment on the definitions that were used in prior reviews. I can only comment on the process for which I was responsible for. I would defer to the Department of Justice for legal definitions.

Senator FEINGOLD. General, do you have an answer to what basis these folks were held on if the term was not defined until later?

General HEMINGWAY. Senator, I was not responsible for making that. As far as my view at the present time, they are held because they are unprivileged belligerents who have been removed from the battlefield.

Senator FEINGOLD. Mr. Wiggins, could you answer?

Mr. WIGGINS. Would you repeat the question, please?

Senator FEINGOLD. Yes. Given the fact that the term "enemy combatant" was not defined until years later, on what basis were the hundreds of detainees held prior to that time? What was the basis?

Mr. WIGGINS. I don't know the answer to that question, Senator.

Senator FEINGOLD. Thank you.

Admiral, Judge Green's decision also stated that the Government attorney in the case conceded that under the U.S. Government's definition of enemy combatant, "a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but what really is a front to finance al Qaeda activities" could be considered an enemy combatant. Do you agree with that?

Admiral MCGARRAH. Sir, that was extracted from the body of evidence in that particular case and was not the sole factor in that determination. Our panels looked at all the information available in the Government's possession and made the determination based on a preponderance of evidence standard.

Senator FEINGOLD. But do you agree with the conclusion that a person could be categorized in that way?

Admiral MCGARRAH. Sir, I agree with the conclusion that an enemy combatant status designation could be made based on a view of all the evidence if the preponderance of evidence indicated that that classification was appropriate.

Senator FEINGOLD. All right. Mr. Wiggins, several witnesses on the second panel have submitted written testimony raising concerns that in the tribunal set up to try or evaluate the status of detainees at Guantanamo Bay, the Government may rely on evidence obtained through torture or coercive means. As Assistant Attorney General for Civil Rights at the Justice Department, doesn't that give you pause?

Mr. WIGGINS. Senator, the President and the Attorney General have made clear that the United States does not condone nor will it commit torture and that we will seek out and punish those who commit such acts. Beyond that, I cannot respond.

Senator FEINGOLD. But what about the reliance on evidence obtained through torture or coercive means? As a Justice Department official, doesn't it give you pause that we might use such evidence?

Mr. WIGGINS. The training manual for al Qaeda encourages them to allege mistreatment. We take every—the military, at least, as do we, take every allegation seriously. They look into it. But the tribunals are free to test the weight of that evidence. They make the decision based on the weight of all the evidence that they have. It would include perhaps in some cases evidence where a detainee has alleged that it was a product of mistreatment. But it is up to the tribunal to determine whether to accept that evidence or not.

Admiral McGarrah is more familiar with the details of the cases, but it is not uncommon.

Senator FEINGOLD. I think the question is fairly straightforward. I don't think that is much of an answer. The question is whether evidence obtained through torture is something that ought to give somebody in our United States Justice Department pause. I think it would give you pause.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feingold.

Senator Sessions?

Senator SESSIONS. Mr. Chairman, the thing that troubles me most about this hearing is that I believe it conveys a completely incorrect vision of how prisoners are being handled who are apprehended by the United States Armed Forces. And we are focusing on problems and due processes and things that suggest that these prisoners are being tortured, that they are being abused in unconscionable ways and suggesting to our enemies around the world that this is occurring, and they are using that information to promote their own agenda to kill American soldiers. And we are placing them at greater risk, and we are making it more difficult for our policy to be successful.

So I feel very strongly that this is a legitimate hearing to find out how people are being held, but to suggest that our activities, as one member of the new left compared it to—or the left, compared it to the gulag of our time, where, as the Chairman knows, 30 million people were killed in Soviet prisons. And we had 700 in Guantanamo, and not a single one has died. Not a single one has been shown to be seriously injured. So I think we need some perspective here.

We have high standards. We prosecuted people who violated prisoners. We cashiered out a fine Army colonel who fired a gun near somebody's head in combat to try to get information to save his life. We prosecuted one officer who was found to be innocent. We prosecuted the people at Abu Ghraib, and they said the higher-ups were involved. And they had their trial, and they never showed any higher-ups ordered them to do that. Just like the evidence was from the beginning.

I am concerned about the tone of this hearing. First of all, our policy has been to treat detainees humanely, consistent with the

principles of the Geneva Convention, even though they are unlawful combatants or, as General Hemingway used the phrase, "unprivileged belligerents." You know what that means? That means because they did not conduct their warfare against the United States consistent with the rules of war, they are not entitled to the protections of the Geneva Convention. They do not apply to them.

Is that not right, General Hemingway, that if people come into this country surreptitiously, conduct activities to bomb civilians against the rules of war, they are not entitled to the protections of the Geneva Convention?

General HEMINGWAY. That is precisely my position.

Senator SESSIONS. And we have not violated a treaty, therefore, if we do not treat each one of these prisoners precisely in accordance with all the language in the Geneva Convention that provides for libraries and things of that nature. I think that is important for us to know.

They are provided more due process than required, but the most important point here for us to remember, these are not people charged with bank fraud in the Southern District of New York, American citizens entitled to a Federal court trial. They are unlawful combatants, and they may be detained under the rules of war until the war is over. And we know that they present a danger to us. We know at least 12 who have been released have been re-apprehended for attacking the United States of America.

We spent $109 million building a new facility in Guantanamo. I visited the old temporary facility, and they showed me the site where the new one would be. It would make a magnificent resort. It is on level land. It sits right out on the water. It is a beautiful site. We spent a lot of money on it; $42 million more is going to be spent to upgrade it. We are spending $140 million to improve housing and detention facilities in Iraq and Afghanistan.

This country is not systematically abusing prisoners. We have no policy to do so, and it is wrong to suggest that, and it puts our soldiers at risk who are in this battle because we went them there. And we have an obligation to them not to make the situation worse than it is. If we made errors, we will bring them up and we will prosecute the people. But to suggest that we are in wholesale violation of the rules of war I suggest is wrong.

Mr. Chairman, there are 520 individuals in Guantanamo today; 234 have been transferred out 164 have been released outright; and 67 have been handed over to another government.

My time has expired, but I would just say that we have heard today that these individuals were screened before they were brought to Guantanamo; 10,000 have been detained. Only five, six, seven hundred have been brought to Guantanamo. They were screened before they were sent there to make sure that they were dangerous. We do not have any interest in bringing somebody, frivolous nature, to house in Guantanamo. It is a burden on our military. They do not want that.

So I think some of them are entitled to be prosecuted, as they were in the Ex Parte Quirin case, approved by President Franklin Roosevelt and the United States Supreme Court for violations of rules of war, and some of them needed to be executed. And I as-

sume that when this dust settles on some of these court hearings, we will be moving forward with that if they deserve it. If they don't, so be it.

Thank you, Mr. Chairman.

Chairman SPECTER. Well, thank you very much, Senator Sessions.

As I said at the outset on the parameter, we are looking at the procedures here. The Committee is taking up about 15 Supreme Court opinions—one plurality, two five-person opinions, and a bunch of concurring opinions, and a bunch of dissenting opinions, and then three district court opinions. And it is a genuine crazy quilt to try to figure out where the due process rights lie. The Supreme Court has said there are due process rights. And I think we have done a fair job today in staying away from the questions of torture, the questions of mistreatment. We have been pretty much within the parameter. There have been some comments—

Senator SESSIONS. Well, these fine men in uniform here today and those out there at risk in these prisons I think have been maligned, frankly, I think unfairly.

Chairman SPECTER. Well, and we are looking at trying to keep some more. We are questioning why they released some on a promise that they would not go back to war and what good that kind of a promise was. And I think that some Congressional input is salutary. We are going to have a lot of work to do following this hearing with the military, with the military commissions, and with the Department of Justice in the parameters and definitions and the procedures. And we are going to have a second panel which will get into some of these questions in some greater detail.

There is no doubt that when you talk about evidence, you are not talking about evidence in a criminal trial or something in the United States District Court. But the question is how much and right to counsel. We have heard testimony about right to counsel, and these are issues which the Constitution says are for the Congress. And to read the opinions of the Supreme Court Justices in the way we have left them hanging trying to figure out where to go piece by piece, it is our responsibility, and to make these judgments we have to know much more about the facts.

Senator SESSIONS. Mr. Chairman, I would just agree that it is fine for us to inquire into this, but I would note in the history of warfare, we have not provided trials to prisoners who have been seized on the battlefield. That has been left to the military to handle.

Chairman SPECTER. Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman, for holding this hearing. The stories coming out of the detention center at Guantanamo Bay continue to harm our image around the world. Guantanamo does not represent the America we know. Instead, it stands in stark contrast to the values that our Nation symbolizes.

Since the first prisoners were wheeled off the plane in January 2002, the detention center in Guantanamo has been on trial in two courts: our Federal courts and the court of public opinion. It has not fared very well in either. Indefinite detention of prisoners in Guantanamo has failed the test of fundamental fairness in our Federal courts.

Of great importance also is the fact that Guantanamo has proved to be a failure in the court of world opinion. To be sure, the goal is not to win a popularity contest. Of course, the goal is to defeat terrorism. Yet to win the war on terrorism, we must engage in and win the battle of ideas in the Muslim world.

Guantanamo is impeding our efforts to win this war of ideas. Shortly after 9/11, hundreds of people gathered in the streets of Iran and other countries around the world to honor the victims of those horrific attacks. Support for the United States at that time was at an all-time high. Yet today, less than 4 years later, we see a much different picture. Instead, it is anti-Americanism that has never been higher. The alleged abuses and incommunicado detentions at Guantanamo which have come to define the United States around the world eroded that support, adding fuel to the fire of anti-Americanism and making it easier for those seeking to do us harm to enlist recruits for their cause.

We believe that security and adherence to the rule of law are not mutually exclusive principles. We have the best justice system in the world, and I believe that we can find a way to make this work. Nobody is advocating the release of suspected terrorists. In fact, quite the opposite, they must be detained or prosecuted. But this must be done in a way that is consistent with our values, and there is growing realization that the policies Guantanamo has come to represent should not continue.

It is important to remember that Guantanamo is in large part a symbol. It is a symbol of bad acts and misguided policies that must be reviewed immediately. So I commend Senator Biden for calling for an independent commission to take a close look at Guantanamo and make recommendations on how to move forward. I believe this will lead us down a path toward fixing what is wrong with Guantanamo and moving us today a system that can withstand international scrutiny as well as keep us safe from terrorist threats.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Kohl.

Thank you very much. It has been a lengthy panel—

Senator LEAHY. Mr. Chairman?

Chairman SPECTER. Senator Leahy?

Senator LEAHY. I was just wondering if I could do a couple of quick follow-ups.

Chairman SPECTER. Sure.

Senator LEAHY. We have talked about these people being held as being captured on the battlefield. Admiral, you said this is a very broad definition of "battlefield." Am I correct that some of the detainees were captured outside Afghanistan? Is that correct?

Admiral MCGARRAH. Yes, sir, that is correct.

Senator LEAHY. And you are going to supply for the record the places they were captured?

Admiral MCGARRAH. We will follow up with you on that issue, sir.

Senator LEAHY. But you will supply the places where they were captured.

Admiral MCGARRAH. That is outside my responsibility, but I will make sure that that gets referred to the right people, sir.

Senator LEAHY. I appreciate that. We had three people arrested in the United States who were designed at enemy combatants by the President. I mention that because the battlefield is not somebody who is out there necessarily in immediate armed combat with us. It seems to be the whole globe is the battlefield. Not all the detainees were captured during active combat. Am I correct in that, General Hemingway?

General HEMINGWAY. I could not give you an accurate statement on that, Senator, because I have not reviewed the files of every single one. The only ones I have looked at are those who have been referred for trial by military commission.

Senator LEAHY. Is it your understanding that all the people there were in active combat?

General HEMINGWAY. It is not my understanding, and I cannot give you an accurate assessment of that because I have not looked at those files, and I would not want to speculate.

Senator LEAHY. Thank you.

Inspector General Fine, I want to thank you for your efforts over the past year to produce a declassified version of your investigation of FBI steps, many would say failures, leading up to September 11th. I know you originally produced a report last year. Your efforts to declassify it prior to the election had failed, but Senator Grassley and I, among others, requested a public version be released. It was released last week. I just wanted to publicly thank you. I know you worked hard to have that happen. I know both Senator Grassley and I appreciate it.

You are currently conducting an investigation of the FBI's action at Guantanamo, what steps the FBI agents took to prevent the mistreatment of prisoners report misconduct. Does your investigation cover the question of the FBI's reporting of complaints to DOJ, Department of Justice lawyers and then what the Department of Justice reported to the Department of Defense?

Mr. FINE. Yes, Senator, our investigation is looking into what the FBI did, what they observed, what reports they made and how they were handled.

Senator LEAHY. And have you interviewed the four Department of Justice lawyers who, according to FBI e-mail, received the FBI complaints?

Mr. FINE. We have interviewed some Department of Justice officials. We are in the middle of our investigation, so I don't believe we have interviewed all the people we need to.

Senator LEAHY. Do you know when a preliminary result of the inquiry might be available?

Mr. FINE. It would be impossible for me to predict that. We are going to do it as expeditiously as we can and we have allocated substantial resources to it.

Senator LEAHY. Thank you, Mr. Chairman, and I will count on Admiral McGarrah and General Hemingway to follow up with answers to the questions I have asked. We will refine those for you more if you would like.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Biden asked me to say publicly that he has some questions for the record, and there may be some other Senators who will submit questions for the record.

Senator CORNYN. Mr. Chairman, may I be permitted just a couple of very quick questions?

Chairman SPECTER. Yes, Senator Cornyn.

Senator CORNYN. I very much appreciate it. Thank you very much.

Mr. Chairman, I am advised that we have had 11 members of the United States Senate visit Guantanamo Bay, and I was privileged to be one of those Senators who had a chance to actually see with my own eyes and to talk to the people in charge there, as well as to observe the detainees and talk to some of the teams that conduct interrogations. It was a very edifying experience for me, and I would think that, of course, any of us who have not yet had an opportunity to do that would benefit from that personal trip to Guantanamo Bay.

I would just agree with the Chairman when you say that the Supreme Court opinions and the Federal court opinions in this area are a crazy quilt, and that we are struggling on this Committee to try to figure out exactly what the rules are and what the parameters should be and what the court has said.

I would suggest that we ought to provide the same opportunity for both the Department of Defense and the administration in trying to deal with what in many ways is an unprecedented set of circumstances. We ought to engage in a presumption of innocence rather than the presumption of guilt, which our enemies seem to apply whenever a charge is made against the United States as regards Guantanamo Bay and our treatment of detainees.

There have been ten different investigations conducted by the Department of Defense into interrogation practices and the alleged abuses and some factual instances of abuses at Abu Ghraib. But this has been extensively reviewed by impartial tribunals and I think that, in the main, our Department of Defense and people in charge of this facility have conducted themselves admirably under difficult circumstances.

Thank you for giving me a couple of minutes.

Chairman SPECTER. Thank you, Senator Cornyn. There is no doubt about the need for inputs, very heavy and very substantial, from the Department of Defense and from the Attorney General.

There is one quotation that I did not start with, but I think it is worth just a moment of the Committee's time, even though it is late, and this is Justice Scalia urging us to deal with this issue. He puts it this way: "There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and making up for the Executive's failure to apply what it says are needed procedures, an approach that reflects on what might be called a Mr. Fix It mentality. The plurality seems to view it as a mission to make everything come out right, rather than merely to decree the consequences as far as individual rights are concerned, of the other two branches' actions and omissions. As the legislature failed to suspend the Writ in the current dire emergency, well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have been included. And as the Executive failed to live up to those reasonable conditions, well, we will ourselves make up for that failure so that this dangerous fellow, if he is dangerous, need not be set free. The problem

with this approach is not only that it steps out of the Court's modest and limited role in a democratic society, but that by repeatedly doing what it thinks the political branches ought to do, it encourages their lassitude and saps the vitality of government by the people."

"Lassitude" is not a word too often used for the Congress and probably ought to be used more often. But that is what we are confronting, with the DOD and the military and the Department of Justice grappling with these issues and the Court proliferating all over the place. "Crazy quilt" are the best words for it. So we have our work cut out for us, among a number of other subjects.

Thank you for agreeing to stay, General Hemingway. Admiral McGarrah, to the extent you could stay, too, it would be helpful.

We turn now, finally, to the second panel. Our first witness is Mr. Joseph Margulies, a principal in the firm of Margulies and Richman, and a trial attorney with the MacArthur Justice Center at the University of Chicago. He is the lead counsel in *Rasul* v. *Bush*, involving the Guantanamo detainees. He has a very distinguished academic and professional record which will be included in the record in full.

Mr. Margulies, if you would step forward, along with former Attorney General William Barr, Lieutenant Commander Charles D. Swift and Professor Stephen Schulhofer, we will begin the second panel.

Mr. Margulies, thank you for joining us. As soon as you are seated, the clock is going to start.

STATEMENT OF JOSEPH MARGULIES, MARGULIES AND RICHMAN, MINNEAPOLIS, MINNESOTA

Mr. MARGULIES. Senator Specter, Senator Leahy, Members of the Committee, the prisoners at Guantanamo can be divided into two categories. One is very small, one is very large. One category has four people; that is, as we heard this morning, the group of people who have been charged by military commissions. That category also includes another seven who have designated as potential candidates for prosecution, but we are talking about a total universe in the military commission context of about a dozen people.

Lieutenant Commander Swift is going to talk about that group, but the rest, and the overwhelming majority of the people at Guantanamo Bay have never been charged with any wrongdoing. They have never appeared before any court of law. They have received nothing but a hearing before the CSRT, which you heard about this morning, or the Combatant Status Review Tribunal. The position of the administration is that this is all the process that they get, and that now they may be held for as long as the President sees fit, under any conditions the military may devise.

You heard this morning how the CSRT operates in theory; that is, how it is written to operate. I want to talk about the reality. I want to talk about the reality because while my written testimony addresses the deficiencies of the CSRTs in some detail, what was absent from the discussion this morning and from the written testimony is a focus on an individual, and there are real people at Guantanamo and I would like to turn our attention to them.

One of my clients is a man named Mamdouh Habib. Mr. Habib is Australian. In October of 2001, he was arrested not on the battlefield, not in Afghanistan, but in Pakistan by Pakistani police. They turned him over to the United States, who, after a period of a couple of weeks, bundled him onto a U.S. military plane in Pakistan and flew him to Cairo, Egypt, where he was held for 6 months. There are no disputes about the facts that I am relating in that regard.

During that 6 months, Mr. Habib was subjected to ingenious tortures. I realize that there are some reservations about making this into a hearing about torture. I say this only as it bears on the CSRT proceeding, however. Let me describe just one of the techniques that was used during that six weeks.

Mr. Habib's captors would bring him to a small windowless room. He was brought there handcuffed behind his back. The room was dark, and water starts to pour into the room and he watches as the water rises up past his knees, past his waist, rising above his chest, past his shoulders, finally past his neck. Mr. Habib, held there, has no idea when or if this water will stop. When it finally stops, it is past his chin and Mr. Habib can keep his mouth above the water only if he stands on the tips of his toes, and his Egyptian captors left him there for hours.

Other tortures that Mr. Habib endured were considerably less creative. They beat him, they kicked him, they shocked him with something that would be fairly described as a cattle prod. Over the course of 6 months, Mr. Habib, as any of us would have expected, confessed to all manner of allegations. He told me he signed everything—and I learned this from him when I went down to talk to him at Guantanamo—he told me he signed everything that they put in front of him. Some of the papers he, in fact, signed were blank. He has no idea what was later written down on them.

The U.S. Government, Senators, has never denied Mr. Habib's allegations in this regard, which are now a matter of public record. In fact, quite the contrary. The State Department has protested repeatedly and for years, including post-9/11, against state-sponsored torture in Egypt. And many of the things that happened to Mr. Habib have been documented to have happened to other people as well.

Senators, my point is simply this: The CSRT relied on Mr. Habib's statements given in Egypt to support its conclusion that he was an enemy combatant. In fact, I have reviewed the allegations against Mr. Habib, and as far as I can tell and as far as the Government has disclosed in court, the CSRT had nothing except Mr. Habib's own uncorroborated statements made during interrogations. My point would just be this: Any process that relies information secured in this way is just not worthy of American justice. It is as simple as that.

So I am here to tell you three things, in addition to trying to answer whatever questions may be posed of me. I want to impart to you only three things. One, if you look at them fairly, the CSRTs are a sham. As I said to Judge Green, and she agreed with me, in the argument of December 1st of 2004, they mock this Nation's commitment to due process and it past time for this mockery to end.

Second, these prisoners must have their day in court. In response to questions, I can address the difference between these prisoners and those 400,000-plus who were held in World War II and given the benefits of the Geneva Conventions. It is past time for them to be held simply on the undifferentiated characterization of them as the worst of the worst. If the administration can prove in a Federal habeas hearing that these people belong in custody, then so be it. But bring that proof on. They have been there more than 3 years and it is time to put up or shut up.

Third, respectfully, Congress must get to the bottom of this. The American people simply have to know what it is that is going on. We cannot tolerate any more black holes and we have a model for what we should do. We need an independent, bipartisan inquiry to figure out just what the administration's detention policy is. What is it all about? What has been done, to whom, on whose authority, and at what facilities?

I would close with these brief comments. Mr. Habib, Senators, is now out of custody, and let me tell you how that happened. When I learned the information that I have related to you today, I filed it in the district court of the District of Columbia, and those papers became public the first week of January.

The next day, they appeared in a front-page article in the Washington Post, and after the front-page coverage it became apparent that Mr. Habib's rendition would become a subject of inquiry within the Federal court. Five days later, after having described Mr. Habib, as they describe all of them, as the worst of the worst and dangerous terrorists—5 days after the account of his rendition became public, the Department of Defense announced that Mr. Habib would be released.

I flew home with him. So far as I know, I am the only attorney who has been allowed to accompany his client home from Guantanamo. At the request of the Australian government, I went from Miami to Guantanamo, where we picked up Mr. Habib, and we flew to Sydney and I had the privilege, Senators, to be with Mr. Habib when he was reunited with his wife, whom he had not seen for more than 3 years, at the airport in Sydney. And when he saw her, he almost collapsed on the tarmac. I will never forget it. It is an experience I will never forget and one of the most memorable I have ever had as a lawyer and I think about it again today in this hearing.

Thank you for your time.

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

Chairman SPECTER. Thank you, Mr. Margulies.

We have had another vote, so we will excuse ourselves for as brief a period of time as we can go and vote. For those of you who don't know, we are up on the energy bill, and we will return as soon as we can.

Senator LEAHY. With as much energy as we can muster.

[Recess 12:06 p.m. to 12:29 p.m.]

Chairman SPECTER. The hearing will resume. Our next witness is Hon. William Barr, who has a very distinguished record, most specifically as Attorney General of the United States from 1991 to

1993, and his now Executive Vice President and General Counsel for Verizon.

When the Department of Defense suggested former Attorney General Barr, I said excellent, he has got a lot of experience.

Thank you for joining us, Mr. Attorney General, and we look forward to your testimony.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON CORPORATION, WASHINGTON, D.C.

Mr. BARR. Thank you, Mr. Chairman. It is good to see you and members of the Committee.

Rarely have I seen a controversy that has less substance behind it. Frankly, I think the various criticisms that have been leveled at the administration's detention policies are totally without foundation and unjustified.

I would like to distinguish between three different kinds of activity that are underway in Guantanamo. First, Guantanamo is a facility for holding enemy combatants are that are captured in the battle theater. We have been fighting wars for 230 years. As the Supreme Court recognized, fighting wars is about destroying the enemy's forces either by killing them or capturing them. And when you capture them, you detain them, and we have been holding enemy combatants, as I say, for 230 years in various facilities.

There is nothing punitive about it. This is not a legal proceeding. There is no need to bring charges. They are being held because they were identified on the battlefield as threats to our forces and to our military mission. That determination has already been treated as a military determination, and it is not one that gives foreigners who encounter our troops on the battlefield due process rights to hearings and evidentiary hearings as to whether they were, in fact, or not enemy combatants. There has never been a case to suggest that. In fact, the Supreme Court cases say that foreigners outside the United States with no connection to the United States do not have due process rights.

Now, I would like to analogize to World War II. We held over two million Axis prisoners during World War II. Over 400,000 were here in the United States, in camps, in Utah, Texas and Arkansas. And it wasn't cut and dry. As a matter of fact, there was a lot of confusion about who was who because we seized a lot of Eastern Europeans and Asians who had been fighting in the Soviet army, captured by the Germans and conscripted into forced labor battalions who were claiming, hey, I am a Soviet citizen, I am not an enemy combatant.

They didn't get into U.S. courts. They didn't get lawyers. They didn't get hearings as to are you a member of the Werhmarcht or not. They were detained until the end of hostilities. So there are no due process rights for foreigners encountered on the battlefield.

However, this should be a moot issue because the administration has provided—for the first time I am aware of in United States history, is providing an adversarial process to each of these individuals to contest whether or not they are, in fact, enemy combatants. This is the CSRT process, and that comports with the process al-

luded by the Supreme Court in *Hamdi* that should be followed for American citizens here in the United States. So they are getting whatever due process rights could theoretically exist, and I submit none do. They are getting more than ample process.

The second issues goes to the Geneva Convention. I hear a lot of pontificating about the Geneva Convention, but I don't see what the issue is. The Geneva Convention applies to signatory powers. Al Qaeda hasn't signed it. They are not covered by the Geneva Convention, period. With all this pontificating, I haven't heard anyone allege any set of facts that would change that.

The President absolutely correct in saying they are not entitled to protection. Does this mean they are without rights? No. If you are not covered by the Geneva Convention, then you are held in detention under the common law of war and you are treated humanely. But to say that terrorist like al Qaeda are entitled to protections of the Geneva Convention demeans international law, the Geneva Convention and our troops.

The third point I want to make is about military tribunals. I guess we have come a long way because when the President first put out his order on military tribunals, there was all this strum and drone and, gee, this is a big end run around Article III courts and the world is coming to an end and this is unprecedented and this is a big deal.

Well, the debate seems to have recentered a bit. I haven't heard any serious argument that these cases belong anywhere else than military tribunals. Now, military tribunals are different than this issue of whether you are an enemy combatant. As to some set of people in our custody, we will choose to bring prosecutions. That is a punitive action and we will try them for violations of the laws of war. Historically, that has always been done by military courts.

So, for example, in World War II when we tried German soldiers for atrocities like the massacre at Malmady, they were tried not in Article III courts here in the United States. They were tried by military courts. And the President has quite rightly, consistent with 230 years of history, set up military courts to try violations of the laws of war.

Part of what is going on here, I think, in this debate is a fundamental misapprehension between two different kinds of constitutional activity. One is law enforcement and the other is waging war. They are different, and it is fundamentally incompatible with our Constitution and constitutional principles to try to take the strictures on executive power that exist in the law enforcement arena and carry them over and try to apply them when the country is waging war against foreign foe.

Thank you, Mr. Chairman.

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

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

Our next witness is Lieutenant Commander Charles Swift, who is defense counsel in the Office of Department of Defense Military Commissions. He is currently detailed to represent Salim Hamdan, who is facing trial by the military commission.

Lieutenant Commander Swift is a graduate of the United States Naval Academy and has a law degree from the University of Puget

Sound, graduating cum laude there. He has been affiliated with the Navy's Judge Advocate General Corps after returning to active service in 1994.

Thank you for your service, Commander Swift, and we look forward to your testimony.

STATEMENT OF LIEUTENANT COMMANDER CHARLES D. SWIFT, DEFENSE COUNSEL, OFFICE OF CHIEF JUSTICE COUNSEL, DEPARTMENT OF DEFENSE, WASHINGTON, D.C.

Commander SWIFT. Mr. Chairman, members of the Committee, as the Chairman stated, my name is Lieutenant Commander Charles Swift and I am with the Office of Military Commissions for the past 2 years and I represent Salim Ahmed Hamdan. I also was in line to represent Mr. Habib, until the press releases regarding his treatment caused his—or charges were not approved against him following those press releases.

My testimony today is made in my capacity as Mr. Hamdan's attorney. And, as such, it does not necessarily represent the opinions of the Department of Defense or the Department of the Navy.

I first got to Military Commissions in March of 2003. Prior to coming to the commissions, I had absolute respect for military justice. I had worked in it. I am extremely proud of our military justice system. So it was surprising to me to get to Military Commissions and during my in-brief be told Mr. Haynes, the general counsel, that Mr. Lloyd Cutler, who has participated in the Quirin Commission as a prosecutor, one of the junior people on it, considered that commission that only thing in his distinguished legal career of which he was not proud. I couldn't really put those two things together—military justice and not being proud. After 2 years at the Military Commissions, I regret to say I can.

I met Mr. Hamdan in December of 2003. I was detailed pursuant to an order or a request by the chief prosecutor. That request said that the purpose in detailing me was to negotiate a guilty plea. It also said that my access to Mr. Hamdan was contingent upon the fact that he engage in those negotiations toward a guilty plea and that if he didn't, then we wouldn't have access anymore. In my military career as an attorney, I had never been detailed to represent somebody under those circumstances.

When I met him, he had already been in solitary confinement for more than 45 days. I call it solitary confinement because Mr. Hamdan was by himself. He was in a windowless room where ventilation was provided only by an air conditioner and where there was no natural lighting. He exercised—and the guards confirmed this—only at night for about 30 minutes. He didn't see any other detainees at any other time, and he was already, in my observation—I am not a physician, but in my observation, under extreme mental stress.

I had to tell him that the only way I could guarantee that I would see him again was if he agreed that we were going to plead guilty to something. To do that ethically, I decided that the only way to do that was to tell him I can't guarantee you—I don't know what the Supreme Court is going to say, but if I am not allowed to see you—

Chairman SPECTER. This is a guilty plea to what?

Commander SWIFT. War crime unspecified, sir.

That if I am not allowed to see, I will file a habeas and a mandamus writ in Federal court on your behalf. I don't know that that would work, but that is what I will do.

I subsequently requested speedy trial. I had requested that in February of 2004. General Hemingway responded in March of the same year saying that—I requested it under the UCMJ because Congress had said in passing Article 36 for commissions that the standards would never be less than the UCMJ. So I felt that surely a speedy trial would be available. I was told no, and it wasn't until I filed a suit in Federal court that Mr. Hamdan got charges. In fact, it was only when the Supreme Court guaranteed that that option existed.

The problem with military commissions ultimately, sir, comes somewhat to what General Hemingway said, and I have the most respect for him. He said I am here on behalf of here on behalf of the Government. The problem is that General Hemingway advises General Altenburg, who is the ultimate judge. A military commission under the rules doesn't have the ability to make any final ruling. They have to send it to General Hemingway for legal review. But he is also here as the prosecutor; he has already made up his mind. We can't say that this is an independent and fair process. It is not befitting of America. If we had the judge also be the prosecutor, would that be an American process, sirs and ma'am?

Thank you. I yield the rest of my time and I would ask that you consider my written testimony.

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

Chairman SPECTER. Your full statement will be made part of the record, Commander Swift.

Our next witness and final witness on this panel is Professor Stephen Schulhofer, Professor of Law at New York University. He has authored some 50 scholarly articles and books, six books, and his recently published work goes to the core of the issues we have here today, called, quote, "The Enemy Within: Intelligence-Gathering, Law Enforcement and Civil Liberties in the Wake of 9/11."

Thank you very much for coming in today, Professor Schulhofer, and we look forward to your testimony.

STATEMENT OF STEPHEN J. SCHULHOFER, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. SCHULHOFER. Thank you, Senator Specter, members of the Committee.

The issues arising out of the Guantanamo detentions are enormously important to our National security because it is essential that we be able to convince the world that America is fighting for freedom and for human dignity. We can't defeat terrorism if we win battles at Tora Bora, but lose the cooperation and respect of the world's one billion law-abiding Muslim citizens. Guantanamo is hurting us very badly.

Senator Cornyn, nobody wants to turn loose the dangerous terrorists you describe; nobody does. Nobody wants to miss the chance to get life-saving intelligence, but we can't let our actions create

dozens of new terrorists for every terrorist we capture, and that is what now seems to be happening.

I have been asked to focus on solutions to this dilemma. That is a problem we have been studying carefully at the Brennan Center for the past 2 years. Global terrorism poses unique challenges, but when it comes to detention, interrogation and trial, we have found no reason to think that the traditional institutions used in all prior wars aren't up to the task. I should say that again because it is obviously not conventional wisdom. In matters of interrogation, detention and trial, we have found no reason to think that traditional institutions aren't up to the task.

The principles that should guide our response to Guantanamo are basically three. First, we should stick closely to the pre-9/11 procedures. Doing that will minimize start-up costs. And most important, it will give us the legitimacy that has been disastrously missing from our detentions at Guantanamo.

Second, our aim should not be to see how many safeguards we can avoid. That is the thinking that has brought us to where we are today. We must maximize transparency and accountability. We must do that even if the lawyers convince you that it is not legally required.

Third, Congress and the administration need to address these issues quickly, but there is no point in doing that in a way that will simply re-inflame world opinion. The point of acting quickly is to show that we are ready to embrace accountability and accept the rule of law, openly administered by independent tribunals. Courts and courts martial already can do that effectively, particularly with the tools provided by the Classified Information Procedures Act.

With that straightforward solution right at our fingertips, it is simply tragic that we are letting ourselves lose this propaganda war. It is tragic that we are letting hardened terrorists paint themselves as victims and elude the punishments that are long overdue, and it is not because defense counsel have had the audacity to file motions. That is not the cause of this delay. It is because the administration is trying to build an entirely new system from scratch.

In terms of intelligence, Admiral Jacoby has one view that you heard read into the record this morning, but let's be clear about this. No other country in the Western world claims that successful interrogation requires keeping terrorism suspects in isolation for years on end. Britain, when it faced a grave emergency in Northern Ireland, extended incommunicado detention from its normal period, which was 48 hours, to a maximum of 5 days—5 days, Mr. Chairman. For the Israelis, even in areas under military occupation, the detention of suspected terrorists before their first court hearing is limited to a maximum of 8 days.

How can we be surprised that the world doesn't buy into Admiral Jacoby's view? How can we be surprised that the world recoils at incommunicado detentions that are lasting for more than 3 years? Congress and the administration should move quickly to start cutting our losses. As I mentioned, there is no reason to think the traditional war-time procedures can't handle the issues. The details are in my written statement.

That said, some of the key facts are still obscure, and "trust us" is just not an answer that works beyond our own borders. So as

Senator Biden said, we do need a bipartisan study, this one focused on detention, interrogation and trials. I know Washington doesn't want another study commission, but there may be no other way to demonstrate our commitment to the rule of law. I think what is equally important is there may be no other way to be sure that our tough-minded practices aren't helping the enemy more than they are helping us. The stakes are very high and we have to get this right.

Thank you for your attention.

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

Chairman SPECTER. Thank you very much, Professor Schulhofer.

We now come to the questioning of the panel, and let me begin with you, Commander Swift. When your instructions to obtain a guilty plea did not work out, you then represented Mr. Hamdan in the habeas corpus proceedings in the United States District Court for the District of Columbia. Is that correct?

Commander SWIFT. Yes, sir.

Chairman SPECTER. And was there any limitation placed upon your representation of him there?

Commander SWIFT. No, sir, there wasn't. During this entire proceeding, I want to assure this panel, this Committee, that I have never felt any pressure from my seniors or from my bosses or anyone in the military—

Chairman SPECTER. So you just proceeded to do a lawyer's job?

Commander SWIFT. Sir?

Chairman SPECTER. You just proceeded to do a lawyer's job?

Commander SWIFT. Sir, I proceeded to do the job I believed to be as a lawyer and an officer in that situation required.

Chairman SPECTER. Is it customary, or are there many other cases where a detainee like Mr. Hamdan is provided counsel like you, well-trained and versed in the field, with experience and expertise?

Commander SWIFT. To my knowledge, two of the cases that were cited for commission's proposition are the Yamashida case and the Quirin case. In both of those, Colonel Royale brought that case to the Supreme Court, and the defense counsel, who will go unnamed in the Yamashida case, went so far as to fly their petition for habeas to the Supreme Court out on an airplane from the Philippines.

Chairman SPECTER. There has been testimony here today that counsel is available in these proceedings before the military commission. To what extent have you found that to be true?

Commander SWIFT. Well, there was counsel available at one time, sir. The problem is that that time has passed. At its height, the Office of Military Commissions and the defense counsel's office was six full-time attorneys. As of July 22nd, it will be down to one, unless reliefs are identified. I am no longer attached directly to the office, in that I went on to other orders. I continue to represent Mr. Hamdan.

Chairman SPECTER. Would the availability of defense counsel impede what Senator Kyl had spoken about here earlier today as the interrogation process which needs to be a continuum?

Commander SWIFT. I don't agree that it would, sir. After an immediate position, my experience—and I can only speak for my ex-

perience here, sir—is that more times than not, when my client has valuable information and there is an opportunity to benefit the Government and benefit himself, my immediate advice is let's give the information and get the benefit of it.

Chairman SPECTER. Let me turn to former Attorney General Barr. In the opinion which Judge Green handed down on a series of Guantanamo cases, she found deficiencies in the CSRT's failure to provide detainees with access to material evidence upon which the tribunal affirmed their, quote, "enemy combatant status," and the failure to permit the assistance of counsel to compensate for the Government's refusal to disclose classified information directly to the detainees.

Mr. Barr, to what extent is it realistic to give detainees access to classified information so that they are able to defend themselves? You made a comment about this is not an adversarial proceeding; the rights are limited. How do you balance that out, or is there no balance?

Mr. BARR. In my mind, it is a prudential judgment by the chief executive, the commander in chief, because it is preposterous to say that there is some kind of constitutional right that the foreign person seized on the battlefield has to look into American intelligence during a way.

I mean, just think about the enormity of that. You know, our troops make a judgment that someone is a hostile and then we have to have an adversary proceeding and then they get free rein into looking into classified material. It is ridiculous.

Chairman SPECTER. Let me turn to Mr. Margulies. My time is nearly expired.

Your representation of Mr. Habib certainly was successful. Was there any evidence to the extent that you feel free to comment about the substance of the Government's charges?

Mr. MARGULIES. What I can say is that I have reviewed the classified and the unclassified portions of the returns. I can only discuss the classified portions to the extent that it has become public. For instance, portions of it are discussed in Judge Green's decision. If the allegations against him were true, he wouldn't be home. If there were an atom's weight worth of true to them, he would still be in custody.

The Department of Defense does not disclose why it is it releases. What it does is puts them on a plane and sends them home. I am the only person who actually got to go home with him, and so we had advanced notice of it. But all we know is that they made very strong allegations against him and then the facts came out that it appears that those allegations were based on statements taken when he was in Egypt. And when that fact came out, he was released.

Chairman SPECTER. I am past time, which I don't like to be, but we are not going to have another round, so I want to follow up with you on just one further area, Mr. Margulies.

Your job as defense counsel is obviously to represent your client, to secure his release if you can. But you have heard the testimony and you know the circumstances of the problems of a terrorist attack and you know the difficulties of producing competent evidence

and giving detainees access to confidential information because of the security problems.

Can you take a step backward and give us a view as to how you would reconcile these differences?

Mr. MARGULIES. I can try.

Chairman SPECTER. That is too broad a question for now, but I will ask you to respond to it. But I would like to ask you to respond further when we work through these issues after this hearing is over today. This is just the start of a lot of hard work on the part of the Committee in trying to figure out what our constitutional duty is to establish these rules.

But what would you say on this tough issue of balance?

Mr. MARGULIES. Two things, Senator. One, my colleagues and I—and when I say my colleagues, that is the lawyers that I have been working with, and there is now a substantial number. I have to give a particular nod to the lawyers at the Center for Constitutional Rights who have been my colleagues in *Rasul* since the case began, and at Sherman and Sterling here in D.C. who have represented the companion case of Al-Odah. We stand ready to work with you and your colleagues in whatever capacity you want.

I know Professor Schulhofer can address this as well. Regarding your other question, the Federal courts of the United States are steeped in the procedures and statutes governing the use and dissemination of classified information. We have dealt with this problem for decades, and dealt with it successfully in terrorism trials.

We know how to create a process that both comports with the requirements of the law and protects national security classified information. We have an entire body of statutes—the Classified Information Protection Act, or CIPA—that can be imported into, either by legislation or by the habeas rules, to control the flow of information in habeas proceedings for the 540 people who are not going to be subject to military commissions.

The problem is that the CSRTs not only rely on classified information that is not shared with the prisoner, but do not share it with counsel. So he must rebut—in fact, the burden is on him to rebut secret information that is not shared with him that he doesn't know about. That is what collectively makes it an invalid process.

Chairman SPECTER. Okay, thank you very much, Mr. Margulies.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. Thank you, all four of you, for being here.

Professor, let me ask you a question. I have sort of been thinking about this this morning. General Hemingway said one of the reasons it took 3 years to begin commissions was because they had to build a whole new judicial system.

Was it necessary to build a whole new judicial system?

Mr. SCHULHOFER. Senator, it was not necessary. For people who have been captured overseas on the battlefield, we have procedures—Army Regulation 190–8—for prompt determinations right on the battlefield of their status. We have procedures. If they are claimed to be unprivileged combatants, as General Barr claimed a minute ago, our own procedures require further process because treating them as unprivileged means that they don't have the

rights to communicate with their families and other principals under the Geneva Convention.

Senator LEAHY. Let me follow that up just a little bit further because you said if they are picked up on the battlefield. Have you heard, as I have, that some of the individuals picked up were not captured during combat, but were picked up far from any battlefield; I have been told in countries such as Bosnia? Does that raise a concern for you if that is so?

Mr. SCHULHOFER. Absolutely. We know for a fact—even though the Government has simply refused to give a direct answer to questions about this, we know for a fact that many of the people, even people seized in Afghanistan, were not seized by our own troops, which was the formulation General Barr mentioned. These are people who were seized by warlords in Afghanistan and literally sold to us under the claim that they had been fighting. That is just Afghanistan for a starter.

Then we know for a fact that some people were picked up in Bosnia. We know for a fact that some of the enemy combatants were arrested right here in the United States. One of them was arrested at O'Hare Airport in Chicago. One of them was arrested by the FBI in Peoria, Illinois. And these people have been determined to be enemy combatants on the theory that the entire world is a metaphorical battlefield. So we know for a fact that that is going on.

Senator LEAHY. It is interesting. I am not looking for answer to this, but if the entire world is a metaphorical battlefield and we know that we will be facing terrorists as long as anybody in this room lives, that gives you an awful lot of leeway if you follow these rules.

Lieutenant Commander Swift, you have been in the military for 18 years. You are obviously there as a career military officer. Defending suspected terrorists probably doesn't make you the most popular person at the officer's club, if I am correct.

Commander SWIFT. I was concerned about that, sir. To relate, though—I think that this is incredibly important to the military—I went back to my 20th reunion at the Naval Academy. One of the people I was kind of worried about seeing is a Marine Corps lieutenant colonel who has had an awful lot of combat time. He has been in every campaign. And he came up to me at the reunion and he looked at me and said, I go out there everyday to fight for our freedom on the battlefield; don't you do dare stop fighting in the courts.

Senator LEAHY. As the proud father of a former Marine, I am delighted to hear that response. When I was a prosecutor, I recall always arguing that we get the best defense attorney possible. The system works better.

You heard General Hemingway's testimony this morning about the military commissions. Is there anything you would like to add to his testimony, or disagree with his testimony?

Commander SWIFT. I would start principally with the idea of rights. The first thing we do is list rights, but they don't read you the last paragraph. The last paragraph says that nothing in the instruction that supposedly creates these rights actually creates a right in any court. Moreover, they are subject to change at any time and cannot be enforced by the accused.

Now, to me, a right is something you get to keep and you get to have unless due process takes it away from you, not a change in the instruction, and it can be enforced. So I think when we start with the entire process, when these have been listed as rights to you, they are not actually rights. They are the current processes and they can be changed at any time and they are unenforceable by the accused.

Senator LEAHY. I think I referred to this morning those pesky rights. Again, when I was a prosecutor—and Senator Specter had far more experience as a prosecutor—those rights oftentimes made our life more difficult, but I don't think either one of us would ever suggest that we not have them.

The administration has argued that if the Geneva Conventions apply to the war on terror, then members of al Qaeda would receive prisoner of war protections and we would not be able to interrogate them. One, is that correct? And, secondly, what advantages would there be for the U.S. to apply the Geneva Conventions to the war on terror?

Commander SWIFT. There would be one—just to relate from history, sir, the Japanese were certainly considered during World War II to be fanatical, willing to die rather than surrender. In fact, they had the precursor of suicide bombers, the kamikaze pilot.

Senator LEAHY. The battles of Mount Surabachi show that.

Commander SWIFT. Yes, sir. The most effective interrogations of the Japanese who were captured were conducted in accordance with the Geneva Conventions. They were conducted by a Marine colonel who was steeped in the Japanese language, their philosophy and understanding. By treating them kindly and humanely, he undercut the propaganda that they had been fed that the Americans were simply out to annihilate the Japanese. When they found that not to be true, they cooperated.

I would also say that as far as applying the Geneva Conventions to al Qaeda, I would harken back to what the Milliken court said. At the end of the court, it said it makes no sense to apply the pains of the law of war to those who cannot claim its protections.

Milliken was a terrorist presumably of his day. He was supposed to be supporting an insurrection in the north against—overthrow of the army behind enemy lines. They said if you are not going to apply the protections of the military to him, you can't apply the military law to him.

If we apply the Geneva Conventions and say we are holding ourselves under their accountability, then we can say we are going to hold you accountable, too. We cannot start this process by saying, well, the Geneva Conventions don't apply to you, you have no protections, we don't have to follow them, and now we are going to hold you accountable for violating them.

Senator LEAHY. Thank you, Commander. I am proud of your response and I think you reflect the feelings of many in the military. And I think you are fighting to make sure we have all of those rights, all of the military are, and I applaud you for upholding them.

I wonder, Mr. Chairman, could I ask Attorney General Barr one question?

Chairman SPECTER. Sure. Go ahead, Senator Leahy.

Senator LEAHY. It is always a pleasure to see Attorney General Barr here. He is no stranger to this Committee in good times and bad. I hope they are mostly good times.

John Walker Lindh was a U.S. citizen who fought alongside the Taliban. To begin with, I am not holding any brief for Mr. Lindh, but he was prosecuted in Federal court and he is now serving a 20-year sentence. Yasir Hamdi, who was another U.S. citizen, was captured in Afghanistan. He was designated an enemy combatant and he was held in a Navy brig for more than 2 years. He was not allowed access to either a lawyer or family.

The Supreme Court then said he was entitled to a fair hearing—hardly a radical ruling from hardly a radical Supreme Court. But the administration said, well, rather than give him the hearing, we will release him. So one minute, he is too dangerous to be allowed access to a lawyer. The next minute, all of a sudden he is free to go.

Quite a bit different, the treatment between Lindh and Hamdi. Which case had a better result?

Mr. BARR. Well, obviously, the Lindh case had a better result, but I think you are mixing up two different things here. One is the legal regime that applies to American citizens, and I think the administration has always taken the position and recognized that in any war you will find American citizens fighting in enemy forces. That has been the case.

That was the case in World War II. There were Americans fighting in the Werhmarcht, and we had captured some, and the administration took the position that they were always entitled to habeas corpus. They can get habeas corpus review of their detention, and the question is what standard applies; what is the showing that has to be made in habeas corpus review to justify continued detention of an American citizen. It didn't address foreigners who do not have a connection with the United States. The court laid out very roughly what the procedures are and those are essentially the procedures that are being given to the foreign detainees at Guantanamo.

But I don't know why the administration dropped the case, although I heard Mr. Margulies talk about all this great way we have of handling classified information. That is nonsense. I had to make the decision to drop many prosecutions precisely because at the end of the day there was no way of protecting that classified information in a criminal prosecution if it was material to the conviction.

Senator LEAHY. So Hamdi got a free pass?

Mr. BARR. I don't know why they dropped it.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I was thinking about the subject matter of today's hearing and the rules by which enemy combatants are detained, interrogated and the like, and it struck me as somewhat ironic when I considered what sort of rules and facilities are provided by our enemy for Americans and our allies who are captured during hostilities.

Of course, it occurred to me also that our enemy doesn't capture any Americans or allies. They kill them, they blow them up, which I think again demonstrates that are engaged in a different kind of conflict and a different kind of war. But it is nonetheless a war, but with an enemy that does not respect or observe the law of war or the conventions that we think of when we think about two countries fighting each other through uniform forces.

As the 9/11 Commission and others have observed, we can't rely strictly on a law enforcement paradigm that it seems has infused so much of the comment here today. We have got to adopt a new paradigm, both to share intelligence and to deal with the need to get actionable intelligence from these detainees, and, yes, to even detain them, these dangerous individuals who are likely to go back and kill more Americans, if released, until the end of the hostilities, as peculiar as that may seem to our modern sensibilities.

I certainly understand and endorse the work that Commander Swift and Mr. Margulies are doing as lawyers. As lawyers in an adversary system, their job is to present the best arguments that they can think of for their client, and I understand and respect that role that lawyers play. But I do believe, and I think we all would agree that the courts are ultimately the ones who are going to make the decision on this. In fact, the courts have. Indeed, in some cases the administration has prevailed and in some cases they have not prevailed.

Let me just ask you, Mr. Barr, with regard to the Geneva Convention issue, hasn't the administration's position that al Qaeda fighters do not have privileges of a POW been upheld by Federal courts? As a matter of fact, according to my count, it is at least three Federal courts. It has been endorsed by the 9/11 Commission and by the Schlesinger report.

Is that your understanding, sir?

Mr. BARR. Yes, Senator, that is my understanding. And as I said earlier, I have not heard any allegation or contention that could possibly bring al Qaeda under the protections of the Geneva Convention.

Senator CORNYN. Now, with regard to the Supreme Court's recent decisions which we are talking about here during this hearing, Mr. Barr, didn't the Court agree with the administration's position that the President has the power to detain enemy combatants and reject legal challenges to that position?

Mr. BARR. Yes. I think one of the things that has been missed by the media in reporting those decisions is all the core positions of the administration that were sustained. The Court specifically said, yes, you can detain enemy combatants. It is not punitive, it is not a trial-type situation where you are trying to punish them.

Number two, it said you can even detain American citizens as enemy combatants. It was in that context that they elaborated on the standard you need for keeping an American citizen in the United States. They also seemingly endorsed use of military tribunals, and they pointed out that military tribunals are inherently flexible and they talked about the need for flexibility in dealing with these kinds of procedures in the national security arena and how the flexibility of military tribunals permits that.

In fact, notwithstanding the professor's comments that we sort of have things on the shelf we can use, that is simply not true. These kinds of situations always involve unique circumstances, which is why we have generally constituted military commissions directed at specific conflicts. And I think that the President's order did exactly what we needed for this particular conflict.

Senator CORNYN. Thank you very much.

Well, in the end I hope we at least all can agree that notwithstanding the arguments people may make in court, or people of good faith who are trying to advance the cause of actually getting a decision on this, that we will ultimately at least agree that the courts are going to be the ones who are ultimately going to decide the parameters of the rights accorded to these detainees, as they have already largely through the Supreme Court's decisions in *Hamdi* and *Padilla* and others.

Thank you very much, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Chairman, I just want the Committee to know that today Attorney General Gonzales, I gather in Brussels, has said, and I quote—and this is about Guantanamo—"We have been thinking about and continue to think about whether or not this is the right approach. Is this the right place, is this the right manner in which to deal with unlawful combatants," he told reporters in Brussels, and I must commend him for that open view.

Mr. Chairman, I would also like to put in the record something we downloaded from the White House fact sheet yesterday, and that is a statement on detainees and it says the United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely, and to the extent appropriate and consistent with military necessity in a manner consistent with the principles of the Third Geneva Convention, 1949.

Then the fact sheet goes on to discern Taliban are entitled to POW status, but al Qaeda detainees are not. And I think in a way, that is the rub. I think, in a way, it is the determination of who is who, guilty of what, that is a real problem here. And I have just about reached the conclusion that this special military commission is not a positive thing, but the Uniform Code of Military Justice really is.

Could I ask this question of anybody that knows: How many cases have come before the military commission?

Commander SWIFT. To date, there are four. Two cases actually had commissions convened in them. The other two cases did not get that far. So there are four people identified at present. Two of the individuals who were to be tried by military commissions requested to represent themselves—or excuse me—one did, and in the other one there was a question regarding counsel so they never started. So there are a total of four.

Senator FEINSTEIN. Thank you. Commander Swift, if I might, you mentioned that you had been told you could only represent Mr. Hamdan as long as it was to negotiate a guilty plea. Did you receive any document to that effect?

Commander SWIFT. Yes, ma'am, I did.

Senator FEINSTEIN. And could you tell us about that document, please?

Commander SWIFT. Ma'am, it was a target letter to the acting chief defense counsel, who at that time was Colonel Will Gunn—he is now the chief defense counsel—on December 15, 2003. It requested Colonel Gunn, who was the detailing authority, to make counsel available for Mr. Hamdan. It was from the chief prosecutor, Colonel Fred Bork, who was at that time the acting chief prosecutor for the military commissions. He said that they were considering preparing charges and that they desired to have a defense counsel detailed. He then put some limitations on that.

Senator FEINSTEIN. And what were those limitations?

Commander SWIFT. Specifically, ma'am, he said that he was authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pre-trial discussions with a view toward resolving the allegations against him; that the prosecutor's office would make arrangements with Commander, Joint Task Force Guantanamo, for such detailed military counsel to have access to Mr. Hamdan.

Senator FEINSTEIN. Now, how do you interpret that?

Commander SWIFT. Well, I interpreted it most on this last line, ma'am: "Such access shall continue so long as we are engaged in pre-trial negotiations." I interpreted that, ma'am, to mean when I was detailed that the only way I could see Mr. Hamdan was we were negotiating for a guilty plea. There are no negotiations in a not guilty plea.

Senator FEINSTEIN. Mr. Chairman, may I enter that memo into the record, please?

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

Senator FEINSTEIN. Thank you.

I would like to ask Professor Schulhofer a question. In your written testimony, you refer to Congress's law-making power under Article I, section 8, of the Constitution. It has been my view that Congress has both the power and the responsibility to take on the issue of detentions and interrogations, specifically pursuant to two clauses of section 8, to make rules concerning captures on land and water, and to make rules for the government and regulation of the land and naval forces.

Do you agree, and are these the particular sources you are referring to?

Mr. SCHULHOFER. Thank you, Senator. Yes, I believe that those two clauses are as explicit and clear as anything could be, and they are not in footnotes. They say that Congress shall have the power to make rules concerning captures and to make rules concerning the regulation of the armed forces. In the absence of congressional action, unquestionably the President must take action as commander in chief, but there is absolutely no room for doubt that this is an appropriate responsibility for Congress.

Senator FEINSTEIN. I think, Mr. Chairman, at best what we have is a very confused situation, depending on interpretation, how commanders interpret how orders are given. And I think we have seen this over and over again. What is clear to me is that we have the legal responsibility to make the rules and I think we ought to do

that. And I think we ought to see that they are consistent with the Geneva Conventions.

I would like to ask you this question. How would you recommend that the question of habeas corpus be handled?

Mr. SCHULHOFER. Thank you, Senator. I have tried to spell out some of the details in my written testimony. I think one place to start, just to be very clear about this, is we are not talking about a law enforcement paradigm. I think it is quite misleading to think that those like myself who have concerns about this process are simply saying you should follow a law enforcement paradigm.

What we are saying is that we should follow the normal military procedure for people who are captured in battle. The normal procedure would have been a prompt battlefield determination of status. Three years later, it is very difficult to do that when the President and the Secretary of Defense and right down the chain of command have already announced that these people are the worst of the worst.

So in that context, there needs to be some other process.

With respect to people accused of committing war crimes, there is, as well, a process already in place in terms of military courts martial. We are not talking about ordinary law enforcement. We are talking about military courts martial under the Uniform Code of Military Justice. So that would be the beginning framework. I think there is room for Congress to make refinements of the Classified Information Procedures Act. If Congress is not able to act, the courts have residual authority to address new situations, but that would be the basic approach.

And then I think the last thing I would want to say about that is I have said that this is a question of the war paradigm, but there is one important limit to that. If we accept the idea that the entire world is a battlefield—and I understand that. My office is less than a mile from Ground Zero. I understand that extremely well. And September 11th for us was not a day; it was months that we had the smoke and the National Guard. It was months that we could smell human flesh burning at Ground Zero. So I know what that means.

But if we accept the analogy, the conclusion is that the President then has unlimited discretion to swallow up the law enforcement paradigm even—

Chairman SPECTER. Professor Schulhofer, could you summarize this answer? We are trying to at least conclude by 1:30.

Mr. SCHULHOFER. Yes. I apologize, Senator. I think I have actually reached the conclusion of my answer and I will be happy to elaborate further after the hearing.

Chairman SPECTER. That sounds like a good idea.

Anything further, Senator Feinstein?

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. Mr. Chairman, this has been a good and interesting discussion. I wish I had been able to hear all of it since the second panel had come.

I think, in general, the tone of this hearing has suggested widespread abuses on the part of our military, whereas what really is at stake here is a legal debate over exactly what procedures ought

to be utilized. If someone has violated the procedures, they ought to be disciplined.

Commander Swift, with regard to your appointment, isn't it true that you were appointed as counsel for Hamdan for all matters relating to military commission proceedings involving him?

Commander SWIFT. I was so appointed.

Senator SESSIONS. Not just solely to take a guilty plea.

Commander SWIFT. Sir, when I was appointed, my access to Mr. Hamdan was not controlled by the Office of the Chief Defense Counsel. It was controlled by the prosecutor, and the prosecutor told me at the time of my appointment that my access was controlled contingent upon him pleading guilty. In fact, he told me further that I had to give him an answer in 30 days and if I didn't give him an answer in 30 days, I had to request extensions. He was in control of whether I saw my client or not.

I believed as a lawyer that once I had an attorney-client relationship, then I had a duty to represent him, no matter what. But the truth of the matter was I had to advise Mr. Hamdan of the real practicalities, and that was that if he wasn't going to plead guilty, he might not see my again.

Senator SESSIONS. Well, Lieutenant Commander Swift, you are a lieutenant commander, a JAG officer. Prosecutors don't order around JAG defense counsel. I know that and you know that from the little time I had as a JAG officer, and I would note that the order directing you to represent him says "all matters relating to military commission proceedings," close quote.

Mr. BARR. Excuse me, Senator. Could I something there?

Senator SESSIONS. Yes, Mr. Barr.

Mr. BARR. Let's put something in perspective here. The United States has a lot of people that they could charge with war crimes. We are not under any obligation to try these people when they want to be tried. We can try them when we want to try them. Rudolph Hess was captured in 1939 and he was tried in 1946. These people are in detention as combatants. So we can take our time and judge who we want to do.

And it doesn't surprise me that as an initial matter, in terms of allocating our resources, the United States wanted to see if anyone was ready to plead guilty. And if they are ready to plead guilty, we will provide them with counsel. If they are not ready to plead guilty, they can stand in line and wait to be prosecuted down the road. That is not a surprising thing.

Senator SESSIONS. I would also note, Mr. Barr, that the—

Senator LEAHY. Can we have the Lieutenant Commander's answer?

Senator SESSIONS. I thought he answered.

Commander SWIFT. Sir, I would like to respond. As you said, this was extraordinary circumstances, though. I can't see my client without the permission of JTF. I have to write a message every single time and be approved.

Senator SESSIONS. Well, you are unhappy that you have to write a message to see the client. That is one thing. It is another thing to say that you weren't commissioned to represent him on anything but a guilty plea.

Commander SWIFT. My access was contingent upon it, sir. Also, he differed from the situation that Mr. Barr described in that he was in solitary confinement. Had he been among the general detainee population, I would be more willing to agree.

Mr. BARR. Another point on that. Anyone who has gone into a Federal maximum-security prison—you know, these violin strings about people being held in segregation, getting out of their cell 20 minutes a day—I am sorry; that is our system in our maximum-security prisons in the United States for American citizens.

Senator SESSIONS. I couldn't agree more, Attorney General Barr.

I would just like to point out that we have regular visits by the Red Cross. Two hundred of these detainees now have habeas corpus petitions pending in Federal courts. A thorough investigation of all procedures has been undertaken as part of ten major reviews, assessments, inspections and investigations, and we have had hearings on that repeatedly. Seventeen hundred interviews have been conducted. Sixteen thousand pages of documents have been delivered to Congress.

Detention operation enhancements and improvements have involved increased oversight and expanded training of the guards and interrogators to improve facilities. 390-plus criminal investigations have been completed or are ongoing. More than 29 congressional hearings have addressed this issue—29 congressional hearings. Those responsible are being held accountable.

In the Army, one general officer has been relieved from command. Thirty-five soldiers have been referred to trial by court martial, 68 soldiers have received non-judicial punishment, 22 memoranda of reprimand have been issued, 18 soldiers have been administratively separated. The Navy has had nine receive non-judicial punishment. The Marines: 15 convicted by court martial. Seven received non-judicial punishment, and four reprimanded.

So I think it is important for the people who are listening to this hearing today to know that our United States military takes this issue seriously. They brought up the Abu Ghraib matter before the press did. They announced it. They commenced their own investigation. People have been prosecuted and convicted, and we are not going to tolerate the kind of behavior that we have seen in certain of these instances.

But the fact is these are not American criminals, Mr. Barr. I think you have indicated that, and they are not entitled to the same due process rights an American does who expects to be tried in Federal district court somewhere.

Could I ask Mr. Barr one more thing?

Chairman SPECTER. Go ahead, Senator Sessions.

Senator SESSIONS. As Attorney General of the United States, you understand that an Executive has certain powers. The courts have certain powers and the legislative branch has certain powers.

Speaking as an attorney general who would be representing a President of the United States, do you have concerns about what could be an erosion of the Executive's power to conduct a war on behalf of the citizens of the United States?

Mr. BARR. Absolutely, Senator, and what we are seeing, I think, today is really a perversion of the Constitution. The Constitution sets up a body politic, members of a political community, and in

that body politic we have rules that govern us. And what the Constitution is all about is to say that when the Government acts against a member of the body politic to enforce our own domestic laws—that is, the Government acting against one of the people—the judicial branch backs off and acts as a neutral arbiter and various standards are imposed on the executive. And those standards sacrifice efficiency in order to be perfect. We don't want to make a mistake. We would rather let guilty people go and pay that price because we want to get it absolutely right.

That is not what is going on here. What is going on here is our body politic, the people, are under attack from foreigners, a different people. They are trying to impose their will on us and kill us. In that situation, the very notion of the judiciary backing off and playing some role as a neutral arbiter between the people of the United States and a foreign adversary is ludicrous and perverse.

The idea that we can fight a war with the same degree of perfection we try to impose on our law enforcement system, which is to say we will not tolerate any collateral damage in law enforcement and we have to be absolutely mistake-free—to try to use those rules and impose them on a war-fighting machine, to say it has to be absolutely perfect and we can't hold anyone in detention and they have all kinds of due process—the idea that a foreign person that our troops believe is a combatant is going to be held, you know, and we are going to turn the earth upside down and turn our army into detectives to figure out whether it is true or not is ridiculous. We will lose wars. We will lose our freedom.

Chairman SPECTER. Commander Swift, do you have a final comment? I note you straining to be recognized, so you are.

Commander SWIFT. Well, thank you, sir. Just a couple of points in response to what I have heard here today. I would point that where Mr. Hamdan is held is equivalent to the maximum-security prisons of the United States. The difference is it is called administrative by criminal sanction.

I agree that we need every tool available as a military officer to fight and win wars, and that they are not the same thing. I would point out, though, that when we go to hold accountability, when you hold a trial, sir, it says as much about the man who is being accused—it says as much about the society that holds the trial as it does about the individual before it. Our trials in the United States reflect who we are. They are the models of the world.

We heard statistics from Senator Sessions, and I couldn't agree more. What they demonstrated was that the Uniform Code of Military Justice works. It was able to try people who had been inside those prisons. All of those trials are done. It worked great. Why don't we use it and start holding the people who attacked us accountable?

Thank you for your time, sirs.

Chairman SPECTER. Thank you very much. Senator Leahy has one more comment and then we are going to conclude.

Senator LEAHY. Mr. Chairman, I would note, with all due respect, about the administration coming forth on Abu Ghraib and Afghanistan, a lot of people had asked questions about what was

going on there long before anything was said by the administration, and it was said only after it became public.

Senator SESSIONS. No.

Senator LEAHY. We, will go back—

Senator SESSIONS. The General in his press briefing announced that they were conducting an investigation of abuses at Abu Ghraib before anybody raised it.

Chairman SPECTER. We will continue this debate at tomorrow's executive session. It starts at 9:30.

[Laughter.]

Chairman SPECTER. Do you have a final statement, Senator Leahy?

Senator LEAHY. Well, Attorney General Barr, whom I have a great deal of respect for, made a strong statement about how people were held in maximum-security, allowed only a few minutes out and everything else. I would just remind him of something that he is well aware of. Those are people who have been convicted and then sentenced. They weren't just being held under charges.

Thank you, Mr. Chairman.

Chairman SPECTER. Well, thank you, Senator Leahy, and I thank the panel and the first panel. We have a great deal of work to do beyond what we have done here today, and we are going to be following up on some of the specifics for ideas as to how to implement the kinds of approaches which have been articulated here today.

I want to thank the staff, Evan Kelly especially, for wading through an extraordinarily difficult series of judicial opinions. It is worthwhile to go back to some of the basics. This has been as lively a Judiciary Committee hearing as we have had in a long time, absent a Supreme Court nomination, and we have a lot more work to do to follow up.

So thank you all.

[Whereupon, at 1:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow:]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 18, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Associate Attorney General J. Michael Wiggins before the Committee at a June 15, 2005, hearing concerning detainees. We apologize for the time necessary to prepare the responses.

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

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Hearing Before the
Committee on the Judiciary
United States Senate
Concerning
Detainees
June 15, 2005

Witness: Deputy Associate Attorney General J. Michael Wiggins

Questions from Senator Joseph R. Biden

5. In Deputy Associate Attorney General Wiggin's written testimony, he discusses the similarities of the Combatant Status Review Tribunal hearings with the Army regulations that govern hearings under Article 5 of the Third Geneva Convention. In retrospect, do you think we could have saved a lot of trouble here had we just undertaken these Article 5 hearings as soon as possible after detention as required by the Third Geneva Convention, instead of waiting to begin any review process until after years and years of detention?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

6. When deciding to not use the Uniform Code of Military Justice and instead coming up with "military commissions" or in formulating the procedures and rules governing Combatant Review Status Tribunals, was there any thought that went in to how these decisions would be perceived world-wide, and in particular in Muslim countries?

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

7. Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and to the Congress?

ANSWER: Our understanding is that the Department of Defense has undertaken 11 major reviews and investigations to examine every aspect of detention operations. These efforts have been led by senior officers in the military and prominent civilian officials, including former Secretaries of Defense. As a result of their efforts, the Department of Defense has reviewed nearly 500 recommendations and incorporated numerous changes to its processes, procedures, and policies.

Questions from Senator John Cornyn

1. The United States Supreme Court has held that the U.S. Government can detain Enemy Combatants during wartime. Is there any basis for the assumption that such detention can last in perpetuity?

ANSWER: As the President has made clear, our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles they embody. The President has also unequivocally directed that the United States Armed Forces treat all detainees humanely. In *Hamdan v. Rumsfeld,* 2006 WL 1764793 (June 29, 2006), the Supreme Court concluded that Common Article 3 of the Geneva Conventions applies as a matter of law to the conflict with al Qaeda and that the military commissions as currently constituted do not comply with Article 3. It is important to note that the Court's decision concerned only whether the baseline standards contained in Common Article 3 apply to the armed conflict with al Qaeda and to military commissions; it did not decide that any other provisions of the Geneva Conventions apply to that conflict or that members of al Qaeda are entitled to the privileges of POW status. Al Qaeda terrorists are not entitled to the privileges of POW status because al Qaeda is not a party to the Conventions and because it conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. This is an important point: Combatants will have no incentive to comply with the Geneva Conventions if they receive POW status without honoring the Conventions themselves.

2. Why do the Geneva Conventions not apply to those we now detain at Guantanamo Bay?

ANSWER: As the President has made clear, our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles they embody. Consistent with this, the President has unequivocally required that the United States Armed Forces treat all detainees humanely. *See* Memorandum from the President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002). In *Hamdan v. Rumsfeld*, 2006 WL 1764793 (June 29, 2006), the Supreme Court concluded that Common Article 3 of the Geneva Conventions applies as a matter of law to the conflict with al Qaeda and that the military commissions as currently constituted do not comply with Article 3. It is important to note that the Court's decision concerned only whether the baseline standards contained in Common Article 3 apply to the armed conflict with al Qaeda and to military commissions; it did not decide that any other provisions of the Geneva Conventions apply to that conflict or that members of al Qaeda are entitled to the privileges of POW status. Al Qaeda terrorists are not entitled to the privileges of POW status because al Qaeda is not a party to the Conventions and because it conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. This is an important point: combatants will have no incentive to comply with the Geneva Conventions if they receive POW status without honoring the Conventions themselves.

3. With regard to detained combatants, is the application of a process like the Administrative Review Board required by the Geneva Convention or any international or domestic law?

ANSWER: No. The Administrative Review Board goes above and beyond any review traditionally provided to enemy combatants in prior conflicts.

Questions from Senator Patrick Leahy

1. In response to a question from Senator Biden, you said that, because the so-called war on terror could last decades, "it is our position that legally they (Guantanamo detainees) could be held in perpetuity." What would constitute an end to the "war on terror"? How will we know when this war is over?

ANSWER: Under the laws of war, the United States may detain enemy combatants until the cessation of hostilities. Thus, the laws of war contemplate an end to detention, but whether hostilities have ceased is a factual question that involves whether the fighting has ended and whether there is a reasonable basis for believing that it is likely to resume. During any conflict, it may be difficult to foresee exactly when or how the conflict will end. In the present conflict, however, there is no question that hostilities are ongoing. While the United States has achieved many successes in our armed conflict with al Qaeda and its affiliated terrorist organizations, that armed conflict continues in Afghanistan, Iraq, and around the world. In fact, it is our understanding that at least 12 detainees released from Guantanamo Bay have been recaptured or killed fighting United States and coalition forces in Afghanistan.

2. Some of the current detainees at Guantanamo have already been held for more than three years. During that time, they have been subject to harsh conditions, and interrogated repeatedly. Realistically, what are the chances of successfully prosecuting any of these detainees in the Federal courts, assuming that the evidence exists to convict them?

ANSWER: The President has unequivocally required that the United States Armed Forces treat all detainees humanely. *See* Memorandum from the President, *Re: Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002). The ability of the United States to pursue a Federal prosecution of any individual on a terrorism related charge is determined by the facts and circumstances of the particular case. These facts and circumstances include the quantity and quality of admissible evidence, the existence of some basis to assert jurisdiction, the extent to which prosecution risks the disclosure of classified or other sensitive information, and the potential legal and factual defenses available to the detainee. Any decision to prosecute a detainee in the Federal courts would require a thorough analysis of all these facts and circumstances.

3. A May 10, 2004, email from an FBI agent to T.J. Harrington states that FBI and Justice Department officials held meetings to discuss interrogation tactics at Guantanamo. The email states: "We all agreed DOD tactics were going to be an issue in the military commission cases." Would you agree that the Defense Department's methods of interrogation may be "an issue" in any attempt to prosecute a Guantanamo detainee? Please explain your response.

ANSWER: We are not familiar with the context in which the quoted statement was made. In response to the Supreme Court's decision in *Hamdan*, the Deputy Secretary of Defense, on July 7, 2006, issued a memorandum in which he made clear his understanding "that, aside from the military commission procedures, existing Department of Defense orders, policies, directives, Executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by Defense Department personnel that comply with such issuances would comply with the standards of Common Article 3." We defer to the Department of Defense regarding whether the Department of Defense's methods of interrogation may be an issue in any attempt to try a Guantanamo detainee by military commission.

4. President Bush recently discussed the case of Iyman Faris, the Ohio truck driver who was convicted of plotting to blow up the Brooklyn Bridge. The President said that when Faris was confronted with the evidence against him, "[he] chose to cooperate, and he spent the next several weeks telling authorities about his al Qaeda association." Isn't it possible, and even likely, that if the Administration had charged some of these detainees with crimes that carry stiff prison terms, many of them would have cooperated with the government?

ANSWER: As your question suggests, Iyman Faris began cooperating with the FBI shortly after he was first approached by the FBI in Ohio. Indeed, his cooperation went on for some time before he was formally charged with a crime. We do not believe that threatening Guantanamo detainees with prosecution in U.S. domestic courts would materially increase their incentives to provide information that would protect the Nation from attack. Detainees at Guantanamo already have similar incentives to cooperate in order to avoid being charged in a military commission or to reduce any sentence that they may receive following an adjudication of guilt in a commission. While the Supreme Court in *Hamdan* invalidated the military commissions as currently constituted, those incentives to avoid prosecution by military commission will remain if Congress acts to provide an appropriate framework for the Executive Branch to conduct commissions. Detainees may also be motivated by the opportunity to be released entirely from Guantanamo. While it may be difficult to isolate the incentives that trigger cooperation in each instance, the intelligence information obtained from Guantanamo detainees suggests that a large number have decided to provide at least some cooperation.

5. As detailed by the *Wall Street Journal* in April of this year, military commissions were used following World War II to try Japanese prison camp guards who interrogated Americans by, among other things, making them stand [at] attention or squat for periods of up to 30 minutes during interrogations; repeatedly interrogating American prisoners without providing for sufficient time for sleep; and refusing to stop the interrogations when American prisoners indicated that they did not wish to participate. Sixty years ago, American military commissions found that these interrogations were crimes against humanity and sentenced the Japanese to prison for terms of five to twenty years. Is it the Department's position that interrogations of detainees in U.S. custody utilizing similar methods are lawful? Is it the Department's position that statements made utilizing these methods may be used as evidence to convict detainees of war crimes?

ANSWER: In response to the Supreme Court's decision in *Hamdan*, the Deputy Secretary of Defense, on July 7, 2006, issued a memorandum in which he made clear his understanding "that, aside from the military commission procedures, existing Department of Defense orders, policies, directives, Executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by Defense Department personnel that comply with such issuances would comply with the standards of Common Article 3." Our understanding is that the Department of Defense takes allegations of detainee mistreatment by United States Armed Forces seriously and investigates credible allegations thoroughly, and would take appropriate action in cases where violations are substantiated. Whether a particular interrogation technique is lawful and whether particular statements made as a result of a particular technique may be introduced as evidence depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate to speculate about the legality of the scenarios you describe. It is also worth noting that the Americans who were interrogated by the Japanese during World War II were entitled to special protections as prisoners of war ("POWs"). Although the President has directed that the United States Armed Forces shall continue to treat detainees humanely, it must be remembered that al Qaeda and Taliban detainees at Guantanamo Bay are not legally entitled to the special protections afforded POWs.

Questions from Senator Russell D. Feingold

1. The Bill of Rights protects the right to be free from coerced confessions, both to protect the civil liberties of defendants, and to ensure the accuracy of information relied upon to deprive individuals of their freedom. Setting aside the question of what constitutional rights apply to the detainees at Guantanamo Bay, would you agree that evidence obtained through the use of torture should be treated as suspect?

ANSWER: As the President has repeatedly and unequivocally emphasized, the United States neither commits nor condones torture. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."). Torture, moreover, is a Federal crime, is not permitted, and cannot be justified for any reason. In addition, the United States has undertaken an international law obligation "to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." CAT Art. 15. And, in the context of military commissions, the General Counsel of the Secretary of Defense reaffirmed that statements established to have been made as a result of torture shall not be admitted as evidence against an accused in a military commission proceeding. *See* Military Commission Instruction No. 10 (Mar. 24, 2006).

2. Lieutenant Commander Swift in his written testimony stated that his client, Mr. Hamdan, has been charged with conspiracy. Please describe the elements of an offense of "conspiracy" under the substantive law applied by the military commissions.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response. Four Justices in *Hamdan* concluded that conspiracy to violate the law of war, standing alone, is not a violation of the law of war, and three Justices found that conspiracy to commit a violation of the law of war falls within the traditional jurisdiction of military commissions. Justice Kennedy did not address this issue, and so there was no opinion of the Court on the issue.

3. You testified before the Committee that the military commissions determine whether to allow the use of evidence obtained through torture or other coercive interrogation techniques. Can you identify any instance(s) in which a military commission has explicitly considered whether or not it should consider evidence produced through torture or other coercive techniques? If so, please identify the instance(s) and the outcome(s).

ANSWER: On March 24, 2006, the General Counsel of the Department of Defense issued Military Commission Instruction No. 10, which expressly provides: "The Commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except against a person accused of torture as evidence the statement was made." Before the issuance of this instruction, no military commission factual hearings had been held; thus, this issue had not been previously presented.

4. The Administration's position is that the detainees at Guantanamo are "enemy combatants" who were picked up on the "battlefield" in as many as 40 different nations.

a. How did the U.S. officials who initially detained each of the individuals now at Guantanamo Bay determine, prior to or at the time of detention, whether the individual was an "enemy combatant"? Please submit documentation of the procedure used to make this determination.

b. Were any of these individuals given an opportunity, prior to detention, to contest their status as enemy combatants?

c. How many detainees have been released from Guantanamo Bay? Please identify each such detainee and indicate on what basis the detainee was released.

ANSWER: For this question, the Department defers to the Department of Defense, which is in a better position to provide a response.

5. In Judge Joyce Hens Green's recent decision finding the procedures of the Combatant Status Review Tribunals unconstitutional, she noted that the government did not formally

define "enemy combatant" until July 2004. On what basis was the government detaining people prior to July 2004?

ANSWER: The term "enemy combatant" has been defined in the law of war for over one hundred years. The Supreme Court recognized this in the 1942 case of *Ex parte Quirin*, where it recognized that "by universal agreement and practice the laws of war draw a distinction . . . between those who are lawful and unlawful combatants." 317 U.S. 1, 30-31. As the Court explained:

> Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

317 U.S. at 31. Before the July 7, 2004 order of the Deputy Secretary of Defense, the Department of Defense, with particularized legal advice of the Department of Justice, determined whether each individual to be detained at Guantanamo Bay met the definition for enemy combatants long established under the laws of the war and the decisions of the Supreme Court.

6. You testified before the Judiciary Committee that the President has the authority to hold individuals for trial "for those crimes that violate the laws of war or other crimes that are regularly tried before military commissions." What "other crimes" are "regularly tried before military commissions" besides war crimes?

ANSWER: Congress in 10 U.S.C. § 821 has provided that the jurisdiction conferred on courts martial in the Uniform Code of Military Justice "does not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." In *Hamdan*, at least seven of the eight participating Justices agreed on the general historical jurisdiction of military commissions under the law of war, to which we refer you for further detail. *See Hamdan*, 2006 WL 1764793, * 22 (plurality); *id.* at *66 (Thomas, J., dissenting). We are aware of only two offenses currently made triable by military commission by statute: aiding the enemy and spying. 10 U.S.C. § 904, 906.

7. Lieutenant Commander Swift told the Judiciary Committee that the rules of the military commissions are explicitly unenforceable and can be changed at any time. Is that statement correct?

ANSWER: The Court in *Hamdan* invalidated the military commissions as currently constituted.

SENATOR LEAHY TO RADM McGARRAH:

1. U.S. forces invaded Afghanistan in October 2001. In a memorandum dated February 7, 2002, President Bush determined that the Third Geneva Convention did not apply to our conflict with al Qaeda and that, while the Convention did apply to our conflict with the Taliban, Taliban detainees did not qualify as POWs. Between October 2001 and February 7, 2002, what was the process for determining the status of captured militants in Afghanistan? Were hearings conducted pursuant to Article 5 and Army Regulation 190-8? If so, how many? If not, why not?

U.S. forces in Afghanistan received adequate guidance regarding the status and treatment of captured individuals prior to the President's determination of February 7, 2002. In November 2001, the Department of Defense (DoD) issued guidance to U.S. Armed Forces conducting military operations in Afghanistan, providing that detainees shall be treated humanely, consistent with the protection provided enemy prisoners of war under the Third Geneva Convention of 1949. This guidance further provided that this treatment policy did not confer any legal status or rights. On January 19, 2002, the Secretary of Defense issued guidance to the Combatant Commanders, through the Chairman of the Joint Chiefs of Staff, that al Qaeda and Taliban individuals under the control of the DoD are not entitled to prisoner of war status under the Geneva Conventions.

2. What were the results of the process used prior to February 7, 2002. Were any al Qaeda detainees classified as POWs and, if so, how many? Were any Taliban detainees classified as POWs and, if so, how many?

No individuals taken into DoD control were classified as enemy prisoners of war under the Third Geneva Convention, either before or after the President's determination of February 7, 2002. Therefore, no detainees were reclassified from enemy prisoner of war status to another status before or after that time.

3. Has any person taken into U.S. custody in connection with the war in Afghanistan been classified as a POW at any time? If so, how many and by what process?

No person detained by the Department of Defense in connection with the war in Afghanistan has been classified as a POW.

4. If any person taken into U.S. custody in connection with the war in Afghanistan was classified as a POW at any time, what happened to such person's status as a result of the President's determination of February 7, 2002? Was any person stripped of POW status and, if so, by what process?

No person detained by the Department of Defense in connection with the war in Afghanistan has been classified as a POW.

5. Please provide copies of all documents and hearing records relating to the classification of persons captured in connection with the war in Afghanistan between October 1, 2001 and

February 7, 2002, including any DA Form 2674-R, Enemy Prisoner of War/Civilian Internee Strength reports, or any comparable form.

Because no hearings were held relating to the classification of detained individuals, no Enemy Prisoner of War/Civilian Internee Strength Reports (DA Forms 2674-R) were used. Further, a review of the records within the National Detainee Reporting Center (NDRC), the organization responsible for tracking and accounting for all detainees under DoD control, reveals no other comparable documents.

6. In your opening statement, you said that in advance of the CSRT hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant designation. Please provide the committee copies of those summaries, with the names of individual detainees redacted, if necessary.

The unclassified summaries of the evidence supporting a detainee's enemy combatant designation are available to the public at *http://www.defenselink.mil/pubs/foi/detainees/index.html*. Because of the sheer volume of these documents, I have not included a paper copy of these documents, but could produce paper copies upon request. These unclassified summaries are presented to the detainee's personal representative as well as to the detainee.

It is also important to note that the most significant evidence tending to support a detainee's enemy combatant classification may be classified. Sharing that information with a terrorist could put our forces' lives and national security at risk.

7. You also said that the tribunals gave detainees the "opportunity to attend all open portions of the proceedings." What factors require a hearing to be closed to the detainee? How can the detainee rebut or address any information that is presented during the closed portion of his hearing?

Each detainee is given the opportunity to attend the unclassified or open portions of each hearing. A hearing would be closed for discussions of classified information, and during panel deliberations and voting.

In striking an appropriate balance between providing a detainee with an administrative hearing and safeguarding classified information, the Department of Defense requested that the intelligence community clear unclassified summaries of the information tending to support a detainee's enemy combatant classification to share as much evidence as possible without impinging upon our national security interests. However, the most significant information tending to support a detainee's enemy combatant classification may be classified. Sharing this classified information directly with the detainee would certainly undermine sensitive resources critical to the anti-terrorism effort. However, the CSRT Recorder is obligated to search government files for evidence (including classified evidence) suggesting the detainee no longer meets the criteria for designation as an enemy combatant, and the personal representative for the detainee has the same access to the classified files.

8. In response to Senator Graham, you said: "I think the definition (of enemy combatant) we are using has precedent." What is that precedent?

The concept of an "enemy combatant" is well-established in the law of war. Indeed, it predates the formation of our republic. Since the Revolutionary War, the United States has tried enemy combatants for law of war violations. Over sixty years ago, the Court, citing a wealth of authority, explained that, "[b]y universal agreement and practice," the law of war distinguishes enemy combatants from the "peaceful populations of belligerent nations" and also distinguishes lawful enemy combatants from unlawful ones. *Ex Parte Quirin,* 317 U.S. 1, 30-31 & nn.7-8 (1942). "[E]nemy combatant[s] who without uniform come[] secretly through the lines for the purposes of waging war," said the Court, are "familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* at 31. The Court has recognized that the trial and punishment of certain "enemy combatants" is "not only a part of the conduct of war," but also "an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war." *In Re Yamashita,* 327 U.S. 1, 11 (1946).

9. In his July 7, 2004, order establishing CSRTs, then-Deputy Secretary of Defense Paul Wolfowitz defined the term "enemy combatant" as follows: "An individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This definition includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." From this definition, it seems clear that someone either was or was not an "enemy combatant" at the time of his capture, and that nothing that happened subsequently could possibly change that status, one way or another. The CSRTs have concluded that 38 of the 558 detainees it reviewed were not "enemy combatants." Do these cases suggest that the administration erroneously detained 38 men for two or more years?

There was no mistake in originally detaining these individuals as enemy combatants. Their detention was directly related to their support of and/or participation in combat activities as determined by an appropriate DoD official before they were transferred to Guantanamo. A determination that a detainee should no longer be classified as an enemy combatant does not negate his original status.

The Tribunal hearing is an administrative, fact-finding process that considers all the information available at the time. Tribunal members reviewed information collected by law enforcement and intelligence agencies, as well as information presented by the individual detainee. Over time, events have occurred and new information has been developed on most detainees since they were captured on the battlefield, allowing the Tribunal to take a broader look.

The Tribunal's decisions are difficult. These are very complex issues, and information is sometimes ambiguous or conflicting. Taliban and al Qaeda fighters are often trained to claim, when captured, that they are simple cooks, or religious students – not terrorists or enemy combatants. The tribunals are charged with examining the relevant and reasonably available information in the government's possession and making a decision based upon the preponderance of evidence.

10. You testified that the Administrative Review Board "will assess on an annual basis whether or not the detainees continue to pose a threat to the U.S. or its allies." What factors are used in this review process?

The basis for detaining individuals at Guantanamo Bay, potentially through the end of hostilities, is their designation as enemy combatants. All enemy combatants at Guantanamo Bay were designated, typically through multiple reviews, as enemy combatants before they ever arrived at Guantanamo Bay. This designation has been most recently validated through the Combatant Status Review Tribunal (CSRT) process. Although the United States may detain these enemy combatants until the end of hostilities, the Administrative Review Board (ARB) process provides a mechanism for the possible early release or transfer (typically to the country of nationality) of detainees before the end of hostilities. For each enemy combatant, the ARB process considers all reasonably available information in the government's possession, invites input from the detainee's home country and family, and develops a recommendation that the detainee be released, be transferred (typically to the country of nationality), or continue to be detained. Some of the main factors considered by the ARB in assessing each enemy combatant and developing this recommendation include:

- The extent of the threat a detainee may continue to pose to the U. S. and its coalition partners if released or transferred;
- The detainee's intelligence value;
- Whether the detainee is under investigation for potential violations of the law of war;
- The detainee's willingness and ability to accept responsibility for his actions if released or transferred; and
- The detainee's country's willingness and ability to accept responsibility for the detainee if released or transferred.

These factors are viewed collectively by the ARB panels in making recommendations to the Designated Civilian Official (DCO). No one particular factor is controlling. Acting Deputy Secretary of Defense Gordon England is the DCO for the ARB process, and is the final decision maker on whether a detainee is released, transferred to country of nationality or a third country, or continued in detention. A process like the ARB is discretionary on the part of the U. S. Government in that an ARB is not required by either the Geneva Conventions or international law. There are no absolutes or formulas that predict a specific outcome in a case, and the overall process does contain some risk in that detainees who are released can return, and some have returned, to the battlefield to engage in subsequent terrorist activities. However, we are taking the historic step of establishing a process that permits an enemy combatant to have a hearing to present his case for release while a conflict is ongoing in order to ensure that no enemy combatant is detained longer than necessary.

11. Your opening statement said that a detainee has the "opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available." What is the standard for determining whether a witness is relevant? Are you aware of any non-detainee witnesses who were successfully called by a detainee? Are you aware of any testimonies of non-detainee witnesses that were heard by "telephonic or video-telephonic testimony" – as the CSRT rules expressly contemplate? What efforts would be made to locate a witness for a detainee in the context of a CSRT proceeding? Would there be consultation with a detainee's attorney, if he has one, on how to locate such witnesses?

In the Combatant Status Review Tribunals, the tribunal president is charged with deciding the relevance of a witness' testimony to the question of whether or not the detainee continues to meet the criteria for designation as an enemy combatant. An enemy combatant is defined as "An individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This definition includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." If the tribunal president determines that a witness' testimony does not relate to the question before the board, he or she would decline to hear the witness.

During the CSRT process, we worked closely with the Department of State and our embassies overseas to attempt to locate relevant witnesses in several countries. As you are aware, travel to Guantanamo can be difficult and costly; when witnesses were located, and when they agreed to provide information, testimony was taken from the witness and an affidavit was provided to the CSRT. These witness searches were conducted through diplomatic channels, not through detainees' lawyers.

SENATOR LEAHY TO BG HEMINGWAY:

1. Please provide the exact number of detainees currently being held in Guantanamo Bay. Also, please provide the following information with respect to the detainees: a) nationalities; b) the countries in which they were captured; c) how many were captured during active combat; and d) how many were captured by U.S. forces. For each detainee not captured by U.S. forces, please provide the name of the military force or government agency that captured the detainee and describe the U.S. government's basis for determining that the detainee was an enemy combatant.

The answer to this question is provided in a classified response.

2. "What are the standards, if any, for determining when a trial can be closed (A) to the public, and (B) to the defendant?"

Part B of the question is addressed first in this answer.

Commission rules regarding the closure of proceedings were broadly delineated in the President's Military Order (PMO) of November 13, 2001. Section 4(c)(3) gave the Secretary of Defense the authority to issue orders and regulations to provide for trials "in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended,...protected by statute or rule from unauthorized disclosure, or otherwise protected by law."

Consistent with this order, Secretary Rumsfeld amended DoD Military Commission Order (MCO) No. 1 on August 31, 2005. Like the previous version of MCO No. 1, Section 6(B)(3) directs that proceedings will remain open except where authorized by the Appointing Authority or the Presiding Officer. Grounds for closure include not only protection of classified information, but also the safety of commission members and/or witnesses, the protection of law enforcement methods, sources or activities, and in furtherance of other national security interests. Section 6(D)(5)(b) of the amended MCO No. 1 empowers the Presiding Officer to exclude from evidence classified and other protected information if its admission would deprive an accused of a full and fair trial. In addition to this protection, detailed defense counsel are judge advocates of the U.S. Armed Forces and as such hold a Secret or Top Secret security clearance. Although the accused may be excluded from portions of the proceeding if such exclusion would not prevent a full and fair trial, detailed defense counsel may not be excluded from any portion of a proceeding.

The Appointing Authority and the Presiding Officer, as lawyers, are well aware of the importance of the presence of an accused at a criminal proceeding. However, the need for presence of an accused must be balanced with the requirement to protect national security related information. Like any U.S. Government proceeding, individuals who do not hold the requisite security clearance are excluded from proceedings in which classified information is disclosed.

A decision by the Presiding Officer to close proceedings to the accused is reviewable. Military Commission Instruction (MCI) No. 8 of August 8, 2004, Section 4A, deals with certification of interlocutory questions, and provides that the Presiding Officer may certify other (non-mandatory) interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

Defense counsel has the opportunity to request that the proceedings remain open or that the Presiding Officer send the issue to the Appointing Authority as an interlocutory question.

MCI No. 9 of December 26, 2003 prescribes the procedures and establishes responsibility for the review of military commission proceedings. Pursuant to Section 6(H)(3) of MCO No. 1, the Appointing Authority performs an administrative review of the record of trial. The record is forwarded to the Review Panel. The Review Panel reviews the entire record to ensure that no material errors of law have occurred. A material error of law includes, but is not limited to, a deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial. A decision to close proceedings and exclude the accused will be considered carefully. If the panel were to decide that the closure was not justified and resulted in denial of a full and fair trial, the record of trial would be returned to the Appointing Authority for further proceedings in accordance with MCI No. 9, Section 4(C)(1)(a).

Likewise, the rules governing the closure of proceedings to the public mirror those regarding the accused for the same reasons. Photography, video, and audio broadcasting are prohibited in military commissions, except as ordered by the Presiding Officer as necessary for preservation of the record of trial. See DoD MCO No. 1, Sec. 6(B)(3). This is common practice in U.S. federal courts and many U.S. state courts as well.

3. I asked you at the hearing if any of the detainees being held at Guantanamo were in the custody of government agencies other than the Department of Defense. You responded, "not to my knowledge. You would have to direct your questions in that regard to some other agency." Because Guantanamo is under the control of the Department of Defense, I presume that the Pentagon would be aware of another government agency operating on its base. Have other government agencies held detainee at Guantanamo in the past four years? If so, which agencies? Are any other U.S. government entities presently holding detainees at Guantanamo. If you are personally unaware of the answers to these questions, please obtain assistance of the Department in supplying an answer.

As a matter of policy, DoD does not discuss operational matters involving other U.S. Government entities.

4. U.S. military personnel are subject to the Uniform Code of Military Justice (UCMJ). In October 2002, Lt Col Diane Beaver wrote a memo in which she noted that poking a detainee in the chest, pushing him lightly or placing a wet towel or hood over his head would constitute an assault under Article 128, UCMJ and that threatening a detainee with death may also constitute a violation of Article 128. She then wrote "It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods." It seems clear that some of the interrogation techniques approved by the Secretary of Defense would constitute an assault under the UCMJ. Has any promise of immunity been given to any individual and, if so, by whom?

We are not aware of any instances of immunity offered or promised to any uniformed individual.

5. A May 10, 2004 email from an FBI agent to T.J. Harrington states that the FBI and Justice Department officials held meetings to discuss interrogation tactics at Guantanamo. The email states, "We all agreed DoD tactics were going to be an issue in the military commission cases." Was the manner of interrogation or the physical abuse of a detainee ever a factor in a decision to not bring charges against a detainee?

No.

6. Can a military commission consider as evidence statements of the accused or other witnesses that were obtained as a result of either physical or mental coercion?

Whether a particular statement made as a result of particular treatment may be introduced as evidence depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate for me to speculate about the legality of the scenario you describe as I may be called upon to opine on issues of this nature in future commissions. It is clear, however, that under the President's Military Order, dated November 13, 2001, each defendant is guaranteed a full and fair trial, and only evidence that has probative value may be admitted into a military commission. In addition, the presiding officer determines the weight to be given evidence and may consider all indicia of its trustworthiness and reliability. The presiding officer, in his capacity as a judicial officer, determines whether evidence may properly be characterized as obtained through coercion and when an accused's right to a full and fair trial requires exclusion of that evidence.

7. In response to a question from Chairman Specter, you said: "We are holding people who have been caught on the battlefield, given the broad definition of 'battlefield,' and we are holding them humanely." Please define what the Defense Department considers to be the "battlefield."

As the President stated on August 30, 2005 in a speech commemorating VJ day, "as we mark this anniversary, we are again a nation at war. Once again, war came to our shores with a surprise attack that killed thousands in cold blood. Once again, we face determined enemies who follow a ruthless ideology that despises everything America stands for. Once again, America and our allies are waging a global campaign with forces deployed on virtually every continent. And once again, we will not rest until victory is America's and our freedom is secure." As demonstrated by the recent attacks in London and Egypt, the enemy has a global reach and uses terror to achieve its objectives. Our reaction to this enemy must recognize these facts. This includes recognizing that the "battlefield" is not limited to Afghanistan or Iraq.

The U.S. Court of Appeals for the Fourth Circuit has recently recognized this fact in its decision in the *Padilla* case. There, the court reaffirmed the President's critical authority to detain enemy combatants who take up arms on behalf of al Qaeda and travel to the United States to kill innocent Americans. The court's holding reflects that the authority to detain enemy combatants like Jose Padilla plays an important role in the President's power to protect American citizens from the very kind of savage attack that took place on September 11, 2001.

8. In your answer to Senator Feinstein, you said that Mr. Hamdan "was removed from the general population, but I would not call what he was in solitary confinement...I would call it segregation." Please explain the difference between solitary confinement and segregation.

Solitary confinement is defined as, "in a stricter sense, the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction." *Black's Law Dictionary* 1393 (6th ed. 1990).

Segregation, as I used the term, denotes a physical separation from the rest of the detainee population at Guantanamo Bay, but under different conditions. Each detainee was housed in a hut at ground level. The cell occupied approximately half of the area of the entire hut and is roomier than a cell in the "discipline barracks," where members of the U.S. military are housed when subjected to solitary confinement. The living area in a hut is approximately 672 square feet. This includes the cell, the adjoining private shower, hallway, and the adjoining conference area. These facilities are air conditioned. Although there are walls on three sides of the cell, the fourth side is visually open to the rest of the hut. Usually bars or plexiglass separate the cell from the other half of the hut where the military guard sits. In addition, the detainee is visited regularly by a military police officer, medical personnel when necessary, and his attorney upon request. The detainee receives time for daily exercise and is given a Koran and special meals to accommodate his religious practices.

9. Senator DeWine asked why it took several years before the first detainees were charged. You said: "Until the intelligence effort has concluded on any particular detainee, the law enforcement effort really does not commence. Once we know that the intelligence people have finished in their analysis of the individual, we look at what they have collected and make a determination whether or not this individual is a candidate for trial by military commission."

In a January 8, 2005, *New York Times* article, a senior American official claimed "that the vast majority of the 550 prisoners now held at the American detention center at Guantanamo no longer had any intelligence value and were no longer being regularly interrogated." The article also quotes a veteran interrogator at Guantanamo who told the *New York Times* that it "became clear over time that most of the detainees had little useful to say and that they were just swept up during the Afghanistan war with little evidence they played any significant role."

Is it your position that Guantanamo detainees were still of intelligence value two or three years after their capture? How many of the current detainees are still of intelligence value?

Absolutely. A large number of the detainees are of high intelligence or law enforcement value.

10. Was Moazzam Begg of Great Britain one of the initial six persons identified for trial by military commissions? Did the Chief Prosecutor prepare charges against Moazzam Begg? If so, why did your office ultimately decide not to refer these charges? Did you receive any direction from the Department of Defense, Department of Justice, Department of State, or the White House, directing you not to refer charges against Mr. Begg?

Moazzam Begg was one of the initial six persons designated by the President as a person subject to his military order. The Chief Prosecutor drafted charges but did not forward these charges

through the Legal Advisor to the Appointing Authority for further action. As in any judicial proceeding, the Chief Prosecutor exercises prosecutorial discretion and makes the final decision on which cases to move forward. Mr. Begg was released from U.S. control on January 25, 2005. This office did not direct his release.

The Office of Military Commissions did not receive any direction from the Department of Defense, Department of Justice, Department of State, or the White House, directing the Appointing Authority not to refer charges against Mr. Begg.

11. Is the Appointing Authority's office required to obtain the approval of officials within the Department of Defense, Department of Justice, or the White House prior to approving charges?

No.

12. As detailed by the *Wall Street Journal* in April of this year, military commissions were used following World War II to try Japanese prison camp guards who interrogated Americans by, among other things, making them stand at attention or squat for periods of up to 30 minutes during interrogations; repeatedly interrogating American prisoners without providing for sufficient time for sleep; and refusing to stop the interrogations when American prisoners indicated that they did not wish to participate. Sixty years ago, American military commissions found that these interrogations were crimes against humanity and sentenced the Japanese soldiers to prison for terms of five to twenty years. Is it the Defense Department's position that interrogations of detainees in U.S. custody utilizing similar methods are lawful? Is it the Pentagon's position that statements made utilizing these methods may be used as evidence to convict detainees of war crimes?

All interrogation techniques currently approved for use by the Department of Defense at Guantanamo Bay, Cuba, are lawful. Whether a particular interrogation technique is lawful and whether particular statements made as a result of a particular technique may be introduced as evidence depends on the facts and circumstances. Without knowing the facts and circumstances, it would be inappropriate for me to speculate about the legality of the scenarios you describe. It is also worth noting that the Americans who were interrogated by the Japanese during World War II were entitled to special protections as Prisoners of War ("POWs"). Under the current Geneva Convention relative to the Treatment of Prisoners of War ("GPW"), no "form of coercion[] may be inflicted on prisoners of war to secure from them information of any kind whatever." Moreover, "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." POWs are also entitled to other special protections under the GPW. Although the President has directed that, as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva, it must be remembered that, as the President has concluded, al Qaeda and Taliban detainees at Guantanamo Bay are not legally entitled to the special protections afforded POWs.

13. The DOD website lists more than 50 pretrial motions to be decided by the military commission. These motions include questions of international law, constitutional law, military procedure, and undue command influence. Is it true that two of the three officers who will rule

on these questions have no formal legal training and the third is a retired Judge Advocate who has not practiced law for four years and is not currently an active member of a state bar? Do you believe that these are the best suited individuals to decide these questions? If so, why?

On August 31, 2005, Secretary Rumsfeld approved changes to Military Commission Order Number 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.* These changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004. Other factors included suggestions from outside organizations on possible improvements to the commission process. DoD will continue to evaluate how we conduct commissions and, where appropriate, make changes that improve the process.

The principal effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury. One of the changes is that the presiding officer will be responsible for deciding most questions of law, while the other panel members will have the authority to determine commission findings and decide any sentence.

Previously, the presiding officer and other panel members together determined findings and sentences as well as most legal questions. The new procedures remove the presiding officer from voting on findings and sentencing and give the other panel members sole responsibility for these determinations, while allocating responsibility for ruling on most questions of law to the presiding officer. A comparison of the previous version of MCO No. 1 and the recently released version can be found at http://www.defenselink.mil/news/Aug2005/d20050831fact.pdf.

We are confident in the qualifications and ability of the Presiding Officer, Colonel Peter Brownback, USA (Ret.). Colonel Brownback served in the Army for 30 years. He gained combat experience early in his career as an infantry officer in Vietnam. He spent 9 years as a military judge, culminating his career as the Chief Circuit Judge of the Army's 5th Judicial Circuit in Manheim, Germany. Very few judge advocates have this level of combined experience as both a line officer on the battlefield and a military judge.

COL Brownback is licensed to practice law in Virginia, where he is currently in an "inactive" status. This status prevents him from practicing law within the State of Virginia. However, the Judge Advocate General of the Army recognizes this status for determining if an attorney is duly licensed and authorized to practice law as a military judge advocate. In fact, several states, including Virginia, permit an individual to practice law as a judge advocate while in an inactive status.

14. As I understand the rules for the Commission, your office is responsible for deciding who is charged and what those charges are. Does your office also rule on any motion that would result in dismissal of these charges? Please explain how you can both prepare the charges and rule on their validity. Specifically, how can such a process be deemed an independent and impartial proceeding?

I am the Legal Advisor to the Appointing Authority. I do not prepare charges. I review the recommendations of the Chief Prosecutor concerning charging decisions. However, charging decisions are made solely by the Appointing Authority. Both the original and amended versions of DoD MCO No. 1, March 21, 2002, provide in paragraph 4(B)(2)(a) that prosecutors prepare charges for approval and referral by the Appointing Authority. Among the draft charges forwarded to the

Appointing Authority from the Chief Prosecutor, the Appointing Authority is responsible for deciding who is charged and what those charges will be.

The case of Mr. Mamdouh Habib demonstrates the independence of the Appointing Authority in making charging decisions. Although the President had determined that there was reason to believe that Mr. Habib committed crimes and although the Chief Prosecutor recommended charges, the Appointing Authority did not charge Mr. Habib, who has since been released.

It should be noted that the function of the Appointing Authority in reviewing and referring charges is distinct from and not in conflict with his role in deciding interlocutory issues. The former function encompasses a determination concerning sufficiency of evidence. The later function involves making determinations on legal challenges and questions of law.

Concerning interlocutory questions or motions, DoD MCO No. 1 provides in paragraph 4(A)(5)(e) that the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. If a motion would result in dismissal of charges, then the Presiding Officer would certify such a question to the Appointing Authority for decision. The decision on such a question relies upon the judicial intellect and integrity of the Appointing Authority.

The Review Panel reviews answers to prior interlocutory questions during the post-trial process. DoD MCO No. 1 provides in paragraph 6(H)(4) for a Review Panel process. Specifically, the Review Panel is empowered to return a case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred. Military Commission Instruction No. 9, December 26, 2003, paragraph (4)(C)(4)(a) states that the Review Panel shall review the entire record of trial, including decisions by the Appointing Authority. As such, the validity of any interlocutory decision by the Appointing Authority concerning a ruling by the Presiding Officer will be determined finally through the Review Panel process.

This commission process inclusive of an independent Appointing Authority and the Review Panel ensures independence and impartiality.

15. In your testimony, you said the reason it took more than three years to begin the military commissions was that it was necessary to build "a whole judicial system to try these cases." Why was the existing courts-martial system, using the UCMJ, inadequate for these cases? If we are able to qualify a detainee at Guantanamo as an "enemy combatant," is there any reason we cannot subject him to a criminal trial in a court-martial, with military judges and in a secure, military environment, for the crime of providing material support to terrorists?

The President found, in his Military Order of November 13, 2001, "consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." Chain-of-custody and other evidentiary challenges in battlefield conditions make the court-martial system and its Military Rules of Evidence impracticable.

The Uniform Code of Military Justice (UCMJ) provides for the use of Military Rules of Evidence in trials by courts-martial that were modeled after the Federal Rules of Evidence. These rules do not permit the admission of hearsay, unless an exception to the hearsay rule exists. Therefore, they do not address adequately the unique challenges presented by a battlefield environment that is fundamentally different from the traditional law enforcement rubric applicable during peacetime in the United States.

The rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant is also provided access to that classified evidence. Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions in courts-martial concerning classified information. However, the procedures used in courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. Armed Forces engaged in the Global War on Terrorism.

16. Two British citizens were initially named as eligible for trial before the military commissions created by the executive order of November 2001. The British government strenuously objected and stated that they would not allow their citizens to be tried by the military commissions unless the rules were altered o comport with international fair trial standards. Earlier this year, both men were returned to Britain and released without charge. Does their release constitute an admission on the part of the administration that the military commissions fall far short of the most basic fair trial standards?

No. The decision to transfer or release a detainee is based on many factors, including whether the detainee poses a continued threat to the United States or its allies and whether he is of further intelligence value. The process also includes assurance by the foreign government that any returned detainee will be treated in a humane manner and that the government accepts responsibility and accountability for the detainee.

During these discussions, the U.K. government requested their transfer and accepted responsibility for these detainees. The U.K. government assured the U.S. government that the detainees would not pose a continuing security threat to the United States or its allies.

17. The military commission rules permit the admission into the trial of evidence containing classified or other sensitive "protected information" from which the defendant and his civilian defense lawyer, if any, may be excluded. How can the military commissions ensure the reliability of convictions that may be obtained on the basis of evidence that the defendant is barred from testing?

Commission rules regarding the closure of proceedings were broadly delineated in the President's Military Order (PMO) of November 13, 2001. Section 4(c)(3) gave the Secretary of Defense the authority to issue orders and regulations to provide for trials "in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended,...protected by statute or rule from unauthorized disclosure, or otherwise protected by law."

Consistent with this order, Secretary Rumsfeld amended DoD Military Commission Order (MCO) No. 1 on August 31, 2005. Like the previous version of MCO No. 1, Section 6(B)(3) directs that proceedings will remain open except where authorized by the Appointing Authority or the Presiding Officer. Grounds for closure include not only protection of classified information, but also the safety of commission members and/or witnesses, the protection of law enforcement methods, sources or activities, and in furtherance of other national security interests. Section 6(D)(5)(b) of the amended MCONo. 1 empowers the Presiding Officer to exclude from evidence classified and other protected information if its admission would deprive an accused of a full and fair trial. In addition to this protection, detailed Defense Counsel are judge advocates of the U.S. Armed Forces, and as such hold a Secret or Top Secret security clearance. Although the accused may be excluded from portions of the proceeding if such exclusion would not prevent a full and fair trial, detailed Defense Counsel may not be excluded from any portion of a proceeding.

The Appointing Authority and the Presiding Officer, as lawyers, are well aware of the importance of the presence of an accused at all portions of a criminal proceeding. However, the need for presence of an accused must be balanced with the requirement to protect national security related information. Like any U.S. Government proceeding, individuals who do not hold the requisite security clearance are excluded from proceedings in which classified information is divulged.

A decision by the Presiding Officer to close proceedings to the accused is reviewable. Military Commission Instruction (MCI) No. 8 of August 8, 2004, Section 4A, deals with certification of interlocutory questions, and provides that the Presiding Officer may certify other (not mandatory) interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. Defense counsel has the opportunity to request that the proceedings remain open or that the Presiding Officer send the issue to the Appointing Authority as an interlocutory question.

MCI No. 9 of December 26, 2003 prescribes the procedures and establishes responsibility for the review of military commission proceedings. Pursuant to Section 6(H)(3) of MCO No. 1, the Appointing Authority performs an administrative review of the record of trial. The record is forwarded to the Review Panel. The Review Panel reviews the entire record to ensure that no material errors of law have occurred. A material error of law includes, but is not limited to, a deficiency or error of such gravity and materiality that it deprives the accused of a full and fair trial. A decision to close proceedings and exclude the accused will be considered carefully. If the panel were to decide that the closure was not justified and resulted in denial of a full and fair trial, the record of trial would be returned to the Appointing Authority for further proceedings in accordance with MCI No. 9, Section 4(C)(1)(a) .

18. Under the military commission rules, commission panels may comprise between 3 and 7 members; and convictions require a 2/3 vote (with a sentence of death requiring unanimity). The cases currently pending before the commissions originally had 5-member military commission panels (meaning it would take 3 members to convict). During the military commission *voir dire* in August 2004, defense lawyers for David Hicks and Salim Ahmed Hamdan challenged all 5 of the appointed panel members on the grounds of apparent prejudice, for such things as having been involved in interrogation or detainee transfer decisions. The Appointing Authority, Maj. Gen. John Altenburg, agreed that two of the challenged members should be excused, reducing the panel number from 5 to 3; Gen Altenburg declined to appoint replacements. Given the smaller panel, the prosecutor now only has to persuade 2 panel

members to convict. Mr. Hicks and Mr. Hamdan argue they were punished for having raised the valid complaint.

How would you respond to observers who see this as an example of arbitrariness and unfairness in the proceedings? Can you articulate any standards that might guide the Appointing Authority in deciding how many members should be on a panel?

The composition of the panel for Mr. Hicks and Mr. Hamdan is neither unfair nor the result of an arbitrary process. In terms of number of members and votes needed to convict, military commissions are very similar to courts-martial. Under the Manual for Courts-Martial, a vote of 2/3 of the members is required to sustain a conviction. That two members were removed from Mr. Hicks' and Mr. Hamdan's panel following *voir dire* and challenges demonstrates that the process is anything but arbitrary.

Counsel for Mr. Hicks and Mr. Hamdan raised their objections following *voir dire*. These challenges were considered at length by the Appointing Authority before he made the final decision to excuse two members. The Appointing Authority's opinion on this issue, *Appointing Authority Decision on Challenges for Cause*, Decision No. 2004-001 (October 19, 2004), available at http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf, established that the decision to relieve two members and retain the remaining members was well reasoned and based on a sound analysis of the facts. With recent changes to MCO No. 1, the remaining two members no longer establish a quorum. Accordingly, the Appointing Authority will appoint new members to these cases. When the trials resume, counsel will have the opportunity to conduct voir dire of the newly appointed members and raise any challenges they may have.

To answer the second part of the question, the Appointing Authority is guided by the existing military commission rules in determining the number of members to select for a panel. The Appointing Authority may select three or more members to sit on a panel under these rules. With the recent changes to MCO No. 1, the Presiding Officer no longer sits as a voting member on issues of guilt or innocence and instead serves much as a judge. As a practical matter, the Appointing Authority will avoid selecting the minimal number of members (3), as the possibility exists that one or more members may be successfully challenged during *voir dire*. In the cases cited, the Appointing Authority selected five members, a panel that maintained a quorum under the previous rules after challenges were considered and resolved.

SENATOR BIDEN TO ADMIRAL MCGARRAH AND GENERAL HEMINGWAY

1a. What are the criteria, established by the Secretary of Defense on January 9, 2003, for transferring a detainee from Bagram to Guantanamo? Please provide the complete set of criteria, both current and any versions previously in force.

The information you have requested is classified. The current policy in force is the "Global Screening Guidance Criteria for Detainees," dated August 22, 2004. The policy previously in force is the "Implementation Guidance on Detainee Screening and Processing for Transfers of Detainees in Afghanistan, to Guantanamo Bay Naval Station," dated January 7, 2002 and revised December 10, 2002.

1b. Under the Secretary of Defense's authorized criteria, are detainees eligible for transfer from Bagram to Guantanamo who are NOT suspected of committing acts of terrorism? If so, please provide a full list of actions APART FROM terrorism that could make a detainee eligible for transfer to Guantanamo.

The criteria for detainees to be eligible for transfer to GTMO are stated in the classified documents referenced in the response to Question 1a above.

1c. How many detainees held at Guantanamo (past and present) are not suspected of participating in ANY military OR terrorist operations, and are being held for possible intelligence value?

The DoD currently maintains custody at Guantanamo of over 500 enemy combatants in the Global War on Terrorism. Each of these detainees, as well as those who have since left Guantanamo, has undergone an extensive, multi-level screening process before they were transferred to Guantanamo and after they arrived. The detainees who are held at Guantanamo met the required criteria to be considered enemy combatants in the Global War on Terror.

The DoD has implemented the Administrative Review Board (ARB) process which will annually conduct necessary proceedings to make an assessment of whether there is continued reason to believe that the enemy combatant poses a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention, including the enemy combatant's intelligence value in the Global War on Terror. Based on this assessment, the ARB can recommend that individuals should be released, should be transferred with conditions or should continue to be detained. Accordingly, the threat level and the intelligence and law enforcement value are questions being examined by the Administrative Review Board.

Many of these enemy combatants are highly trained, dangerous members of al Qaeda, its related terrorist networks and the former Taliban regime. More than 4000 reports have captured information provided by these detainees, much of it corroborated by other intelligence reporting. Specific information on the detainee population and its intelligence value can be obtained through our public website at http://www.defenselink.mil/news/Mar2005/d20050304info.pdf and http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf

2. In his written testimony, Lieutenant Commander Charles Swift called the military commissions the Department of Defense has implemented "ad hoc," "on-the-fly," "an exercise in

futility," and "an experiment in justice conducted on a living human being." Lieutenant Commander Swift goes chapter-and-verse into all his perceptions of the commissions' shortcomings:

- **"A complete set of rules for the conduct of proceeding has never been promulgated."**
- **"The military commissions do not prohibit testimony obtained by torture."**
- **"Mr. Hamdan was removed from hearing portions of voir dire" and "the prosecution indicates that during trial, they intend to seek Mr. Hamdan's exclusion from one to two days of trial proceedings."**
- **Defense counsel was only requested initially "for the limited purpose of 'negotiating a guilty plea' to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea."**

Please provide detailed, specific reactions to each of the Lieutenant Commander's points. Are his points and perceptions accurate? If not, why not?

General Hemingway's response for each of Lieutenant Commander Swift's points follows:

- **"A complete set of rules for the conduct of proceeding has never been promulgated."**

Military Commission Instructions, Orders, and Regulations, as supplemented by the Presiding Office Memoranda (POM), establish the conduct of military commission proceedings. These documents are publicly accessible on the military commission website at http://www.defenselink.mil/news/commissions.html

The President has determined that the Federal Rules of Evidence are inapplicable to military commissions convened to try those suspected of war crimes during ongoing hostilities. Military Commission Orders, Instructions, and Regulations are unlike the highly technical rules of procedure and evidence adopted by U.S. Federal Courts or established by or pursuant to the Uniform Code of Military Justice, but are more closely aligned to the Statutes and Rules of Procedure and Evidence of the existing war crimes tribunals such as the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda.

- **"The military commissions do not prohibit testimony obtained by torture."**

The President has recently and repeatedly reaffirmed the longstanding policy that the United States will not commit or condone torture under any circumstances. In addition, the President's Military Order, dated November 13, 2001, requires that each individual tried by military commission be given a full and fair trial. Under the recent revision of Military Commission Order No. 1, effective August 31, 2005, the presiding officer is responsible for ensuring that the President's directive in this regard is implemented. He determines the weight to be given evidence and may consider all indicia of its trustworthiness and reliability. The presiding officer, in his capacity as a judicial officer, determines whether evidence may properly be characterized as obtained through torture and when an accused's right to a full and fair trial requires exclusion of that evidence.

- **"Mr. Hamdan was removed from hearing portions of voir dire" and "the prosecution indicates that during trial, they intend to seek Mr. Hamdan's exclusion from one to two days of trial proceedings."**

LCDR Swift is referring to the *voir dire* session held on August 24, 2004. A copy of the unclassified transcript is a public record. When asked by the Presiding Officer if he wanted to conduct a classified session of *voir dire*, LCDR Swift stated, "In reviewing my notes, I believe all of the members indicated at least one area that required classified information, sir." He went on to note that "two of the members had extensive contacts in Afghanistan and in intelligence gathering and detainee operations . . . ." After receiving from counsel an estimate of the time required to close the proceedings, the Presiding Officer heard argument from LCDR Swift on whether or not to exclude his client. LCDR Swift stated that "I understand the rest of the public will not (be present), but I would like to talk about my client being present for the next session." LCDR Swift then asked that summaries of the testimony be given to the original classifying agency to determine whether or not the information could be given to his client. The Presiding Officer denied his request and closed the proceedings.

Commission rules regarding the closure of proceedings were broadly delineated in the President's Military Order (PMO) of November 13, 2001. Section 4(c)(3) gave the Secretary of Defense the authority to issue orders and regulations to provide for trials "in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, . . . protected by statute or rule from unauthorized disclosure, or otherwise protected by law."

Military Commission Order (MCO) No. 1, Section 6(B)(3) directs the commission to hold open proceedings except where otherwise directed by the Appointing Authority or the Presiding Officer. Grounds for closure include not only protection of classified information, but also the safety of commission members and/or witnesses, the protection of law enforcement methods, sources or activities, and in furtherance of other national security interests.

The Chief Defense Counsel and Chief Prosecutor "shall ensure that all personnel assigned to the Office of the [Chief Defense Counsel/Chief Prosecutor] review, and attest that they understand and comply with . . . [the PMO, MCO No. 1], and subordinate instructions and regulations." Military Commission Instruction (MCI) No. 4, Sec. 3(B)(4) and MCI No. 3, Sec. 3(B)(5). If classified or protected information is to be introduced, prosecutors and defense counsel have an obligation under the regulations to request proceedings be closed.

The Appointing Authority and the Presiding Officer, as lawyers, are well aware of the importance of the presence of an accused at all portions of a criminal proceeding. However, the need for presence of an accused must be balanced with the requirement to protect national security related information. Like any U.S. government proceeding, individuals who do not hold the requisite security clearance are excluded from proceedings in which classified information is disclosed. Here, the Presiding Officer exercised his obligation and authority under the President's Military Order of Nov. 13, 2001, Sec 4(c)(4) and under MCO No. 1 to close the proceedings.

- **"Defense counsel was only requested initially 'for the limited purpose of negotiating a guilty plea' to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate a plea."**

Mr. Hamdan's right and access to counsel to conduct his defense at a full and fair trial are guaranteed by both the President's Military Order of November 13, 2001 and Military Commission Order No. 1, recently amended on August 31, 2005. On December 15, 2003, the Chief Prosecutor for

Military Commissions informed the Chief Defense Counsel, via a target letter, that the Office of the Prosecution was considering whether to prepare charges against Mr. Hamdan. Three days later the Chief Defense Counsel detailed Lieutenant Commander Swift to represent Mr. Hamdan for all matters relating to military commission proceedings "until such time any findings and sentence become final," unless he is excused by Mr. Hamdan or by the Chief Defense Counsel.

LCDR Swift stated that, upon reading the target letter sent to the Chief Defense Counsel, he was worried that Mr. Hamdan's access to an attorney was conditioned on Mr. Hamdan agreeing to plead guilty. However, this statement is misleading. The Detailing Letter from COL Gunn to LCDR Swift makes clear that LCDR Swift's duties as a detailed defense counsel were to be far more extensive than he led the Committee to believe. That letter further directs him to "inform Mr. Hamdan of his rights before a Military Commission."

Though Mr. Hamdan had not yet been charged, the Chief Prosecutor opined in the target letter sent to the Chief Defense Counsel that Mr. Hamdan was authorized to be represented by an attorney for any pretrial discussions and that he would arrange with the commander of the detention facility for detailed defense counsel to have access to Mr. Hamdan during the pretrial negotiation process. Under Military Commission rules, procedures accorded the accused include access to an attorney "sufficiently in advance of trial to prepare a defense." When to charge a detainee subject to the President's order, like any charging decision, is a matter of prosecutorial discretion and must be initiated by the Chief Prosecutor.

As an accused being tried by Military Commission, there are numerous procedural safeguards accorded the accused. Among these is access to counsel to help him prepare for trial. Representation by counsel begins in advance of the trial and continues until after the end of the trial. Representation by counsel necessarily includes the ability of counsel to meet with Mr. Hamdan, which LCDR Swift has done on numerous occasions. The Chief Defense Counsel detailed LCDR Swift to be defense counsel for Mr. Hamdan and further ordered him to inform Mr. Hamdan of his rights before a Military Commission. The Chief Prosecutor, in his target letter, could not deprive Mr. Hamdan of procedural safeguards accorded by the commission rules. Similar target letters are used routinely in criminal prosecutions to initiate pretrial negotiations, and no attorney could reasonably argue that such a letter implied his client would be denied permanent access to counsel unless he pled guilty.

"LCDR Swift also reported that "not a single person has been prosecuted in the Military Commission" – not a single one. In fact, it has been widely reported that only four have been charged. Another of the witnesses, Professor Schulhofer, notes that after more than 3+1/2 years, "99 percent of Guantanamo detainees have not been charged with any misconduct, and they continue to be held even though many of them claim to be ordinary citizens."

On November 13, 2001, the President ordered the establishment of military commissions to try a subset of the detainees for violations of the law of war and other applicable laws.

In order to proceed to trial, the Office of the Chief Prosecutor examines the intelligence gathered by the DoD, the FBI, and the CIA to make recommendations to the President that a detainee is subject to trial by military commission. The President must approve these recommendations in writing, a process called a Reason To Believe (RTB) determination. Subsequently, charges may be approved and referred to the commission by the Appointing Authority. Prosecutors continue to gather evidence and make RTB recommendations on that subset of individuals who have allegedly committed a violation of the law of war and may be tried by military commission.

Since the establishment of commissions, the Secretary of Defense, the General Counsel for the Department of Defense, and the Appointing Authority for Military Commissions have published Orders, Instructions, and Appointing Authority Directives that govern the conduct of these trials. This rule-making process is not unlike that used by recently established international courts. The International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) was established on May 25, 1993 by the United Nations Security Council. Witnesses were heard in the first case against Dragan Nikolic on October 9, 1995, and his trial began on May 7, 1996, nearly three years after the UN Security Council's establishment of the *ad hoc* tribunal. Similarly, hearings began in the U.S. military commission cases of four charged individuals during the week of August 24, 2004, less than three years after the President's Military Order. Pretrial motions were filed between August and November 2004, and on November 1, 2004, pretrial motions hearings began in the case of David Hicks.

The Supreme Court's decision in *Rasul* on June 28, 2004, established that United States courts had jurisdiction to consider challenges to the legality of the detention and hearings at Guantanamo Bay under 28 U.S.C. § 2241, the habeas statute. Detainees began to file habeas proceedings heard by numerous judges in the D.C. District Court. Proceedings in Mr. Hamdan's military commission were halted on November 8, 2004, by Judge Robertson of that same court. He rejected the President's authority to establish military tribunals and held that even if a competent tribunal (an Article 5) determined Mr. Hamdan's status, he could be tried by military commission only if commission rules were changed to parallel the UCMJ. In particular, Judge Robertson objected to the exclusion of the defendant during closed proceedings.

Judge Robertson's decision was appealed and oral argument heard on April 7, 2005 in the U.S. Court of Appeals for the D.C. Circuit. A three judge panel decision was released on July 15, 2005. With regard to commissions, the court held that Congress, through a joint resolution, entitled "Authorization for Use of Military Force," Pub. L. No. 107-40, 115 Stat. 224, 224 (2001), and through 10 U.S.C. §§ 821 and 836, authorized the military commission that will try Mr. Hamdan. The court stated that the district court erred in its interpretation of 10 U.S.C. § 836, which provides that military commissions and other tribunals "may not be contrary to or inconsistent with this chapter," and that a sensible reading of this language is that it provides that the President may not adopt procedures that are "contrary to or inconsistent with" the UCMJ's provisions regarding military commissions, not courts-martial.

The lower court's stay in the *Hamdan* case remains in place until the court of appeals issues its mandate.

Not all of the detainees held at Guantanamo will face trial by military commission. The determination of enemy combatant status is initially a battlefield decision made by the military commander who is authorized to engage the enemy with deadly force. Ultimately, the President as the Commander in Chief identifies which persons to engage and whom to detain in an armed conflict. Persons currently held at Guantanamo are those individuals who are providing actionable intelligence through interrogations, are still considered a threat to US forces on the battlefield, or are awaiting release after CSRT or ARB decisions. Some of them have not committed law of war violations or other crimes. These individuals will be held until the end of the conflict or until they are determined no longer to be a threat to United States forces by the Administrative Review Board.

Presidents have detained enemy combatants in every major conflict in the Nation's history, including the Gulf War, Vietnam Conflict, and the Korean War. During WWII hundreds of thousands of individuals captured on the battlefield were subsequently held in the US without trial or counsel. These detentions have always served the same purpose – intelligence gathering, and to prevent individuals from returning to the battlefield and killing American forces.

3. Were any proceedings brought against detainees prior to the Supreme Court rulings on these issues in June 2004? If the answer is no, why not? In other words, why the delay in holding these prisoners accountable for their actions? What does the Defense Department consider a reasonable time period for bringing proceedings against a detainee?

Lieutenant Commander Swift also asked why we turned to this "ad hoc" system instead of relying on the well established courts martial proceedings established in the Uniform Code of Military Justice.

Proceedings herein refer to the commencement of military commissions at Guantanamo Bay in court. All four of the active commission cases began the week of August 24, 2004.

The Office of the Chief Prosecutor examines the intelligence gathered by the DoD, the FBI, and the CIA to make recommendations to the President that a detainee be subject to trial by military commission. The RTB determination made by the President sets into motion a series of events that must all occur in sequence prior to commencement of trial proceedings.

For instance, the President signed an RTB determination for Mr. al Bahlul on July 3, 2003. Defense counsel and prosecutors were appointed, Presiding Officer and commission members were appointed, charges were approved and referred by the Appointing Authority, and preparation for trial began.

Since the establishment of commissions, the Secretary of Defense, the Department of Defense General Counsel, and the Appointing Authority for Military Commissions have published Orders, Instructions, and Appointing Authority Regulations that govern the conduct of these trials. This rule-making process is not unlike that used by recently established international courts. The International Criminal Tribunal for the Former Republic of Yugoslavia was established on May 25, 1993 by the United Nations Security Council. Witnesses were heard in the first case against Dragan Nikolic on October 9, 1995, and his trial began on May 7, 1996, nearly three years after the UN Security Council's establishment of the *ad hoc* tribunal. Similarly, hearings began in the U.S. military commission cases of four charged individuals during the week of August 24, 2004, less than three years after the President's Military Order. Pretrial motions were filed between August and November, 2004, and on November 1, 2004, pretrial motions hearings began in the case of David Hicks.

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were changed to parallel the UCMJ. In particular, Judge Robertson objected to the exclusion of the defendant during closed proceedings.

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The lower court's stay in the *Hamdan* case remains in place until the court of appeals issues its mandate.

Military commissions are not some newly concocted "ad hoc" creation. To the contrary, these types of commissions predate our independence. The British used a military commission to prosecute Nathan Hale. Under George Washington's direction, we prosecuted Major John Andre (Benedict Arnold's co-conspirator) as a spy for the British. Military commissions were used in the Revolutionary War, the Mexican-American War, the Civil War, and World War II.

Moreover, the procedures relating to military commissions are well established. There are specific orders, directives, instructions and other materials clearly delineating its structure and operations. These documents cover a wide range of topics including, but not limited to, the crimes and elements for trial by military commission, the responsibilities of prosecutors and defense counsel, the qualifications of defense counsel, the reporting relationships for military commission personnel, sentencing, and administrative review.

4. "What specifically in the Uniform Code of Military Justice would be inappropriate or unacceptable in the present context?"

There are many provisions of the UCMJ that would be inappropriate or unacceptable to apply in military commission trials of detainees at Guantanamo Bay, Cuba, including, but not limited to, the criminal rights warning requirements (Article 31(b)), the cumbersome and time-consuming pretrial investigation hearing process (Article 32), equal opportunity to obtain witnesses and evidence regardless of any pertinent security classifications (Article 46), and complex and cumbersome post-trial review and appeal procedures (Articles 59-76).

Finally, the UCMJ (Article 36) provides for the use of rules of evidence in courts-martial that, so far as the President determines practicable, apply the principles of law and rules of evidence generally used in criminal trials in United States district courts. Courts-martial use Military Rules of Evidence that are modeled after the Federal Rules of Evidence. Both of these sets of evidentiary rules would have to be modified significantly for use in military commissions. For example, these rules do not permit the admission of hearsay, unless an exception to the hearsay rule exists. Therefore, they do not address adequately the unique challenges presented by a battlefield environment that is

fundamentally different from the traditional law enforcement rubric applicable during peacetime in the United States.

Throughout American military history, hearsay evidence has been admissible in military commissions. In the Seminole War, hearsay evidence was admitted in military commissions to try British subjects for inciting and aiding the Creek Indians in warring against the United States. *See* Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons*, 8-11 (2004).

During the Civil War, a military commission admitted hearsay evidence in the trial of Captain Henry Wirz for the atrocities committed against Union prisoners of war at the Andersonville prison. Lewis Laska & James Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77, 118 & n.128 (1975) (e.g., a witness who did not observe an alleged murder was permitted to testify that he heard another individual identify Captain Wirz as the gunman).

During World War II, hearsay evidence was admitted in the military commission that tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. *See In re Yamashita*, 327 U.S. 1, 18-19 (1946). Similarly, the military commission that tried Japanese General Homma for war crimes related to the infamous Bataan Death March considered hearsay evidence. Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 75 (1973); *In re Homma*, 327 U.S. 759, 760-61 & n.1 (1946).

Internationally, it is well settled in the International Criminal Tribunals of the Former Yugoslavia and Rwanda (ICTY/ICTR) that hearsay is admissible. Rules 89(c) and 89(d) of the ICTY Rules of Procedure and Evidence (RPE), read in conjunction, provide guidelines for admissibility of evidence based on relevance and probativeness, subject to exclusion to ensure a fair trial. The ICTR has adopted similar provisions. *See* ICTR RPE 89 and 92. Hearsay evidence is also admissible before the International Criminal Court. *See* Rules of Procedure and Evidence, International Criminal Court, Rule 63.

The rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant is also provided access to that classified evidence. Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions in courts-martial concerning classified information. However, the procedures used in courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. armed forces engaged in the Global War on Terrorism.

Moreover, trial before conclusion of hostilities creates security concerns not present in prosecutions after the end of a conflict.

SENATOR BIDEN TO ALL WITNESSES:

6. When deciding to not use the Uniform Code of Military Justice and instead coming up with "military commissions" or in formulating the procedures and rules governing Combatant Status

Review Tribunals, was there any thought that went into how these decisions would be perceived world-wide, and in particular in Muslim countries?

Response from RADM McGarrah:

It would be inappropriate to apply the Uniform Code of Military Justice to a CSRT, which is an administrative screening procedure to validate enemy combatant status designation. Even Article 5 tribunals, which were cited by the Supreme Court as a model, do not rely on the UCMJ.

Yes, with respect to formulating the procedures and rules governing CSRTs, thought went into how these decisions would be perceived world-wide, and in particular in Muslim countries. DoD coordinated its decisions with the State Department.

Response from BG Hemingway:

Yes, in deciding not to use the UCMJ, thought went into how these decisions would be perceived world-wide, and in particular in Muslim countries. DoD coordinated its decisions with the State Department.

7. Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and Congress?

Joint Response for RADM McGarrah/BG Hemingway:

An independent panel, which was chaired by former Secretary of Defense James R. Schlesinger, has already investigated detention operations. In addition to the independent panel, there have been ten other comprehensive investigations on interrogation and detention operations. These investigations are based on more than 1,700 interviews and more than 16,000 pages of documents. They have yielded 442 recommendations, over 300 of which have been addressed. In addition, 136 recommendations are currently in the process of being addressed.

These eleven investigations span almost two years, from August 2003 to July 2005. They cover detention operations in the Global War on Terrorism, detention and corrections operations in Iraq, intelligence and detention operations in Guantanamo Bay, Cuba, and Charleston, South Carolina, military intelligence and contractor interrogation procedures at Abu Ghraib, training in detention operations, detainee operations and facilities in Afghanistan, FBI allegations of abuse at Guantanamo Bay, and a comprehensive review of DoD interrogation operations to ensure that all appropriate guidance relating to authorized interrogation practices is being followed. Some investigations were limited to specific units, while others addressed DoD policy generally. They include investigations by the Army Inspector General, the Navy Inspector General and the Army Provost Marshal, who is the single source for the Army staff on all key law enforcement elements and security issues.

Given the wide breadth of these investigations, we believe that the President, Congress and the Department of Defense have received considerable guidance on how to improve interrogation and detention operations, and the Department of Defense is actively implementing the recommendations. In light of these developments, an additional investigation by yet another independent commission does not appear necessary at this time.

SENATOR FEINGOLD TO RADM McGARRAH:

1. The Administration's position is that the detainees at Guantanamo are "enemy combatants" who were picked up on the "battlefield" in as many as 40 different nations.

a. How did the U.S. officials who initially detained each of the individuals now at Guantanamo Bay determine, prior to or at the time of detention, whether the individual was an "enemy combatant"? Please submit documentation of the procedure used to make this determination.

Since September 11, 2001, the United States and its coalition partners have been engaged in a war against al Qaeda, the Taliban, and their affiliates and supporters. There is no question that under the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Responsibilities of the Department of Defense with respect to the Taliban and al Qaeda were set forth in the President's Memorandum Re: Humane Treatment of al Qaeda and Taliban Detainees, dated February 7, 2002. The guidelines for these procedures are classified.

b. Were any of these individuals given an opportunity, prior to detention, to contest their status as enemy combatants?

Not to my knowledge.

c. How many detainees have been released from Guantanamo Bay? Please identify each such detainee and indicate on what basis the detainee was released.

Approximately 246 detainees have been released or transferred from Guantanamo Bay by the Department of Defense. The decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether the detainee is believed to pose a continuing threat to the United States if released. There are ongoing processes to review the detention status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time.

To maintain the safety and privacy of those who have been detained and due to operational security considerations, we do not provide specific information on any individual detainee or the circumstances of his release or transfer from Guantanamo.

2. Professor Schulhofer testified that some individuals who were eventually sent to Guantanamo Bay "were seized by warlords in Afghanistan and literally sold to us under the claim that they had been fighting." Is that accurate? Please provide whatever evidence you can to refute that statement.

All individuals ultimately detained by the DoD were screened through an extensive multi-step process which determined who was an enemy combatant and which enemy combatants should be transferred to Guantanamo. Information on this process is available through the DoD website at http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf. It includes information on the assessments done of detainees in the field, the centralized assessments completed in the area of operations, general officer review of those assessments and DoD review of individuals prior to their transfer to Guantanamo. As noted on the website, the DoD also has a detailed process in place for

Guantanamo detainees. The DoD assesses the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released or transferred from Guantanamo, consistent with our national security concerns.

Since the war began in Afghanistan, the United States has captured, screened and released approximately 10,000 individuals. It transferred to Guantanamo fewer than ten percent of those screened. The Department of Defense is committed to help ensure that no one is detained any longer than is warranted, and that no one is released who remains a threat to our nation's security. Of the detainees we have released, we have later recaptured or killed about 5% of them while they were engaged in hostile action against U.S. forces.

3. You argue that the Combatant Status Review Tribunals provide all the necessary process required under Article 5 of the Third Geneva Convention. Please provide transcripts of three CSRT hearings, including one in which the detainee was found not to be an enemy combatant.

To clarify, we have not argued that Article 5 of the Third Geneva Convention requires that any level of process be given to Taliban or al Qaeda detainees. Rather what we have argued is that the procedural protections included in the CSRTs closely resemble those that would be available in any tribunals conducted under Army Regulation 190-8. Copies of the transcripts are being sent to you under separate cover.

4. Concerns have been raised, by former Secretary of State Colin Powell and others, that the failure of the United States government to acknowledge the applicability of the Geneva Conventions with respect to detainees captured in Afghanistan and elsewhere puts our own troops in jeopardy when they are captured abroad. Although al Qaeda may not abide by the Geneva Conventions, over many decades the Geneva Conventions have gained strength and legitimacy such that few regimes wish to be identified as violators of these important international norms. Do you share Secretary Powell's concern about the impact that the U.S. decision to disregard Geneva norms in the fight against terrorism may have on the safety of our own troops?

The guidance contained in the President's memorandum (February 7, 2002) is legally correct in its determination that the Geneva Convention does not apply to al Qaeda and that al Qaeda and Taliban detainees are not entitled to prisoner of war status. Under the Geneva Conventions, al Qaeda and Taliban members are not entitled to prisoner-of-war status because they do not meet the requisite criteria. The safety of American soldiers would be jeopardized if we were to accord prisoner-of-war status to enemy combatants who are members of non-signatory organizations and flagrantly violate the laws of war by beheading civilians and committing mass murders. If everyone is entitled to POW status, other signatory countries would have no incentive to comply with the Geneva Conventions as they will get the message that their forces will be given preferential POW treatment even if they do not provide reciprocal privileges to our servicemembers.

The Department of Defense is committed to the rule of law and the humane treatment of all detainees. In his February 7, 2002 memorandum, the President stated that "[O]ur values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces

shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." The DoD follows this directive.

5. In your view, would applying the Geneva Conventions to the detainees at Guantanamo Bay mean that all detainees would automatically be treated as prisoners of war?

No. Prisoner-of-war status is only given to those who meet the requisite criteria under the Third Geneva Convention.

Redacted copies of transcripts for three CSRT hearings, including one in which the detainee was found to be No Longer an Enemy Combatant (NLEC)

for

Senator Feingold

Re: Q#3.
You argue that the Combatant Status Review Tribunals provide all the necessary process required under Article V of the Third Geneva Convention. Please provide *transcripts* of three CSRT hearings, including one in which the detainee was found not to be an enemy combatant."

Note: Only the unclassified portion of the CSRT was transcribed, and only when the detainee participated in that unclassified portion was there anything of substance to transcribe.

Summarized Sworn Detainee Statement

When asked by the Tribunal President if the detainee understood the CSRT process, the Detainee answered:

Detainee: I don't understand all of it.

Tribunal President: Do you understand you do not have to say anything to us?

Detainee: Yes.

Tribunal President: If you want to give us any information you will be allowed to do so.

Detainee: I don't have any information.

Tribunal President: Do you understand that you have a military officer here to help you today?

Detainee: What are you doing, I don't know the process.

Tribunal President: That's what I am explaining, what we are going to do.

Detainee: That's good.

Tribunal President: Your Personal Representative will help you as we go through this hearing. At any time you have a question about what we are doing or why, he may ask me.

Detainee: I have a question. Give me this information. Why am I a detainee here?

Tribunal President: We will be receiving that information shortly.

Detainee: Yes, you tell me and then I will know if it is correct or not.

Tribunal President: The three of us have never seen any of your files. This is the first time we will be hearing why the government thinks you are an enemy combatant. The promise that we gave earlier was that we would look at that information and other information and decide if is you are properly detained here. The promise that we made was that we would look at everything given to us and decide whether you have been properly classified as a detainee. This is your chance, your place to tell us what you like. You will have a chance in a little while. Do you understand why we are here and what we are about to do now?

Detainee: I don't know why I came into this place but it is okay.

[As the Recorder was reading the unclassified summary the Translator stated the accusations were not the same as the ones he had translated. The Tribunal recessed for a few minutes to correct this.]

[After the Recorder read the unclassified summary the detainee interrupted.]

Detainee: Can I talk about this please?

Tribunal President: In just a moment.

Tribunal President: Do you wish to make a statement to this Tribunal?

Detainee: The accusation against me that I asked the Afghani soldiers for a weapon to use on Americans.

Tribunal President: Would you like to make your statement under oath? An oath is a promise to tell the truth.

Detainee: The first time I came in here I took an oath but it didn't help me.

Tribunal President: The first time you came in this room or here at Guantanamo?

Detainee: At the time I was interrogated, they gave me an oath.

Tribunal President: You may provide your statement today under oath if you wish.

Detainee: What kind of oath?

Tribunal President: We have a Muslim oath you may take if you wish to use it.

Detainee: I will take the oath for you on the accusation, where I asked the soldiers for a weapon to use on Americans.

[The detainee was sworn using the Muslim oath.]

Tribunal President: You may proceed.

Detainee: I have forgotten the accusations. If you read them again I will speak to them.

Tribunal President: Personal Representative please assist the detainee.

Personal Representative: 3. (The detainee attempted to engage in hostilities against the United States.)

Detainee: I don't understand the meaning of the word.

Tribunal President: Which word?

Detainee: Hostilities.

Tribunal President: Hostilities is a fight or an attack, that's what it means that you wanted to fight or attack or to kill or to damage the United States. Hostilities against the United States.

Personal Representative: 3.1. (The detainee asked Afghan soldiers for weapons to fight Americans.)

Detainee: This is a lie about me. I took the oath what should I do about it?

Tribunal Member: Tell us if it is true or not.

Detainee: This is a lie. How could it be true? It is not possible.

Personal Representative: 3.2. (The detainee is associated with individuals willing to participate in attacks against Americans.)

Detainee: Who are these people that I was associated with? Why don't you tell me their names? I don't know those people.

Tribunal President: We don't have that information either. This is all we know. We do not know the names.

Detainee: You should have gotten complete information before you brought everybody here as detainees. This is not correct. Somebody must have some kind of animosity against me.

Personal Representative: Let me read the last allegation then you can tell the Tribunal what you told me.

Detainee: I didn't understand the accusation.

Tribunal President: The Personal Representative will read the last part of the accusation for you.

Personal Representative: 3.b. (The detainee was captured in January 2003, by Afghan military forces in Gereshk, Afghanistan after attempting to obtain weapons to kill Americans.)

Detainee: Do you have the weapon that you accuse me of having? Can you show it to me? Can you show me what weapon I had in my hand?

Tribunal President: This statement does not say you had a weapon. You tried to buy one or tried to get one.

Detainee: This is animosity. You don't know it but someone with animosity would say that. This is very clear you should know that. If I don't know how to get a weapon how could this be possible?

Personal Representative: Are these allegations against you true or not true?

Detainee: None of these are true. None of them are based on truth.

Personal Representative: You have told your story before to others and to me but these men have never heard your story and they have never read anything about you. Would you like to tell them the same story that you told me when I met with you a few days ago?

Detainee: What story?

Personal Representative: You told me that you lived with your uncle and that you were traveling to visit another one.

Detainee: Now I know what you are talking about. I was living at my uncle's house because I don't have a mom and dad. I decided to go and visit my uncle from my mother's side. I was walking and then got into a car. After awhile it got dark and I saw a tent and went to the tent for the night. The tent belonged to soldiers and I stayed and ate with them. They asked me to stay the night with them. In the morning when I woke up I told them I was going to leave and go to my uncle's home. They told me I couldn't leave. They put me in a car and transported me somewhere else. One guy told me that he would give me a weapon and told me I had to fight against Americans. I told them no and told them I was going to my uncle's home. They told me again I would have to fight against Americans. I told them no and they took me somewhere and wrote a paper. They then took me to a jail and I was detained.

Personal Representative: Why did you stop at the tent when you were traveling?

Detainee: I didn't have any money.

Personal Representative: You said when you went to the tent that there were soldiers there. How did you recognize them as soldiers.

Detainee: I saw the weapons with them.

Personal Representative: Did they have uniforms on?

Detainee: They had on national clothes not military suits.

Personal Representative: Was there anybody else there besides the soldiers and you? Did anybody else spend the night in the tent?

Detainee: All of them were soldiers.

Personal Representative: So when you were taken by the soldiers to another place were you the only one that they gave up or was there some one else with you?

Detainee: One other guy also.

Personal Representative: Where did you meet that other guy for the first time?

Detainee: In the car.

Personal Representative: Do you know his name?

Detainee: Yes.

Personal Representative: What was his name?

Detainee: [redacted]. I don't know more than that. I asked him one time and he told me his name was [redacted]

Personal Representative: What happened to that other person when you were taken to the jail?

Detainee: He was opposite of my room, he was also detained.

Personal Representative: In what city were you handed over to the Americans?

Detainee: Gereshk.

Personal Representative: I have nothing else sir.

Detainee: It seems like you are keeping and detaining innocent people.

Tribunal President: Does this conclude your statement?

Detainee: Of course I have something else to say. Why have I been accused and why am I detained here?

Tribunal President: We are trying to find out and cannot answer that at this time.

Detainee: That's right I want an answer.

Tribunal President: You will receive an answer when we have completed all the proceedings.

Tribunal President: Personal Representative do you have any questions for the detainee?

Personal Representative: Just one. Do you know or ever heard of the name [redacted]?

Detainee: No.

Tribunal President: Recorder do you have any questions for the detainee?

Recorder: No sir.

Tribunal President: Does the board members have any questions for the detainee?

Tribunal Members: No sir.

Tribunal President: Do you have any other evidence to present to this Tribunal?

Detainee: No.

Tribunal President: Personal Representative do you have any other evidence to present to this Tribunal?

Personal Representative: No sir.

AUTHENTICATION

I certify the material contained in this transcript is a true and accurate summary of the testimony given during the proceedings.

[redacted], Col, USAF
Tribunal President

Summarized Unsworn Detainee Statement

I do not accept the accusations.

When the Detainee made no further comments, the Personal Representative read each bullet of the Unclassified Summary and the Detainee had the following responses.

- **3(a)(1) The Detainee traveled to Kabul, Afghanistan from [redacted] in September, 2000.**

  I forgot. It's been 2 ½ years. I don't remember which month.

- **3(a)(2) Detainee's travel route took him through Karachi, Islamabad and Peshawar, Pakistan and through Kandahar, Afghanistan.**

  That's right.

- **3(a)(3) The Detainee has family ties to known terrorists in Pakistan.**

  What kind of ties?

The Personal Representative rephrased the question. Is anyone related to you a terrorist in Pakistan?

  I have no relatives in Pakistan. How can…?

- **3(a)(4) One of Detainee's "family ties" is a member of a terrorist group responsible for attacks in Uzbekistan.**

  None of my family members have ties with the terrorist group in Uzbekistan.

- **3(a)(5) The Detainee resided in Taliban provided housing and worked as a cook in a Taliban camp.**

  I told you last time. I wasn't a cook, I just grew the vegetables. I don't even know how to cook. My mother was cooking for me all of the time.

- **3(a)(6) The Detainee was captured in December 2001 at his house in [redacted]**

  Yes, that's right it was 2001, but I don't remember the month. It was the middle of Ramadan in 2001.

Questions by the Personal Representative

Q: Can you tell us who you traveled to Afghanistan with?

A: There were 10 people, my grandmother, sisters and brothers.

Questions by the Tribunal Members

Q: Good morning.

A: Thank God.

Q: We don't know much information about you. The only information we have about you is from the Unclassified Summary and what you have told us today. We have a few questions so we can figure out your story. Are you a citizen of [redacted]

A: Yes.

Q: Can you tell us why you went from [redacted] to Afghanistan with your family?

A: In [redacted] there are no jobs. It's hard to make money.

Q: You and your entire family went to Afghanistan to look for work?

A: We heard that any immigrants to Afghanistan from other countries are provided with food.

Q: Was that true? When you went to Afghanistan, did they provide you with food and a place to live?

A: Yes, they provided.

Q: How did you know how to get from [redacted] all the way to Afghanistan?

A: ***The Detainee did not respond to the question.***

Q: It was a very long journey. How did you know how to do it?

A: There was no money. A guy named [redacted] who knows the route. I went with [redacted]

Q: Do you remember how long it took you to get from [redacted] to Kabul?

A: Approximately 2-3 days.

Q: How did you get there [Kabul]. By plane, car?

A: We went by plane from [redacted] to Karachi, Pakistan and then by bus from Karachi to Kabul.

Q: So, you were in a house in Kabul and the only thing you did was grow vegetables. Did you do anything else?

A: I looked on the house. Nothing else.

Q: All of your family members lived in the same house?

A: The rest of them were in the house. [redacted] was working in the kitchen as a cook. The rest just stayed in the house.

Q: You and your family didn't have to pay for any food or housing costs?

A: We don't pay anything. All of the food and stuff is free. [redacted] gets paid money from them [Afghanistan government].

Q: Did they [Afghanistan government] ask anything from you in return?

A: No.

Q: The government in Afghanistan didn't require any service from you?

A: No.

Q: You lived in Kabul for a year or so? Maybe a little longer?

A: Approximately a year.

Q: You found the situation in Afghanistan better than your home country of [redacted]

A: It was not a hard life. They bring everything, like food, to us. I helped with the back yard.

Q: When did you first realize that Afghanistan was in the middle of a civil war?

A: Please repeat the question.

Q: At some point did you realize that the country was at civil war?

A: When you traveled on the road, you can see the broken houses and tanks and realize there is a war going on.

Q: Was the place where you and your family lived ever in any danger of the civil war?

A: No. The houses are safe.

Q: Did anybody from the Taliban ever approach you and ask you to assist them?

A: No.

Q: Did they approach any members of your family?

A: No. Most of my family is just kids and a woman.

Q: It seems most unusual that the government would be so generous to you and your family, but not ask anything of you in return. Can you explain this for us?

A: ***The Detainee did not respond to the question.***

Q: What can you tell us about the other accusations you said were false? When it says you have "family ties" to known terrorists in Pakistan and Uzbekistan, what is the government talking about when it says these things?

A: You mean how the Taliban government...how they feel about the terrorist groups in Pakistan and Uzbekistan, right?

Q: No. What does the United States government mean when it says you have "family ties" to terrorists?

A: They are just blaming me. It's false.

Q: Do you think this is about someone else in your family?

A: We came to Afghanistan because we are all Muslim. They provide all the food and housing because of the Muslim religion.

Q: We're trying to figure out why you're here. The United States wouldn't detain someone for more than 2 years for simply growing vegetables. Can you help us understand?

A: ***The Detainee did not respond to the question.***

Q: Do you want to tell us why you think you're here?

A: I'm here because I went to Afghanistan with my family for a better life. They captured me at that house. That's the reason I'm here.

Q: Who captured you in Kabul?

A: ***The Detainee did not respond to the question.***

Q: Was it Americans?

A: The Afghan people captured me. When I was in prison, I heard Massoud's people captured me.

Q: When you were captured, were members of your family in the house also?

A: There were 3 people in the house. [redacted] was in that house too?

Q: [redacted] too?

A: Yes.

Q: Was there any resistance to the arrest?

A: I don't know; they just captured me at my house.

Q: You had nothing to defend yourself with?

A: There is nothing.

Q: Do you have any idea where the rest of your family is?

A: God knows.

Q: Did you ever have the opportunity to have any type of training while in Afghanistan?

A: For what reason?

Q: To do something other than growing vegetables, maybe help the government.

A: I can't do anything except grow vegetables.

Q: Did anyone ask you if you wanted to do something else?

A: No.

Q: What kind of vegetables did you grow?

A: Green peppers, tomatoes, green beans and some potatoes.

Questions by the Tribunal President

Q: Was your garden large or confined to a small yard?

A: It was only for my family.

Q: The house you stayed in, did it house just your immediate family members or were other people living in this house?

A: No, just my family members.

Q: Yet, when you were captured, other people were with you, other than your family. Right?

A: ***The Detainee did not respond to the question.***

Q: You said earlier other people were arrested with you at your house.

A: I told you there were 3 people arrested in the house.

Q: You were with 3 people when you were arrested?

A: Yes.

Q: What work did these people do to earn a living?

A: They just ate whatever God provided.

Q: They too were living off the good graces of the Taliban government in Afghanistan?

A: ***The Detainee did not respond to the question.***

Q: Do you know if the others received military training while in Afghanistan?

A: [redacted] was a cook for the back-up forces. [redacted] came from Pakistan, studying Islamic studies and came from Pakistan to Kabul.

Q: Do you know if they received military training from the Taliban?

A: I don't know.

Q: Did you receive military training from the Taliban or Al Qaeda while you were in Afghanistan?

A: No.

Q: In your vegetable garden, did you also grow poppies?

A: I do not know what a poppy is.

Q: Flowers.

A: Like a kind of drug?

Q: Yes, opium.

A: No, what I am going to do growing this?

Q: It's pretty popular in Afghanistan, and it's a pretty good cash crop from what I understand. So, your garden was for your family's use only? You didn't provide those vegetables to anyone else?

A: The ground is not good. Vegetables don't grow well.

Questions by the Tribunal Members

Q: You were not able to sell any vegetables to make any money for yourself?

A: ***The Detainee did not respond to the question.***

Q: It seems unusual to us that you would be in Afghanistan for over a year, but have no money yourself and have no source of income. Can you explain this for us, please?

A: ***The Detainee did not respond to the question.***

Q: If you were released from Guantanamo Bay, where would you like to go?

A: Mecca, it's a holy place. I know they are [Saudi Arabia is] a Muslim country.

Q: I don't have any more questions, but I'll give you one more chance to say anything you might want to say to help us understand why many of these things don't seem to make sense.

A: ***The Detainee did not respond to the question.***

Q: Is there anything else you can tell us to help us understand why you're here?

A: ***The Detainee did not respond to the question.***

Q: At your house, did you have neighbors?

A: ***The Detainee did not respond to the question.***

Q: Was there anyone close by?

A: It's a community and there are other houses around.

Q: They all grew vegetables?

A: I don't know.

Q: Did [redacted] get vegetables from you?

A: ***The Detainee did not respond to the question.***

Q: He was a cook; he needed vegetables.

A: ***The Detainee did not respond.***

Q: No answer?

A: Sir, I told you the ground is really bad and it doesn't really grow anything. It doesn't really grow vegetables.

Questions by the Tribunal President

Q: Do you have any other information that you would like to present to this Tribunal today?

A: ***The Detainee did not respond to the question.***

AUTHENTICATION

I certify the material contained in this transcript is a true and accurate summary of the testimony given during the proceedings.

Colonel, U.S. Marine Corps
Tribunal President

Summarized Unsworn Detainee Statement (as delivered by his Personal Representative due to the Detainee declining to participate in the Tribunal)

Personal Representative reads statement on behalf of detainee marked as exhibit D-B.

3a. The detainee is associated with al Qaida and the Taliban.

I do not know al Qaida, of course. I have no relations with al Qaida. As for the Taliban, I went to see them according to the Fatwa, which says if they applied the conditions in the Fatwa, I will go for Jihad with them. I went to see if they applied these conditions and this is all in my file. The Fatwa is photocopied from a Pakistani newspaper in Arabic. It has been declared in a Pakistani Newspaper and the associated Scholar's name is also. there. He is a Saudi. All of the details of the above account are available in my file.

3a1. The detainee was recruited at a mosque in [redacted] to participate in Jihad.

I have not been recruited. I only took an address for Jihad in Kashmir [for a man]. (He is one of the Mujahadin.) All details are in my file.

3a2. Detainee received two weeks of weapons training on the Kalashnikov rifle.

The part that refers to 2 weeks of training is correct.

3a3. In November and December 2001, detainee met with al Qaida members while in Tora Bora, Afghanistan.

I passed through Tora Bora just to go to Pakistan. I truly meet some people who were Arabs but I truly did not know whether they were Taliban or Al Qaida. I thought they were with me because we were all retreating. I was late getting to the Front because I was part of the last group. Al Qaida do [does] not have a special uniform for me to recognize and avoid them.

3a4. One of the detainee's known aliases was on a list of captured al Qaida members that was discovered on a computer hard drive associated with a senior al Qaida member.

I know nothing about this. I gave my name to nobody. The front line where I went had no electricity. As for the aliases, there is more than one person with the same name. My nickname is [redacted] or [redacted] How would they prove that this [redacted] or [redacted] is me? For example, [redacted] is so common a name among interrogators. It will be true only if there is a picture with the name. This question is to be turned to the owner of the computer.

3b. The detainee participated in military operations against the coalition.

It is true I was in the front line but I did not fight because I went to see whether they applied the Fatwa conditions only.

3b1. Detainee was issued a Kalashnikov rifle in Bagram, Afghanistan to fight on the lines.

It is obligatory to receive a gun in [the] front line. It is not my choice but I did not use it. I was only observing if the Fatwa applied and not fighting. I was even transferred to the back lines. I was not even able to share the fighting. Actually there was no fighting during my time there.

3b2. Detainee fought the Northern Alliance from September through December 2001.
3b3. Detainee was instructed to flee Afghanistan and go to Pakistan via the mountains.

Tribunal President: All unclassified evidence having been provided to this tribunal, this concludes the open session of the tribunal.

AUTHENTICATION

I certify the material contained in this transcript is a true and accurate summary of the testimony given during the proceedings.

[redacted]

Colonel, U.S. Marine Corps
Tribunal President

[redacted] Statement [redacted] (1/2)

A - I do not know Al Quaida of course. I have no relation with Al Quaida. As for the Taliban, I went to them according to the Fatwa, which says if they applied the conditions in the Fatwa I will go for Jihad with them.

I went to see if they apply these conditions and this is all in my file. The Fatwa is photocopied from a Pakistani newspaper in Arabic. It has been declared in a Pakistani newspaper and the associated Scholars name is also there. He is a Saudi. All of the details of the above account are available in my file.

A-1 - I have not been recruited. I only took an address for a Jihad in Kashmir. He is one of the Mujahideen. All details are in my file.

A-2 - Correct

A-3 - I passed through Tora Bora just to go to Pakistan. I truly met some people who were Arabs, but I truly did not know whether they were Taliban or Al Quaida. I thought they were with me because we were all retreating. I was late getting to the front because I was part of the last group. Al Quaida do not have a special uniform for me to avoid them.

EXHIBIT D-B

[redacted] Statement (2/2)

A-4- I know nothing about this. I gave my name to nobody. The front line where I was it had no electricity. As for the aliases, there are more than one person with the same name. My nickname is [redacted] or [redacted]. How will they prove that this [redacted] or [redacted] is me? e.g. [redacted] is so common a name among interrogators. It will be true only if there is a picture with the name. This question is to be turned to the owner of the computer.

B- It is true I were in the front line but I did not fight. Because I went to see whether they applied the Fatwa conditions.

B-1- It is obligatory to receive a gun in the front line. It is not my choice. But I did not use it. I was only observing if the Fatwa applies and not fighting. I was even transferred to the back lines. I am not even able to share in the fighting. Actually there was no fighting during my time there.

Exhibit D-B

SENATOR FEINGOLD TO BG HEMINGWAY:

1. In your written testimony to the Senate Judiciary Committee, you attested that the President determined application of the Federal Rules of Evidence to military commission proceedings "not practicable."

a. How do the Federal Rules of Evidence differ from the Military Rules of Evidence that apply in courts-martial?

The Military Rules of Evidence used in courts-martial are modeled after, and generally follow, the Federal Rules of Evidence used in Article III courts. Specific differences are discussed in detail in Appendix 22, Analysis of the Military Rules of Evidence, of the Manual for Courts-Martial, United States (2002 edition).

b. In your opinion, what aspects of the Federal Rules of Evidence would it not be practicable to apply?

The Federal Rules of Evidence do not permit the admission of hearsay, unless an exception to the hearsay rule exists (801-807). Therefore, they do not address adequately the unique challenges presented by a battlefield environment that is fundamentally different from the traditional law enforcement rubric applicable during peacetime in the United States.

Other Federal Rules of Evidence which are not practicable to apply in military commissions include, but are not limited to, the following:

- Fed. R. Evid. 404, 405, 608, 609 (restricting the use of character evidence)
- Fed. R. Evid. 501 (common law rule of privileges)
- Fed. R. Evid. 412-415 (restrictions on evidence in sex offense cases)
- Fed. R. Evid. 901-903 (authentication and identification rules)
- Federal Rules of Evidence 701-706 (opinions and expert testimony) and 1001-1008 (contents of writings, recordings and photographs) would have to be rewritten for military commissions.

Other portions of the Federal Rules of Evidence would not be applicable to military commissions because they relate primarily to civil litigation. These include Fed. R. Evid. 301-302 (presumptions in civil actions and proceedings), 407-409 (subsequent remedial measures) and 411 (liability insurance).

c. Does the same statement apply with regard to the Military Rules of Evidence?

Yes. Some additional Military Rules of Evidence would also have to be changed, including 301-321 (exclusionary rules and related matters concerning self-incrimination, search and seizure, and eyewitness identification) and 501-513 (privileges).

d. Please provide details of at least one situation in which application of the Federal Rules of Evidence and application of the Military Rules of Evidence would have been impracticable. In your response, please take into account existing protections for classified information in federal and military courts, such as the Classified Information Procedures Act.

As Legal Advisor to the Appointing Authority for Military Commissions with a judicial role in resolving interlocutory appeals, it would be inappropriate for me to comment publicly on specific evidentiary matters regarding ongoing cases. As discussed earlier, the evidentiary rules applicable in a civilian law enforcement context are not appropriate in a battlefield environment and have typically not been used in trials by military commission of violations of the law of war and related offenses.

Below are four typological examples where the application of the Federal Rules of Evidence or the Military Rules of Evidence would be impracticable in military commissions. There are others.

Exclusion of detainee statements taken without criminal rights warnings. Statements taken from detainees by soldiers on the battlefield or military intelligence interrogators near the battlefield without a criminal rights warning would be inadmissible against a detainee under Military Rule of Evidence 304 which incorporates both a statutory (Article 31(b), UCMJ) and constitutional (Fifth Amendment) criminal rights warning. Similar constitutional law requirements are incorporated in the Military Rules of Evidence for statements by co-defendants (Mil. R. Evid. 306), unlawful searches and seizures (Mil. R. Evid. 311, 314, 315, 316), body views and intrusions (Mil. R. Evid. 312), interception of wire and oral communications (Mil. R. Evid. 317), and eyewitness identification (Mil. R. Evid. 321). In short, application of the Federal or Military Rules of Evidence, without significant changes, would effectively grant detainees the vast majority of criminal procedural safeguards for U. S. criminal trials under Constitutional law. Under battlefield conditions, these are impracticable.

Hearsay. International tribunals generally permit hearsay statements. Such statements would not be admissible in military commissions under either the Federal Rules of Evidence (Fed. R. Evid. 801-807) or the Military Rules of Evidence (Mil. R. Evid. 801-807).

Authentication and content of writings rules. Criminal rules of evidence regarding authentication/chain of custody/best evidence are impracticable for materials seized or captured on a battlefield that are later determined to be relevant for use in a criminal trial. Such evidence would not be admissible in military commissions under either the Federal Rules of Evidence (Fed. R. Evid. 901-903, 1001-1008) or the Military Rules of Evidence (Mil. R. Evid. 901-903, 1001-1008)).

Classified evidence. Because of the ongoing conflict, much of the evidence that may be used in military commissions remains classified. A considerable amount of this evidence will be declassified or reduced to a declassified summary prior to trial. However, it is anticipated that in some instances, the only available evidence to convict a detainee must remain classified in order to protect a sensitive collection source or method or to protect the lives of members of the U.S. armed forces or covert operatives. In those instances, the protections afforded by the Classified Information Procedures Act and its military counterpart (Military Rule of Evidence 505), such as a court order, redactions or summaries, would not be adequate to protect the classified information. If the CIPA or Military Rule of Evidence 505 were applied in such cases, then that detainee could not be prosecuted.

2. Concerns have been raised, by former Secretary of State Colin Powell and others, that the failure of the United States government to acknowledge the applicability of the Geneva Conventions with respect to detainees captured in Afghanistan and elsewhere puts our own troops in jeopardy when they are captured abroad. Although al Qaeda may not abide by the Geneva Conventions, over many decades the Geneva Conventions have gained strength and legitimacy such that few regimes wish to be identified as violators of these important international norms. Do you share Secretary Powell's concern about the impact that the U.S.

decision to disregard Geneva norms in the fight against terrorism may have on the safety of our own troops?

The guidance contained in the President's memorandum (February 7, 2002) is legally correct in its determination that the Geneva Convention does not apply to al Qaeda and that al Qaeda and Taliban detainees are not entitled to prisoner of war status. Under the Geneva Conventions, al Qaeda and Taliban members are not entitled to prisoner-of-war status because they do not meet the requisite criteria. The safety of American soldiers would be jeopardized if we were to accord prisoner-of-war status to enemy combatants who are members of non-signatory organizations and flagrantly violate the laws of war by beheading civilians and committing mass murders. If everyone is entitled to POW status, other signatory countries would have no incentive to comply with the Geneva Conventions as they will get the message that their forces will be given preferential POW treatment even if they do not provide reciprocal privileges to our servicemembers.

The Department of Defense is committed to the rule of law and the humane treatment of all detainees. In his February 7, 2002 memorandum, the President stated that "[O]ur values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." The DoD follows this directive.

3. In your view, would applying the Geneva Conventions to the detainees at Guantanamo Bay mean that all detainees would automatically be treated as prisoners of war?

No. Prisoner-of-war status is only given to those who meet the requisite criteria under the Third Geneva Convention.

4. In LCDR Swift's written testimony to the Judiciary Committee, he indicated that as of next month, there will be only one full time defense lawyer in the Office of the Chief Defense Counsel.

a. What is the cause of this reduction in defense counsel staff?
b. How will one lawyer be able to defend all of the individuals held at Guantanamo Bay who have been charged with crimes?

The temporary reduction in defense counsel staff was the result of normal military rotations that generally occur in the summer months. It is expected that the Office of the Chief Defense Counsel (OCDC) will be soon staffed at its previous level when the summer assignment and rotation cycle is completed. At no time will the staff of the OCDC be reduced to "one full time defense lawyer."

At the present time, each of the four accused before a military commission (Mr. Hicks, Mr. Hamdan, Mr. Al Qosi and Mr. Al Baluhl) has been detailed one or more military defense counsel. Mr. Hamdan and Mr. Hicks have also availed themselves of Foreign Attorney Consultants, as authorized by the military commission orders and instructions.

5. You testified before the Committee that four people detained at Guantanamo Bay have been charged and scheduled for trial by military commission and that eight more people have been determined to be subject to the President's order establishing military commissions.

a. What, specifically, are the charges against each of these four people?

All four individuals are charged with conspiring with other persons who shared a common criminal purpose to commit the following offenses: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism. Mr. Hicks is additionally charged with attempted murder by an unprivileged belligerent as he allegedly used small arms fire, explosives and other means intended to kill American, British, Canadian, Australian, Afghan, and other Coalition forces during an armed conflict, and he is also charged with aiding the enemy, to wit: al Qaeda and the Taliban, such alleged conduct taking place in the context of and associated with armed conflict.

b. When were each of them informed of the charges?

Mr. al Qosi was personally served with charges on March 17, 2004. Due to a translation issue, Mr. al Qosi was served again on July 14, 2004.

Mr. al Bahlul was personally served with charges on April 14, 2004. Due to a translation issue, Mr. al Bahlul was served again on August 12, 2004.

Mr. Hamdan's charges were served on his attorney on August 6, 2004. Mr. Hamdan's attorney requested that he receive the charges rather than the prosecution serving them on his client.

Mr. Hicks' charges were served on his attorney on June 10, 2004. Mr. Hicks' attorney requested that he receive the charges rather than the prosecution serving them on his client.

c. What factors determine whether an individual becomes subject to the President's order on military commissions?

Whether an individual is subject to the President's Military Order is a jurisdictional question. An individual may be subject to the President's Military Order if the individual is not a U.S. citizen and the President determines that: (a) there is reason to believe that the individual is or was a member of al Qaeda; has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or knowingly harbored one or more of the individuals described above; or (b) it is in the interest of the United States that such individual be subject to this order. This presidential decision, made in writing, is called the Reason to Believe (RTB) determination.

d. What factors determine when an individual is charged and set for trial?

In order to proceed to trial, the Office of the Chief Prosecutor examines the intelligence gathered by the DoD, the FBI, and the CIA to make recommendations to the President that a detainee be subject to trial by military commission. The President must approve these recommendations in the RTB determination. Subsequently, charges may be approved and referred to the commission by the

Appointing Authority. Prosecutors continue to gather evidence and make RTB recommendations on that subset of individuals who have allegedly committed a violation of the law of war and may be tried by military commission.

6. More than 500 of the individuals detained at Guantanamo Bay have so far not been determined to be subject to the President's order establishing military commission. Is it possible that many of these remaining detainees will be held at Guantanamo Bay for the rest of their lives without trial? At what point will a detainee who is not subject to trial by a military commission be eligible for release? What factors have made other detainees eligible for release? How many detainees have been released?

The Administrative Review Boards (ARBs) were established in order to review the case of every detainee. We continually review the population to ensure we only detain those who represent a genuine threat or have critical intelligence value.

The ARBs will conduct reviews annually and make an assessment of whether there is continued reason to believe that the enemy combatant poses a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention, including the enemy combatant's intelligence value in the Global War on Terrorism. Based on this assessment, the ARB can recommend that individuals should be released, transferred with conditions or continue to be detained.

During the review, each eligible enemy combatant is given the opportunity to appear in person before an ARB of three military officers and provide information to support his release. The enemy combatant is provided with a military officer to assist him. In addition to information provided by the enemy combatant, the ARB considers written information from the family and national government of the enemy combatant, if provided, and information provided by DoD and other U.S. government agencies. Based on all of the information provided, the ARB makes a recommendation to release, transfer or continue to detain the individual.

The process to release a detainee is completed only after receiving appropriate assurances that the receiving government will continue to treat the detainee humanely.

To date, 246 detainees have been released or transferred from Guantanamo by the Department of Defense. 177 have been released and 69 have been transferred to the control of other governments (Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden, United Kingdom, Kuwait, Australia and Belgium.) We are working with other U.S. Government agencies to help Iraqi and Afghan authorities assume responsibility for detention operations in their countries.

7. Lieutenant Commander Charles Swift, a JAG attorney assigned to defend detainees before military commissions, reported to the Judiciary Committee that his initial representation of Mr. Hamdan was conditioned by the Chief Prosecutor on Mr. Hamdan pleading guilty to an unspecified charge. What is your response to this allegation? To what charge would Mr. Hamdan have pled guilty if he had not yet been informed of the charges against him?

Under military commission rules, procedures accorded the accused include appointment of counsel to conduct Mr. Hamdan's defense at a full and fair trial. This procedural safeguard is

delineated by both the President's Military Order of November 13, 2001 and Military Commission Order No. 1, promulgated March 21, 2002 (and revised on August 31, 2005), and access to counsel was never either endangered or limited.

On December 15, 2003, the Chief Prosecutor for Military Commissions informed the Chief Defense Counsel, via a target letter, that the Office of the Prosecution was considering whether to prepare charges against Mr. Hamdan. Similar target letters are used routinely in criminal prosecutions to initiate pretrial negotiations. Such pretrial negotiations may encompass a wide variety of discussions and options, including but certainly not limited to, a guilty plea.

The target letter advised Chief Defense Counsel that Mr. Hamdan was authorized to be represented by an attorney and that arrangements would be made for detailed defense counsel to visit Guantanamo Bay to meet with Mr. Hamdan during these pretrial negotiations. Under military commission rules, an accused must be afforded access to an attorney "sufficiently in advance of trial to prepare a defense." Under the customary law of armed conflict, representation by counsel begins only after an enemy combatant is charged with a war crime or other criminal offense committed during detention. The Chief Prosecutor was reinforcing procedural safeguards by suggesting early appointment of counsel, even before charges were formally initiated.

LCDR Swift stated that, upon reading the target letter sent to the Chief Defense Counsel, he was worried that Mr. Hamdan's access to an attorney was conditioned on Mr. Hamdan's plea of guilty. However, this statement is misleading. The Detailing Letter from COL Gunn to LCDR Swift makes clear that LCDR Swift's duties as a detailed defense counsel were to be far more extensive than he led the Committee to believe. That letter further directs him to "inform Mr. Hamdan of his rights before a Military Commission."

As an accused being tried by military commission, Mr. Hamdan is accorded certain procedural safeguards. Among these is representation by counsel to help him prepare for trial. Representation by counsel begins in advance of the trial and continues until after the end of the trial. Representation by counsel necessarily includes the ability of counsel to meet with Mr. Hamdan, which LCDR Swift has done on numerous occasions. The Chief Defense Counsel detailed LCDR Swift to be defense counsel for Mr. Hamdan and further ordered him to inform Mr. Hamdan of his rights before a military commission. The Chief Prosecutor, in his target letter, could not deprive Mr. Hamdan of procedural safeguards accorded by commission rules. Similar target letters are used routinely in criminal prosecutions to initiate pretrial negotiations, and no attorney could reasonably argue that such a letter implied his client would be denied permanently access to counsel unless he pled guilty.

8. Lieutenant Commander Swift told the Judiciary Committee that the rules of the military commissions are explicitly unenforceable and can be changed at any time. Is that statement correct?

The Secretary of Defense, consistent with the President's directive to give each defendant a "full and fair trial," has discretion to establish and revise military commission rules. The Supreme Court's decision in *Rasul* held that United States courts have jurisdiction to consider challenges to the legality of the detention and hearings at Guantanamo Bay under 28 U.S.C. § 2241, the habeas statute.

9. Assistant Attorney General Michael Wiggins testified before the Committee that the military commissions themselves determine whether to allow evidence obtained through torture or other coercive interrogation techniques.

a. As Legal Advisor to the Appointing Authority for the Office of Military Commissions, have you provided guidance on the use of such evidence? Has anyone else involved in the military commission process done so?

No.

b. Can you identify any instance(s) in which a military commission has explicitly considered whether or not it should consider evidence produced through torture or other coercive techniques? If so, please identify the instance(s) and the outcome(s).

No.

10. Over a period of more than three years since the U.S. government began sending people to Guantanamo Bay, 12 Guantanamo detainees have been identified to go through military commission proceedings. You testified that the law enforcement effort to determine whether to charge a particular detainee does not begin until the intelligence-gathering process is complete. For how many individuals detained at Guantanamo Bay is the intelligence-gathering process now complete?

I appreciate the opportunity to clarify my answer. Although the intelligence gathering process is never complete, the law enforcement effort to determine whether to charge a particular detainee does not begin until the intelligence gathering process has been given an opportunity to reach its highest potential. Thereafter, additional intelligence can continue to be gathered, but law enforcement efforts can also begin to work simultaneously. We continue to receive valuable intelligence from many detainees.

SENATOR CORNYN TO RADM McGARRAH AND BG HEMINGWAY:

1. Why didn't the Department of Defense conduct Article 5 tribunals for the detainees held in Guantanamo Bay?

As explained by Rear Admiral McGarrah, the detainees were afforded an opportunity to contest their status as enemy combatants in the CSRT process. The CSRT proceedings offered the detainees rights comparable to those provided in Article 5 tribunals, which are typically conducted on the battlefield.

The key question is how the determination was made that Article 5 tribunals were not required. As the President made clear in his memorandum of February 7, 2002, the Geneva Conventions do not apply to our conflict with al Qaeda. Al Qaeda is an international terrorist group, not a state, and therefore is not and can not be a party to the Conventions. Al Qaeda also does not recognize the Conventions or comply with the principles they embody. It conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. With respect to our conflict with the Taliban, the President determined that the Geneva Conventions do apply, but that Taliban detainees do not qualify for "prisoner of war" status because they do not satisfy the requirements set forth in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status.[1] *See also United States v. Lindh*, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity."); *see also* INGRID DETTER, THE LAW OF WAR 148 (2000) ("Unlawful combatants..., though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status.").

Because there is no doubt as to whether al Qaeda, the Taliban, and their affiliates and supporters may claim prisoner-of-war status, there is no need or requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when there is doubt under any of the categories enumerated in Article 4.[2] The United States concluded that Article 5

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[1] The U.S. Supreme Court, citing numerous authoritative international sources, has held that unlawful combatants "are subject to capture and detention, [as well as] trial and punishment by military tribunals for acts which render their belligerency unlawful." *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) (citing GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, ch. xiv, §§ 445-451; REGOLAMENTO DI SERVIZIO IN GUERRA, § 133, 3 LEGGI E DECRETI DEL REGNO D'ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1109; 2 HYDE, INTERNATIONAL LAW, §§ 654, 652; 2 HALLECK, INTERNATIONAL LAW (4th Ed. 1908) § 4; 2 OPPENHEIM, INTERNATIONAL LAW, § 254; HALL, INTERNATIONAL LAW, §§ 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, §§ 570 bis).

[2] Article 5 states:
"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, signed at Geneva on Aug. 12, 1949; entered into force on Oct. 21, 1950 (entered into force for the United States, Feb. 2, 1956).

tribunals were unnecessary because there is no doubt as to the status of these individuals.

In conclusion, combatants who do not accept and abide by the laws and customs of war may not then invoke the mantle of protection afforded POWs under the Geneva Conventions. For these reasons, an Article 5 tribunal was not required – there was no doubt that al Qaeda and Taliban members were unlawful enemy combatants, or unprivileged belligerents, not protected by the Geneva Conventions.

2. Will all detainees at Guantanamo Bay be tried by military commissions for alleged violations of the law of war and related offenses?

No, not all of the detainees held at Guantanamo will face trial by military commission.

The determination of enemy combatant status is initially a battlefield decision made by the military commander who is authorized to engage the enemy with deadly force. Ultimately, the President as the Commander in Chief identifies which persons to engage and whom to detain in an armed conflict.

Presidents have detained enemy combatants in every major conflict in the Nation's history, including the Gulf War, Vietnam Conflict, and the Korean War. During WWII, hundreds of thousands of individuals captured on the battlefield were subsequently held in the US without trial or counsel. These detentions have always served the same purposes – intelligence gathering, and to prevent individuals from returning to the battlefield and killing American forces.

The intelligence gathering efforts of the FBI, the CIA and the DoD provide a bank of information that is made available to the Office of the Chief Prosecutor (OCP) for Military Commissions. The Chief Prosecutor decides when there is sufficient evidence for trial and makes the recommendation to the chain of command that the individual be subject to a Reason to Believe (RTB) Determination. The RTB is a designation made in writing by the President that an individual is subject to his November 13, 2001 military order and to trial by military commission. Following Presidential designation of this status, the OCP prepares charges for approval and referral by the Appointing Authority. Military commissions have jurisdiction over violations of the law of war and other alleged offenses.

Many individuals held at Guantanamo will not face trial by military commission. These individuals are either providing actionable intelligence through interrogations, and/or are still considered a threat to U.S. forces on the battlefield. Some of them have not committed law of war violations or other crimes. These individuals will be held until the end of the conflict or until they are determined to no longer be a threat to US forces by the Administrative Review Board.

3. Military Commissions have adopted a "probative" value standard for the admissibility of evidence. What is the rationale and basis for adopting a probative value standard?

Military Commissions adopted the probative value standard for admissibility of evidence based on the battlefield conditions in which unique challenges arise regarding the collection and preservation of evidence. It is not only unnecessary, but unreasonable, to require the use of search

warrants in battlefield conditions or the application of technical authentication procedures for evidence collected on the battlefield.

The probative standard is universally accepted as an appropriate standard for admissibility of evidence in war crimes prosecutions and reflects the standard of admissibility of evidence before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

4. What are the consequences of using Article III courts and courts-martial regarding classified and protected information?

The rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant is also provided access to that classified evidence. Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions in courts-martial concerning classified information. However, the procedures used in courts-martial are insufficient when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. armed forces engaged in the Global War on Terrorism.

The Department of Justice is in the best position to respond to questions concerning the protection of classified information in Article III courts under the Classified Information Procedures Act, 18 U.S.C. Appendix III, §§ 1-16.

5. Lieutenant Commander Swift, the detailed military defense attorney for Mr. Hamdan, asserted in his testimony before this committee that Brigadier General Hemingway, as the Legal Advisor to the Appointing Authority for Military Commissions, concluded that Mr. Hamdan did not have a right to a speedy trial and, as a legal matter, could be held indefinitely. Are these your legal conclusions?

To clarify, General Hemingway did not conclude that Mr. Hamdan does not have a right to a speedy trial. On February 12, 2004, LCDR Swift asked that Mr. Hamdan be moved from a segregated detention into the general detainee population, citing the speedy trial provisions of Article 10, UCMJ. Brig. Gen. Hemingway responded on February 23, 2004 that Article 10, UCMJ did not apply and that Mr. Hamdan was an enemy combatant, subject to being held as such. General Hemingway did not state that Mr. Hamdan was not entitled to a speedy trial. In fact, General Hemingway is committed to the expeditious processing and resolution of cases against those detainees identified for trials by military commission.

In addressing speedy trial claims it is important to understand that the detainees held at Guantanamo Bay are enemy combatants. This status exists notwithstanding any decision to try a particular detainee by a military commission.

The capture and detention of enemy combatants are fundamental and lawful incidents of armed conflict. One purpose of such detention is to prevent the captured individuals from returning to the

battlefield and taking up arms once again. Such detention during armed conflict is not punishment, nor is it penal in nature, but is solely protective custody to prevent the detainee's further participation in the armed conflict. Consistent with long-standing law of war principles, such detention may last no longer than the duration of active hostilities in the relevant conflict. For these reasons, speedy trial considerations cannot operate to effect the release of a combatant from such detention prior to termination of the hostilities concerned.

6. Was Mr. Hamdan's right and access to counsel conditioned on a plea of guilty?

No. Mr. Hamdan's right and access to counsel to conduct his defense at a full and fair trial are guaranteed by both the President's Military Order of November 13, 2001 and Military Commission Order No. 1, promulgated March 21, 2002 (as revised on August 31, 2005). On December 15, 2003, the Chief Prosecutor for Military Commissions informed the Chief Defense Counsel, via a target letter, that the Office of the Prosecution was considering whether to prepare charges against Mr. Hamdan. Three days later the Chief Defense Counsel detailed Lieutenant Commander Swift to represent Mr. Hamdan for all matters relating to military commission proceedings "until such time any findings and sentence become final," unless excused by Mr. Hamdan or by the Chief Defense Counsel.

LCDR Swift stated that, upon reading the target letter sent to the Chief Defense Counsel, he was worried that Mr. Hamdan's access to an attorney was conditioned on Mr. Hamdan agreeing to plead guilty. However, this statement is misleading. The Detailing Letter from COL Gunn to LCDR Swift makes clear that LCDR Swift's duties as a detailed defense counsel were to be far more extensive than he led the Committee to believe. That letter further directs him to "inform Mr. Hamdan of his rights before a Military Commission."

Under the law of war, enemy combatants detained during an armed conflict need not be represented by an attorney unless charged with a war crime or other criminal offense committed during their detention. Though Mr. Hamdan had not yet been charged, the Chief Prosecutor opined in the target letter sent to the Chief Defense Counsel that Mr. Hamdan was authorized to be represented by an attorney for any pretrial discussions and that he would arrange with the commander of the detention facility for detailed defense counsel to have access to Mr. Hamdan during the pretrial negotiation process. Under military commission rules, an accused is accorded representation by counsel "sufficiently in advance of trial to prepare a defense." The Chief Prosecutor was reinforcing procedural safeguards by suggesting early appointment of counsel, even before charges were formally initiated. When to charge a detainee subject to the President's order, like any charging decision, is a matter of prosecutorial discretion and must be initiated by the Chief Prosecutor.

As an accused being tried by Military Commission, there are numerous procedural safeguards accorded the accused. Among these is access to counsel to help him prepare for trial. Representation by counsel begins in advance of the trial and continues until after the end of the trial. Representation by counsel necessarily includes the ability of counsel to meet with Mr. Hamdan, which LCDR Swift has done on numerous occasions. The Chief Defense Counsel detailed LCDR Swift to be defense counsel for Mr. Hamdan and further ordered him to inform Mr. Hamdan of his rights before a military commission. The Chief Prosecutor, in his target letter, could not deprive Mr. Hamdan of procedural safeguards accorded by the commission rules. Similar target letters are used routinely in criminal prosecutions to initiate pretrial negotiations, and no attorney could reasonably argue that such a letter implied his client would be denied permanently access to counsel unless he pled guilty.

7. What type of logistical support has the Appointing Authority provided to defense counsel? For example, how has the Appointing Authority facilitated LCDR Swift's visits to Mr. Hamdan?

The Office of the Appointing Authority (OAA) is responsible for providing logistical and administrative support to the Office of the Chief Defense Counsel (OCDC). In that capacity, the OAA details or employs personnel such as defense attorneys, paralegals, court reporters, interpreters, translators, security personnel, and clerks to support the ODC.

Appointing Authority personnel process travel requests, arrange for theater and area clearance requests, and housing and transportation requirements to and from Guantanamo and while on the island. Manning, equipment and office relocation requests are also handled through the OAA.

During this fiscal year to date, detailed Defense Counsel to Messrs. Al Bahlul, Qosi, Hicks, and Hamdan were authorized a total of $ 367,000 for travel. Many of these trips were to Guantanamo to visit their clients. Other travel included trips to the Sudan, Afghanistan, the International Criminal Tribunal for the Former Yugoslavia (ICTY), Australia, Bali and Pakistan. LCDR Swift, detailed Military Defense Counsel to Mr. Hamdan, spent in excess of $65,000 in travel from October 2004 to the present. He traveled to Guantanamo on 21 occasions from November 2003 through June 2005, and to Yemen and The Hague on one occasion.

All requests for travel submitted by the defense teams to the OAA, whether to Guantanamo or to other locations for the purpose of gathering evidence or enhancing relevant professional knowledge, have been approved. The only exceptions to this open travel policy are at the request of the Commander, Joint Task Force Guantanamo. For example, for security reasons, access to Guantanamo during detainee movement operations is restricted for all personnel, not just defense personnel; however, the duration of such restrictions is typically less than one day and cannot fairly be represented as impeding either the defense or prosecution of any accused.

8. Can you expand on the reasons previously provided for the delays associated with the completion of trials by military commissions?

On November 13, 2001, the President ordered the establishment of military commissions to try a subset of the detainees for violations of the law of war and other applicable laws.

In order to proceed to trial, the Office of the Chief Prosecutor examines the intelligence gathered by DoD, FBI, and the CIA to make recommendations to the President that a detainee is subject to trial by military commission. The President must approve these recommendations in writing, a process called a Reason To Believe (RTB) determination. Subsequently, charges may be approved and referred to the commission by the Appointing Authority. Prosecutors continue to gather evidence and make RTB determinations on that subset of individuals who have allegedly committed a violation of the law of war and may be tried by military commission.

Since the establishment of commissions, the Secretary of Defense, Department of Defense General Counsel, and the Appointing Authority for Military Commissions have published Orders, Instructions, and Appointing Authority Directives that govern the conduct of these trials. This rule-making process is not unlike that used by recently established international courts. The International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) was established on May 25, 1993 by

the United Nations Security Council. Witnesses were heard in the first case against Dragan Nikolic on October 9, 1995, and his trial began on May 7, 1996, nearly three years after the UN Security Council's establishment of the *ad hoc* tribunal. Similarly, hearings began in the U.S. military commission cases of four charged individuals during the week of August 24, 2004, less than three years after the President's Military Order. Pretrial motions were filed between August and November, 2004, and on November 1, 2004, pretrial motions hearings began in the case of David Hicks.

The Supreme Court's decision in *Rasul* on June 28, 2004 established that United States courts had jurisdiction to consider challenges to the legality of the detention at Guantánamo Bay under 28 U.S.C. § 2241, the habeas statute. Detainees began to file habeas proceedings heard by numerous judges in the D.C. District Court. Proceedings in military commissions were halted on November 8, 2004 by Judge Robertson of that same court. He rejected the President's authority to establish military tribunals and held that even if a competent tribunal (an Article 5) determined Mr. Hamdan a lawful enemy combatant, he could be tried by military commission only if commission rules were changed to parallel the UCMJ. In particular, Judge Robertson objected to the exclusion of the defendant during closed proceedings.

Judge Robertson's decision was appealed and oral argument heard on April 7, 2005 in the U.S. Court of Appeals for D.C. Circuit. A three-judge panel decision was released on July 15, 2005. With regard to commissions, the court held that through the joint resolution of Congress, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001), 10 U.S.C. §821, and 10 U.S.C. §836, Congress authorized the military commission that will try Mr. Hamdan. The court stated that the district court erred in its interpretation of 10 U.S.C. § 836, which provides that military commissions and other tribunals "may not be contrary to or inconsistent with this chapter," and that a sensible reading of this language is that it provides that the President may not adopt procedures that are "contrary to or inconsistent with" the UCMJ's provisions regarding military commissions, not those regarding courts-martial.

The lower court's stay in the *Hamdan* case remains in place until the court of appeals issues its mandate.

Military commissions have been on hold since November 8, 2004 due to the exercise of detainees' rights in habeas in federal court. The Office of the Appointing Authority for Military Commissions, which administers the proceedings, fully supports the exercise of those rights by the accused. Therefore, any concerns about delay must be secondary to the exercise of those rights.

SENATOR CORNYN TO RADM McGARRAH:

1. What are the factors beyond enemy combatant designation that are used in making recommendations for release or transfer?

The basis for detaining individuals at Guantanamo Bay, potentially through the end of hostilities, is their designation as enemy combatants. All enemy combatants at Guantanamo Bay were designated, typically through multiple reviews, as enemy combatants before they ever arrived at Guantanamo Bay. This designation has been most recently validated through the Combatant Status Review Tribunal (CSRT) process. To ameliorate the potential for the indefinite detention of these enemy combatants until the end of hostilities, the Administrative Review Board (ARB) process provides a mechanism for the possible early release or transfer to country of nationality of detainees before the end of hostilities. For each enemy combatant, the ARB process considers all information in the government's possession, invites input from the detainee's home country and family, and develops a recommendation that the detainee be released, be transferred (typically to country of nationality), or continue to be detained. Some of the main factors considered by the ARB in assessing each enemy combatant and developing this recommendation include:

- The extent of the threat a detainee may continue to pose to the U. S. and its coalition partners if released or transferred;
- The detainee's intelligence value;
- Whether the detainee is under investigation for potential charges of war crimes;
- The detainee's willingness and ability to accept responsibility for his actions if released or transferred; and
- The detainee's country's willingness and ability to accept responsibility for the detainee if released or transferred.

These factors are viewed collectively by the ARB panels in making recommendations to the Designated Civilian Official (DCO). No one particular factor is controlling. Acting Deputy Secretary of Defense Gordon England is the DCO for the ARB process, and is the final decision maker on whether a detainee is released, transferred to country of nationality or a third country, or continued in detention. A process like the ARB is totally discretionary on the part of the U. S. Government in that an ARB is not required by either the Third Geneva Convention or international law. There are no absolutes or formulas that can be counted on to predict a specific outcome in a case, and the overall process does contain some risk in that detainees who are released can return, and in some cases have returned, to the battlefield to engage in subsequent terrorist activities. However, we are taking the historic step of establishing a process that permits an enemy combatant to have a hearing to present his case for release while a conflict is ongoing in order to ensure that no enemy combatant is detained longer than necessary.

2. What do the Combatant Status Review Tribunal and Administrative Review Board processes entail?

As suggested by Justice O'Connor in *Hamdi*, the CSRT process was based on Army Regulation 190-8, and provides detainees with much of the same process afforded by that regulation. The CSRT provided each detainee the opportunity to present information as to why he should not be considered an enemy combatant, including personal testimony, witness statements, or other documentary evidence. A personal representative was appointed to assist the detainee in preparing for

the tribunal, the detainee had the opportunity to review an unclassified summary of information relating to the basis for detention, and a government representative was tasked to review all documents, classified and unclassified, to identify any information tending to disprove enemy combatant status that existed. A tribunal of three neutral officers reviewed the materials and determined whether the detainee meets the criteria to be designated an enemy combatant. This is an unprecedented level of process provided to enemy combatants, and extends beyond the process required in the analogous context of an Article 5 tribunal under Army Regulation 190-8.

The Department of Defense also established Administrative Review Boards (ARBs) to determine annually if enemy combatants under DoD control at Guantanamo could be released, transferred, or detained until further review. In developing the ARB process, OARDEC had a dialogue with the International Committee of the Red Cross, non-governmental organizations, and the Ambassadors of countries with detainees at Guantanamo Bay, and then worked across all U. S. Government agencies to develop a rigorous and fair review process. During the review, each enemy combatant has the opportunity to review an unclassified summary of information relating to continued detention, and to appear personally to present information relevant to continued detention, transfer, or release. A military officer is assigned to assist the detainee in preparing for the Board. In addition to information provided by the enemy combatant, the ARB considers written information from the family and national government of the enemy combatant, if provided, and information provided by Department of Justice, Central Intelligence Agency, Department of Homeland Security, and the National Security Council staff. Based on this information, the ARB makes an assessment whether the enemy combatant continues to pose a threat to the United States or its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters, and/or whether there are other factors bearing upon the need for continued detention (e.g., intelligence value and/or law enforcement interest). The ARB recommendation is forwarded to the Designated Civilian Official, Acting Deputy Secretary of Defense Gordon England, who makes the final determination.

It is important to remember that this administrative review process is not required by any law or convention. We have adopted this process as a matter of policy so as to not detain anyone any longer than necessary.

3. What resources have been allocated to OARDEC for the accomplishment of the Combatant Status Review Tribunals and Administrative Review Boards? How many people are involved in theses processes? What is your budget?

OARDEC is a joint command that came into being in June 2004. Since then, 293 military personnel from all components of all four services have been assigned to OARDEC, working both in Washington D.C. and Guantanamo Bay. We currently have a staff of 86, which includes 12 contract linguists. OARDEC's FY05 operating budget is $4.2 million, and includes office space, equipment, contract translators and travel expenses between Washington D.C. and Guantanamo Bay.

The CSRT and ARB processes are thorough and methodical. We coordinate within the Department of Defense, and with the Department of State, Department of Justice (including the FBI), Central Intelligence Agency, Department of Homeland Security, and the National Security Council staff to acquire information relevant to each detainee's situation. The ARB and CSRT processes have required time, and have not been without their challenges. For example, the pursuit of off-island witness input for CSRT hearings was very time consuming, and we have received very little input from home countries in the ARB process. But we must do this right, because there are two sides to the

fairness coin. First, fairness to the American people requires that those in detention who still pose a significant threat should not be released and permitted to return to terrorist activities. Second, fairness to the detainee, as well as our clear desire not to detain persons any longer than necessary, would suggest that those who no longer pose a threat to the United States or our allies be released or transferred to their own countries.

4. What process is provided to detainees in the Combatant Status Review Tribunal and Administrative Review Board proceedings?

The process provided to detainees in the CSRT and ARB processes are robust and consistent with the Army Regulation 190-8 that provides policy, procedures and responsibilities for the handling of prisoners of war and certain other detainees. The Supreme Court's plurality in *Hamdi* suggested that the processes described in this regulation meet the due process standards for an American citizen detained as an enemy combatant in the United States. In conducting the CSRTs, DoD has extended these opportunities to all of the detainees at Guantanamo Bay. The CSRT procedures provide each detainee many opportunities:

- The opportunity for review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially, and who make their decisions by majority vote, based on the preponderance of the evidence;
- The opportunity to attend all open portions of the proceedings;
- The opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available;
- The opportunity to question witnesses called by the tribunal;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity freely to decline to testify.

The CSRT process also provides more process and protections than Army Regulation 190-8:

- The detainee is given the opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for his hearing;
- The CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal;
- The CSRT Recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant;
- In advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification;
- The detainee is allowed to introduce relevant documentary evidence;
- The result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings, if appropriate.

The ARB process provides each eligible detainee with the following opportunities:

- The opportunity for review by a neutral decision-making panel of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their assessments, in writing and by majority vote, on whether there is reason to believe the enemy

combatant no longer poses a threat to the United States or its allies and any other factors bearing on the need for continued detention;

- The opportunity to attend all open portions of the proceedings;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity to receive assistance from a military officer to ensure he understands the process and to prepare for his hearing.

5. The Global War on Terrorism is likely to continue into the future and is unlike any conflict previously faced by our country. Does the Administrative Review Board process address concerns over the potential indefinite detention of the captured combatants at Guantanamo?

Yes. The ARB process is designed to assess annually whether each detainee continues to pose a threat to the U.S. or its allies and to recommend whether each detainee should continue to be detained, be released, or be transferred. Although these enemy combatants can each be held until the end of hostilities, the U.S. Government has no interest in holding any detainee any longer than necessary and has taken this unprecedented step to regularly evaluate the circumstances of each enemy combatant and, when appropriate, to release or transfer an enemy combatant even though the current conflict is still ongoing.

6. Are the Combatant Status Review Tribunal and Administrative Review Board panels subject to being influenced by superior officers or officials?

No, the CSRT and ARB processes are not subject to being influenced by superior officers or officials. Rather, they are thorough and methodical. We have dozens of dedicated people working long hours under difficult conditions to carefully sort through many cases. CSRT decisions and ARB recommendations are made by a neutral decision-making panel of three commissioned military officers sworn to execute their duties faithfully and impartially.

7. Aren't the Combatant Status Review Tribunal and Administrative Review Board proceedings just arbitrary legal processes, run by personnel that rely on information obtained through coercive interrogations, and personnel who are afraid to make decisions contrary to what their superiors, to include the President, expect?

No, CSRT and ARB proceedings are not arbitrary. The CSRTs and ARBs are administrative processes that are thorough and methodical, and involve a rigorous evaluation of all the reasonably available information in the government's possession regarding each detainee. They are being conducted by commissioned military officers sworn to execute their duties faithfully and impartially.

8. Are the Combatant Status Review Tribunals and Administrative Review Boards held in secret?

No. The unclassified portions of both the CSRTs and the ARBs are open to media observation, and the media have observed some. The ARBs continue to be available for media observation and reporting. In addition, we have extended an open invitation to the International Committee of the Red

Cross (ICRC) to observe. We strive to be as open and transparent in our processes as possible, while safeguarding national security concerns.

9. Are the Guantanamo Bay detainees held incommunicado?

No. Each detainee is allowed to send and receive mail through the U.S. Postal Service. In addition to visiting with detainees, representatives of the International Committee of the Red Cross (ICRC) also process mail to and from the detainees. The amount of correspondence processed by the Department of Defense is extensive--over 14,000 pieces of mail were sent to or by detainees at Guantanamo between September 2004 and February 2005 alone.

Answer of Joseph Margulies

to Written Questions Propounded by the

U.S. Senate Committee on the Judiciary

July 11, 2005

Senator Specter, Senator Leahy, and Members of the Committee:

Thank you for the opportunity to respond to your question. You have asked whether I support the creation of an independent commission, modeled after the 9/11 Commission, to examine the administration's detention policy. As I indicated in my remarks to the Committee June 15, 2005, I strongly support such an inquiry.

The disclosures about Guantánamo, Abu Ghraib, and Bagram Air Force Base are by now a matter of common knowledge. The administration insists these problems were isolated events, unrelated to the policy itself. But there is a persistent and widening gulf between words and deeds and a credibility gap has emerged that can only be bridged by an independent, bi-partisan inquiry into all aspects of the detention policy.

In an effort to quell the growing clamor for such a commission, Defense Secretary Donald Rumsfeld has suggested that, "arguably, no detention facility in the history of warfare has been more transparent or received more scrutiny than Guantánamo." To prove his point, he and the President have invited journalists and members of Congress to tour the base.

But when officials take them up on their offer, their visits are tightly controlled affairs.[1] No member of Congress has ever seen a "stress and duress" position, and no reporter has ever watched an interrogator create "an atmosphere of dependency and trust"

[1] Charles Savage, *Inside Guantánamo*, Miami Herald (Aug. 24, 2003) at L1 (describing the "tightly controlled media visits").

– the military's euphemistic description for interrogations that do not comply with the Geneva Conventions.

At the same time, the administration has refused to allow international monitors to visit the base. Since 2002, the U.N. Special Rapportuer on Torture has repeatedly asked to visit Guantánamo but has not received a reply from the United States.[2] And whatever willingness the administration may have to open at least a partial window into Guantánamo apparently does not extend to Bagram, about which we know considerably less, or the secret facilities used by the CIA around the world, about which we know almost nothing. The administration repeatedly rebuffed the U.N. Human Rights Commission's independent expert for Afghanistan when he tried to visit Bagram and Kandahar Air Force Bases in Afghanistan, and later forced him from his job.[3]

To this, the United States says the International Committee of the Red Cross has been allowed to visit Guantánamo. But as the administration well knows, the ICRC's reports are confidential, and therefore cannot establish the transparency of the facility at Guantánamo Bay. In addition, people who have seen the ICRC report about Guantánamo say it makes a scathing attack on the conditions and interrogations being used, describing them as "tantamount to torture."[4] But their complaints seem to have fallen on deaf ears. Furthermore, the ICRC has been excluded from other U.S. and U.S.-backed facilities around the world.

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[2] Associated Press, *U.N.: U.S. Stalling on Guantanamo Request* (June 23, 2005).

[3] Carlotta Gall, *U.N. Monitor of Afghan Rights Accuses U.S. on Detentions*, New York Times (April 23, 2005); Warren Hoge, *Lawyer Who Told of U.S. Abuses at Afghan Bases Loses U.N. Post*, New York Times (April 30, 2005).

[4] Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, New York Times (Nov. 30, 2004).

And of course, all of this secrecy is deliberate. Recently *Time Magazine* published excerpts of the interrogation log of Mohammed al-Qahtani, a prisoner at Guantánamo. The log is stubbornly impersonal, with a clinical, distant tone. Al-Qahtani is never identified by name – he is only "detainee." His questioners are anonymous – identified only as "interrogator" or "interrogators." His interlocutors seem unwilling to acknowledge that they are dealing with a human being. The interrogations themselves are obviously meant to convince al-Qahtani that he occupied a place in the world somewhere beneath that of an animal:

> Detainee was reminded that no one loved, cared, or remembered him. He was reminded that he was less than human and that animals had more freedom and love than he does.
>
> Interrogator told detainee that he will not be allowed to leave trash all around and live like the pig that he is. He picked up all the trash from the floor while hands were still cuffed in front of him.
>
> Began teaching the detainee lessons such as stay, come, and bark to elevate his social status up to that of a dog. Detainee became very agitated.

At various times, al-Qahtani was forced "to bark like a dog and growl at pictures of terrorists." Interrogators hung pictures of scantily clad women around his neck. He was taken to a booth decorated with American flags. His head and beard were shaved. He was repeatedly subjected to "the close physical presence of a woman." At one point, medics forcibly administered fluids by an IV drip and interrogators questioned Al-Qahtani until he urinated on himself. The log then notes, "[h]e is beginning to understand the futility of his situation." Not surprisingly, a Pentagon official reacted to

the interrogation log by observing that this is the "kind of document that was never meant to leave Gitmo."[5]

Despite what the administration says, its detention policy remains a black hole. But democracy dies in the dark. If this policy is defensible, it must be defended openly and honestly. We must bridge the gulf between words and deeds, and close the widening credibility gap. I urge Congress to create an independent commission, modeled after the 9/11 Commission, to conduct a full and fair investigation. The commission must urgently address a number of pressing and persistent questions:

> Who may be designated an "enemy combatant," what legal process do they enjoy to challenge that designation, and when can that process finally commence?
>
> What, precisely, is the scope of the problem? Who is being detained; where were they captured; where are they held; and what have they allegedly done to justify their continued detention?
>
> What abuses have taken place, at whose direction, and at what facilities?
>
> How did these abuses happen? Were they, in fact, simply the work of rogue and undisciplined soldiers, or was it authorized and approved at higher levels?
>
> What reform is needed? How do we insure that abuses do not recur? Do we need to strengthen our commitment to universally accepted prohibitions against cruel, inhuman, and degrading treatment, including the obligation not to deliver a prisoner to a country where we know he will be tortured? Or do these principles unduly constrain our ability to fight terrorism in all its invidious forms?

To answer these questions, and to get the bottom of this burgeoning scandal, I ask the Committee to lend its support to the creation of a bi-partisan inquiry. I envision a genuinely independent commission modeled after the 9/11 Commission:

> Completely bi-partisan;

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[5] Adam Zagorin & Michael Duffy, *Detainee 063: Inside the Wire at GITMO*, Time (June 20, 2005).

Congressionally funded;

Led by commissioners with unimpeachable credentials;

Supported by a professional staff;

Empowered to issue subpoenas and compel testimony.

We are a nation of values, and first among equals is an unflinching commitment to the rule of law. We have nurtured this commitment for generations, and it has endured undiminished throughout our history. But the seemingly irresistible Siren of alleged "military necessity" now threatens this commitment. We must resist this threat with the same urgency that we attach to the war itself.

To achieve not only Congressional "buy-in," as Senator Graham called it during the Committee hearing, but "buy-in" by both the American public and our international allies, we need an independent commission that will be Congressionally funded, but free from the pressures of partisan politics; steeped in the complex issues of military intelligence-gathering in the war on terror, but not beholden to the military or its leadership; but most of all, charged with asking the hardest questions, but willing to let the truth have the last word.

Thank you. I would be happy to answer any other questions you may have.

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July 12, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Senate Dirksen Office Building
Washington, D.C. 20510-6275
ATTN: Barr Huefner

Dear Mr. Chairman:

Enclosed with this letter are my answers to the questions you forwarded to me from Senators Biden and Feingold after the Senate Judiciary Committee's hearing regarding "Detainees" held on June 15, 2005.

Sincerely,

Glenn A. Fine
Inspector General

Enclosures

Written Question Submitted by
Senator Joseph R. Biden, Jr.
For June 15, 2005, "Detainees" Judiciary Committee Hearing

Question 7. Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and to the Congress?

Answer 7: As discussed in more detail in my written testimony, the Department of Justice OIG is conducting a review of certain aspects of the FBI's involvement in the treatment of detainees at Guantanamo, Abu Ghraib, and elsewhere. If the Administration and the Congress determine that a 9/11-style independent commission should be created to review U.S. interrogation and detention operations, I would not be opposed and would be pleased to share our findings with such a commission.

Written Questions Submitted by
Senator Russell D. Feingold
For June 15, 2005, "Detainees" Judiciary Committee Hearing

Question 1. In your testimony, you explained your office's ongoing review of FBI actions and observations regarding detainee abuse at military facilities. As the Inspector General for the Justice Department, you do not have jurisdiction over the Defense Department employees who might also have been involved in those incidents. Similarly, the Defense Department Inspector General does not have jurisdiction over the actions of FBI agents. In these circumstances, however, it seems likely that your investigation could turn up evidence of detainee abuse by military officials.

a. Is there any mechanism in place for you to coordinate your investigative efforts with Inspector Generals of other Departments, such as the Defense Department? If there is not such a mechanism, do you believe it would be beneficial to establish one?

Answer 1a: Yes, there are mechanisms for Inspectors General to coordinate their investigative efforts. These mechanisms include the President's Council on Integrity and Efficiency (PCIE), a group composed of all Presidentially appointed Inspectors General, which meets monthly to discuss issues of common interest. The PCIE also has regular meetings of various committees, including the Investigations Committee, which can help coordinate investigative efforts among Offices of Inspector General (OIGs). Both the Department of Defense OIG and the Department of Justice OIG participate in both the PCIE and the Investigations Committee.

In addition, the Intelligence Community Inspectors General Forum, which consists of Inspectors General who have oversight of aspects of intelligence community operations, meets regularly to discuss and coordinate issues and investigations of concern throughout the intelligence community. Again, both the Department of Defense and Department of Justice OIGs participate in this group.

b. If you uncover evidence of detainee abuse by employees outside the Justice Department, how would you proceed?

Answer 1b: If the Department of Justice OIG uncovered evidence of detainee abuse by employees outside the Justice Department, we would report it to the appropriate authorities at the agency in which those

employees worked, and also to the appropriate authorities within the Department of Justice. In addition, we would discuss the evidence relating to such abuse in our written report of investigation.

c. Are you, in fact, coordinating with the Defense Department Inspector General on this investigation?

Answer 1c: As far as we know, the Department of Defense Inspector General does not have an ongoing review in this area. However, an investigation ordered by the U.S. Southern Command has been reviewing instances of alleged mistreatment of detainees at Guantanamo Bay that are cited in FBI documents. We have coordinated and cooperated with the Southern Command review.

Moreover, as noted in the answer to the previous question, if we found evidence of abuse of detainees by military employees, we would report that evidence to the Department of Defense, as well as to the military officials involved in the review of allegations of abuse of detainees by military personnel.

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Hon. Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

Att'n: Barr Huefner

July 14, 2005

Dear Senator Specter,

Enclosed in two attachments are my responses to the written questions posed by Committee members following the Committee's hearing regarding Detainees on June 15, 2005.

Thank you very much for holding the hearing on this matter, which is of such vital importance to our national security, and thank you for allowing me the opportunity to participate and contribute to your deliberations.

Sincerely,

Stephen J. Schulhofer

Attachment #1

FOLLOW-UP QUESTION (BY SENATOR JOSEPH R. BIDEN, JR.):
"Do you support the creation of a 9/11-style independent commission to consider U.S. interrogation and detention operations and to propose recommendations to the President and to the Congress?"

RESPONSE (by Professor Stephen J. Schulhofer):

I strongly support the creation of an independent commission to examine U.S. interrogation and detention practices, to report the facts, and to make recommendations for the future.

In our struggle against terrorism, it is essential to convince the world that America is fighting for freedom, for democracy and for the human dignity of all peoples. We know that we are, but the sad truth is that much of the world does not automatically see it that way. Millions of people around the globe begin with great skepticism about our good intentions. And we cannot defeat terrorism if we lose the cooperation and respect of the more than one billion law-abiding Muslim citizens around the world.

For that reason, the allegations of abuse at Guantánamo and other U.S. detention facilities are hurting us very badly. Many of the allegations are disputed of course. In some instances, as in connection with Abu Ghraib, the abuses themselves are admitted and irrefutable, but accusations continue to swirl concerning whether the abuses were solely the work of a few "bad apples" or whether they had their source in decisions made high in the chain of command. The truth may turn out to be reassuring, but in the current environment, poisoned by mistrust and a pervasive lack of transparency, many around the world are predisposed to believe the worst. "Trust us" is simply not a response that works beyond our own borders.

Under these circumstances, we are paying a heavy price, every day, for the resentment engendered around the world by our perceived unwillingness to address the allegations forthrightly and to hold accountable any high-level officials who may have been responsible. Guantánamo, Abu Ghraib and what they represent have become potent recruiting tools for extremists. And beyond that effect, troubling enough in itself, the perceived abuses pose other serious problems. In the United States, Western Europe and around the world there are millions of decent Muslims who would never consider becoming terrorists, no matter what we do at Guantánamo. But these good, law-abiding citizens now mistrust the United States and hesitate to cooperate with our intelligence-gathering efforts.

For half a century, the United States has exported democracy and human rights to the world, but Guantánamo has tarnished America's name and poisoned our reputation. It is imperative that we confront this predicament and that we do so quickly, before festering resentment and new allegations, whether founded or not, do any more damage. We must let the world know that we are committed to restoring our reputation and that we are taking immediate, credible steps to do so.

Therefore, I urge Congress and the Administration to appoint a truly independent, bipartisan commission to look carefully at detention, interrogation, and trials, and then report its findings and recommendations. There may be no other way to demonstrate our commitment to the rule of law. Equally important, there may be no other way to be sure that our tough-minded practices are not helping the enemy more than they are helping us.

An inquiry of that sort can succeed, however, only if it has unquestioned independence and credibility. It will not be easy to assemble such a group quickly. Even better than attempting to create a new, 9/11-style commission, therefore, would be for the 9/11 Commission itself to be reconvened. The 9/11 commissioners already have the expertise and wide public acceptance, and they are in a position to pursue this important mission with the urgency it deserves.

Attachment #2

FOLLOW-UP QUESTION (BY SENATOR PATRICK LEAHY):

"[W]hat procedures should be followed to determine that someone is an "enemy combatant"? Once such a determination is made, what type of review procedures would you recommend? What changes are necessary to federal law or the Uniform Code of Military Justice to implement your proposals?"

RESPONSE (by Professor Stephen J. Schulhofer*):

The procedures described in this response are grounded in policy concerns discussed at length at the Committee's June 15 hearing. Those concerns nonetheless should be restated briefly here. First and foremost, the rule of law is important for its own sake. Adherence to the rule of law shows the world that the United States, unlike Al Qaeda, respects the rights of the innocent. The rule of law helps promote accurate results. And one pragmatic consideration is especially powerful: *the urgent need to defuse resentment abroad.* In responding to terrorism, we must be tough and aggressive. But as many Senators and witnesses stressed, tough tactics backfire when - - as now - - they are creating dozens of new terrorists for every one we capture. Equally important, to defeat terrorism we must have the cooperation of immigrant communities in the West and law-abiding Muslim citizens in the United States and elsewhere throughout the world. Our procedures must inspire confidence, not - - as now - - anger and mistrust. With these concerns in mind, I describe the process appropriate for establishing and reviewing alleged "enemy combatant" status in a manner that is both fair and fully protective of our national security.

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* I gratefully acknowledge the assistance in preparing this response of Aziz Huq, Associate Counsel at the Brennan Center for Justice, and Julie Mandelsohn, NYU Law School Class of 2007. The views expressed here are my own.

The Administration's current working definition of an "enemy combatant" is wide, flexible, and subject to change.[1] It includes Taliban soldiers captured in battle, suspected terrorists seized far from any zone of combat, and alleged supporters of terrorism arrested by FBI agents within the United States. Though to date the Administration has not disclosed specific statistics, it is known that Guantanamo holds large numbers of detainees in both of the first two categories, and that the Naval Brig at Charleston, South Carolina, holds at least two individuals in the third category, one of whom is an American citizen.

The process appropriate for determining whether someone is an enemy combatant cannot be identical for all of these groups. As explained below, the distinction between seizures during armed combat and seizures under other circumstances is fundamental. This response first discusses combat seizures, describing:

- procedures for future battlefield captures;
- additional safeguards necessary for detainees seized years ago who have not previously had an independent hearing; and
- review procedures necessary after an initial finding of enemy-combatant status.

I then discuss the altogether different approach that is imperative in the case of seizures outside the zone of armed combat.

A. **<u>Future detainees seized in combat</u>, regardless of citizenship, should have the right to a prompt battlefield hearing comparable to the proceeding required by Army Reg. 190-8. Congress should add to the Uniform Code of Military Justice a**

[1]The current definition, set forth in the July 7, 2004 Order creating the Combatant Status Review Tribunals, includes anyone who is "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." See In re Guantanamo Detainee Cases, 355 F. Supp. 443, 475 (D.D.C. 2005). Previously, in its Supreme Court brief in Hamdi v. Rumsfeld, the government had defined an "enemy combatant," for purposes of that litigation, in considerably narrower terms, namely "an individual who, [the government] alleges, [supported] forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (plurality opinion) (internal quotation marks omitted).

new subchapter codifying the core elements of the battlefield status-determination proceeding.

Seizures on the battlefield during conventional armed combat present compelling reasons for a simplified process, and seizures of this sort are the subject of long-established practices that are uncontroversial in the international legal community and in armies throughout the world. Adhering to these longstanding procedures is practical, fair and, moreover, will protect against perceptions that the United States is inventing new rules of its own choosing in order to create legal black holes in which ordinary safeguards do not apply.

The United States military has determined through experience that the procedures set forth in Army Regulation 190-8 are the most appropriate way to process prisoners captured in battle, while combat operations are ongoing. The regulation provides for military tribunals to determine the classification of all detained individuals as soon as any doubt about their status arises. Though not used in connection with military operations since September 11, 2001, tribunals of this type were routinely deployed in prior conflicts; for example, approximately 1200 of these tribunals were convened during the 1991 Gulf War. The central features of Reg. 190-8 are summarized here to illustrate the core elements of an appropriate process for determining whether someone seized in the zone of combat is an "enemy combatant."

Reg. 190-8 provides for a tribunal of three commissioned officers, who consider sworn testimony and written statements, normally under oath, in a proceeding that is open to the detainee and others except when doing so would compromise security. The detainee has no right to counsel, but he has the rights to remain silent, to testify if he wishes, to call witnesses if reasonably available and to question witnesses called by the tribunal.

The 190-8 tribunal can make three possible determinations: that the detainee is (1) entitled to *prisoner of war status* and, thus, to the protections of the Third Geneva Convention; that he is (2) an *innocent civilian* who must be "immediately returned to his home or released"; or that he is (3) a person appropriately *detained but not entitled to prisoner of war status.* A detainee can be placed in this third category because he is either (3a) a combatant considered to have violated the laws of war, (3b) a civilian who should be interned "for reasons of operational security,"or (3c) a civilian who should be held on "probable cause incident to a criminal investigation."[2] With respect to the various types of detainees in the third category - - those not entitled to prisoner of war status - - Reg. 190-8 establishes a critically important principle: they "may not be executed, imprisoned or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[3]

These principles reflect basic requirements of fundamental fairness and due process owed to all individuals and do not depend on whether the opposing power has signed the Geneva Conventions or complied with its terms. Indeed, Reg. 190-8 itself specifies that its protections of due process and humane treatment apply to "[a]ll persons captured . . . or otherwise held in U.S. Armed Forces custody . . . from the moment they call into the hands of U.S. forces . . . ."[4] The Army's longstanding approach, in short, reflects the view that it is wise to follow Reg. 190-8 regardless of whether the 1949 Geneva Conventions apply.

Reg. 190-8 does not specifically establish a timeframe for the status-determination proceeding, but contemporary standards clearly require a "prompt" hearing - - ordinarily

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[2]"Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," Army Reg. 190-8, § 1-6(e)(10) (1997).

[3] Id., § 1-6(g).

[4] Id., § 1-5 (a) (1). Similarly, Reg. 190-8 requires that all detainees "be provided with the protections of the [Third Geneva Convention] until some other legal status is determined by competent authority," §1-5 (a) (2); and it prohibits with respect to all detainees "inhumane treatment," §1-5 (a) (4), including "sensory deprivation, . . . and all cruel and degrading treatment," §1-5 (b); insults, [and] all threats or acts of violence." §1-5 (c).

not more than eight days after a challenge to status is made, in the absence of extraordinary military exigencies.[5]

This approach allows rules of evidence and other procedural norms to be adapted to battlefield conditions, including any needs to protect classified information. Its relative informality is appropriate because it leads only to non-punitive outcomes - - either release, internment with full POW privileges, or detention with similar privileges pending a more formal proceeding, either in local civilian courts or in a court-martial under the UCMJ.[6] For anyone captured in battle who is to be afforded full Geneva Convention privileges, these procedures provide all the process that can fairly be considered due. Conversely, to classify someone as an *unlawful* combatant, who is *not* entitled to the Geneva Convention protections, a two-stage process is necessarily required - - a 190-8 tribunal must initially find a basis for denying those protections and that finding must be confirmed by a subsequent, more formal proceeding.

To implement this approach, Congress should add to the Uniform Code of Military Justice a new subchapter codifying the basic framework of a battlefield status-determination proceeding, including the requirement of a prompt hearing, and the procedural protections described above. The Department of Defense should retain the authority to establish more detailed practices and procedures, to the extent not inconsistent with the basic framework.

B. **Current detainees seized in combat and held for extended periods prior to any hearing should retain their existing right to seek relief in the federal courts. There is no need for new legislation to implement this remedy. But Congress could**

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[5]See Marab v. IDF Commander on the West Bank, H.C. 3239/02, 57 P.D. 349, ¶¶ 26, 27, 46 (Israel S. Ct. 2003); see Stephen J. Schulhofer, Checks and Balances in Wartime, 102 Mich. L. Rev. 1906, 1928-30 (2004).

[6] Reg. 190-8, § 1-5 (3) provides that "punishment of [detainees] known to have, or suspected of having, committed serious offenses will be administered [in accordance with] due process of law and under . . . the Uniform Code of military Justice . . . ."

ease any potential obstacles in these proceedings by amending CIPA to make it applicable in such cases and by authorizing the creation of a permanent corps of counsel with appropriate security clearances.

Hundreds of foreign nationals currently held at Guantánamo and elsewhere were seized during combat operations late in 2001 or early in 2002. They were not afforded the prompt battlefield hearing contemplated by Army Reg. 190-8. And a hearing along those lines cannot be considered appropriate for these detainees now, because of several intervening events - - in particular, their long periods of incommunicado confinement and public pronouncements in which the Vice President and the Secretary of Defense emphatically condemned these detainees en masse. These circumstances preclude reliance on relatively informal military proceedings in which detainees lack the assistance of counsel. The circumstances require instead a forum with more rigorous procedural safeguards and demonstrated independence from both the military and the executive branch.

Although the Judiciary Committee might explore legislation to create such a forum from scratch, it is neither necessary nor prudent to attempt to do so at this juncture. First, there is simply no need to create a new forum for the Guantánamo detainees, because the *Rasul* decision already establishes the jurisdiction of the federal courts to hear their cases under established habeas corpus procedures. That, in my judgment, is the appropriate process for detainees seized years ago who were not afforded a prompt battlefield hearing at the time of capture.

Prudential considerations also counsel strongly against efforts to create a new forum for the Guantánamo detainees. The federal courts already have jurisdiction over their cases, and it is seldom wise for Congress to intervene in ongoing litigation. Second, the courts are now deeply engaged in the process of determining what actually occurred

over the past three years and what should be the legal consequences of those events; Congress is not well situated to make case-by-case determinations of that sort.

Third, it is essential to consider the international ramifications of Congressional action in this sensitive area. Our struggle against terrorism has been weakened immeasurably by global reaction to Guantanamo, with criticism focused on the contested allegations of mistreatment and on our *undisputed* failure to provide detainees a prompt, independent determination of their status. Court decisions like *Rasul* have given the world some assurance that the United States will soon provide detainees a fair hearing in accordance with the rule of law. Against that background, it is difficult to overstate the damaging impact of any Congressional action that would be perceived as undermining those decisions.

Simply put, legislation taking the Guantánamo cases away from the courts will shock the world. Many, including our friends and allies, will be dismayed. Unless Congress creates an alternative tribunal with unimpeachable independence (a difficult challenge for any new forum, especially in an environment already poisoned by mistrust), legislation that alters the pending *Rasul* litigation will aggravate our current international predicament enormously.

The upshot, therefore, is that detainees previously seized in combat and not afforded a prompt battlefield hearing should now have the opportunity to contest their classification in the habeas corpus proceedings authorized by *Rasul*. *Habeas* courts are already well-equipped to hear such cases and to fashion appropriate procedures in the exercise of their equitable discretion. It does not appear that the Guantánamo cases will pose significant logistical problems for the District Court for the District of Columbia, given the availability of closed-circuit television to permit the personal participation of each detainee in hearings to resolve disputed issues of fact.

Though these cases can proceed smoothly even in the absence of enabling legislation, Congress could make the procedural details more manageable in two respects.

First, the Classified Information Procedures

Act currently is triggered only upon the filing of an indictment or information. Section 2 of CIPA, 18 U.S.C., app. 3, should be amended in its first sentence to provide that CIPA mechanisms may also be invoked upon the filing of "a petition under 28 U.S.C §2241," with respect to classified information matters that may arise "in connection with the disposition of the prosecution or the petition." Second, detainee litigation is likely to put extraordinary pressure on the security clearance process for counsel. Congress should therefore authorize the Administrative Office of United States Courts to establish within the Federal Defender for the District of Columbia a permanent corps of pre-cleared counsel, as described in the Brennan Center Report.[7]

C. **Review of enemy-combatant status for detainees captured in battle should be afforded not less than once a year, in a non-adversarial, parole-type hearing before an independent military tribunal. Congress should place within the Uniform Code of Military Justice new subchapter codifying the core elements of the combatant-status review proceeding.**

In the absence of prosecution for criminal offenses or war crimes, individuals held as enemy combatants can be detained only for the duration of "active hostilities" in the armed conflict that led to their detention.[8] In addition, even while the conflict continues, prisoners who are seriously sick or wounded must be repatriated, and the detaining power is obligated to consider parole, repatriation, or release to a neutral country under a variety of circumstances.[9]

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[7]See Serrin Turner & Stephen J. Schulhofer, The Secrecy Problem in Terrorism Trials 27 (Brennan Center for Justice, 2005).
[8]Third Geneva Convention, art. 118.
[9] Id., arts. 21, 109-115; Fourth Geneva Convention, arts. 132-34.

Even if the scope of the relevant armed conflict is narrowly limited, as international law requires (see section D.2. below), combatants held in connection with our conflict with the Taliban and al Queda face long-term, potentially indefinite detention. There is accordingly wide recognition of the need for regular case-by-case review of the basis for continued detention, and the Department of Defense has established a formal administrative process to conduct such reviews.[10]

Where review procedures are concerned with combatants captured on the battlefield, the predicate for initial detention is relatively reliable, and the need for formality in proceedings is accordingly reduced.[11] The regime established by the existing DoD Order provides a reasonable point of departure for considering the elements of an appropriate review process. Under that Order, (1) an Administrative Review Board must examine the need for continued detention of each combatant "at least annually."[12] The Board, (2) consisting of three or more military officers, (3) must consider all available information concerning the detainee, including information submitted by (3.a.) the detainee himself and by (3.b.) the government of the State of which the detainee is a national. The detainee is afforded (4) notice of the hearing, (5) the opportunity to be present in person and (6) the opportunity to be heard. (7) An "Assisting Military Officer" is assigned to aid the detainee at the hearing and in preparing for it, but (8) the detainee has no right to legal counsel and (9) the hearing is described as "non-adversarial."[13]

These relatively informal procedures are, in my judgment, appropriate under the circumstances and provide a reasonable forum for ongoing review of the need for continued detention, stressing again the proviso that the initial detention itself must have a reliable foundation, based either on a prompt battlefield determination for an individual

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[10] U.S. Dept. of Defense, Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, (May 11, 2004).

[11] The same principle applies to a non-combat seizure when its basis has been verified in an adversarial status-determination proceeding accompanied by substantial procedural safeguards, as described in Section D.1. below.

[12] DoD Order, supra, at ¶3.F.

[13] Id., ¶3.A.

seized in combat or, in all other cases, on a formal adversarial hearing accompanied by substantial safeguards, including the rights to presence, representation by counsel, confrontation and cross-examination.

In three respects, however, the review process established by the DoD Order is unacceptable. First, the review board's members lack sufficient independence. They are required to be officers who report to and are selected by a political appointee in the Department of Defense.[14] This lack of independence contravenes long-recognized principles that lie at the core of the Uniform Code of Military Justice,[15] as well as the rule-of-law principles that govern military justice in the armed forces of our allies.[16] To bring the review process into line with these principles, (10) the officers comprising the review board must be designated by the same process as that required for military judges under Section 826 of the UCMJ.

Second, the review board prepares only a non-binding recommendation; the actual decision whether to detain or release the prisoner is made by a DoD political appointee.[17] The insertion of an Executive Branch official at the decisive step of the decision process again contravenes principles of military justice long accepted by ourselves and our allies.[18] Respect for these principles requires a process that gives the review board not only independence but also (11) the authority to make decisions that are binding in the first instance, subject only to the independent channels of appeal established by the UCMJ.

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[14] Id., ¶2.B.1.a.

[15] See, e.g., 10 U.S.C. §826(c) (officer may act as a military judge "only when he is assigned [by] and directly responsible to the Judge Advocate General.").

[16] See, e.g., De Jong, et al. v. The Netherlands, 8 Eur. H.R. Rep. 20 ¶ 47 (1984); Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221 ¶¶ 76-77 (court-martial members must not be selected in a manner that leaves "doubts about the tribunal's independence."). See generally Armed Forces Act, 1996. c. 16 (Eng.); European Military Law Systems (Georg Nolte, ed., 2003).

[17] Id., ¶ 3.E.(v).

[18] See, e.g., De Jong v. The Netherlands, supra, at ¶48 (in a military proceeding that determines the liberty of a detainee, the presiding judge must have the power to order release, not merely to recommend it to a higher authority); Findlay v. United Kingdom, supra, at ¶¶ 76-77 ("the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of a 'tribunal.'").

The final concern - - the standard for determining whether to retain or release the detainee - - is fundamental. The existing DoD Order directs the review board and the ultimate civilian decisionmaker to order continued detention if the detainee "remains a threat to the United States and its allies . . . *or if there is any other reason that it is in interest of the United States and its allies for the enemy combatant to remain in the control of DoD*." The first part of the test is imprecise but correctable; the second part is wholly unacceptable, for reasons of basic importance.

The desire to detain whenever there is a "threat to the United States" is understandable but at odds with the limited rationale of enemy-combatant detention. It is likewise at odds with the simplified procedures which are legitimate only because of that rationale. The justification for detention as an enemy prisoner of war - - the sole justification - - is the need to prevent a return to the battlefield while hostilities continue. The point is made over and over, in every discussion of the law of war, that this is the *only* justification, period.[19] As the Supreme Court plurality stated in *Hamdi*, "It is a clearly established principle of the law of war that detention may last no longer than active hostilities."[20] Detention for any other reason (such as a perceived threat to public safety, national security or an orderly occupation) must be based on pertinent findings reached in an appropriate process, The question for a given detainee, therefore, cannot be whether he poses any sort of threat. It must focus exclusively on whether there is a significant danger that he will return to the battle while the armed conflict with al Qaeda and the Taliban remains ongoing.[21]

The flaw in the second part of the DoD test, the existence of "any other reason," is not so subtle. That part of the test, a dramatic departure from the rationale for enemy-

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[19]See, e.g., Third Geneva Convention, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); *Hamdi*, at 2641 (plurality opinion) (collecting authorities).
[20]*Hamdi*, at 2641 (plurality opinion).
[21] Cf. Jackson v. Indiana, 406 U.S. 715, 738 (1972), holding that due process "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

combatant detention, is far out of line with the rudimentary battlefield process on which detention rests. To point out that the "any other reason" standard is open-ended, vague and lacking in any guidance or constraint for the decisionmaker is to belabor the obvious. It is worth adding two points, however. First, a particularly important "other reason" that the DoD Order implicitly endorses - - that release could be denied because of a detainee's continuing intelligence value - - was firmly and explicitly rejected by the *Hamdi* plurality.[22] More broadly, the issue of possible justifications for continued detention has been confronted directly by our allies, in the specific context of the war on terrorism, and detention of enemy combatants for "any other reason" has been expressly rejected as antithetical to the rule of law.[23]

Accordingly, an appropriate review process must (12) establish a clear standard requiring release of the detainee if there is no longer a significant danger that he may return to a continuing armed conflict that was the basis for his initial detention.

To implement this approach, Congress should add to the Uniform Code of Military Justice a new subchapter codifying the basic framework of the combatant-status review proceeding, including the twelve requirements detailed above. The Department of Defense should retain the authority to establish more detailed practices and procedures, to the extent not inconsistent with the basic framework.

D. **Current and future detainees seized outside zones of military combat, if not suitable for release, should be charged with war crimes or other criminal offenses and prosecuted in criminal courts or in courts-martial under the Uniform Code of Military Justice. Congressional action is not necessary to implement this**

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[22] Id. ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.").
[23] See Emmanuel Gross, Human Rights, Terrorism and the Problem of Administrative Detention in Israel, 18 Ariz. J. Int'l & Comp. L. 721, 726 (2001) (discussing the decision of the Israel Supreme Court in the "bargaining chips" case); Schulhofer, 102 Mich. L. Rev., at 1926-27.

approach, but legislation would remove any contrary implication that might unjustifiably be drawn from congressional silence in the September 2001 resolution (the "Authorization for Use of Military Force.")

Seizures outside the zone of military combat involve more than a technical difference in context. To be sure, everyone understands that terrorism poses a global threat and that terrorists may strike indiscriminately, in any place at any time. Drawing on that analogy to the traditional battlefield, the Administration insists that by simple logic and by the accepted laws of war, military authority to seize and detain a suspected enemy combatant is identical, regardless of whether he is captured by an Army unit fighting in Afghanistan or is arrested by FBI agents at a Chicago airport.

The logic of this position and its legal assumptions are deeply flawed, but the point to stress first is simply that the move to non-combat situations does not pose any ordinary problem of determining the reach of a legal rule. The applicability of the "war" model in non-combat environments - - where law enforcement principles and criminal procedure requirements would otherwise apply - - is a question of breathtaking significance. It is as important as any issue Congress has ever considered at any time in its history. As the Supreme Court noted when it once faced essentially the same question, the issue "involves the very framework of the government and the fundamental principles of American liberty. . . . No graver question was ever considered by this court."[24] Whatever one's view on the merits of this issue, carrying military powers from situations of armed combat to other counter-terrorism settings is not a step that can follow quickly or automatically from partial analogies between the two contexts.

Yet despite the large number of Guantánamo detainees seized in civilian settings, assertions of power to detain "enemy combatants" typically give no specific attention to non-combat environments or tacitly equate them with traditional battlefields. At this

[24] Ex parte Milligan, 71 U.S. 2, 109, 118 (1866)..

Committee's June 15th hearing, speakers defending the Administration's position, whenever they made the context of capture explicit, focused exclusively on situations involving combat troops in battle. Former Attorney General Barr, for example, stressed that his "remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al-Queda."[25] He repeatedly evoked the setting and imagery of traditional combat, referring to "foreign persons captured by American forces on the battlefield," "military operational judgments," and "the circumstances of the initial encounter on the battlefield [with] our frontline troops."[26]

Elaborating on these themes, Attorney General Barr posed a vivid hypothetical: "American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the constitution vests these men with due process rights as against the American soldiers?"[27] Senator Kyl reflected the tenor of the June 15th hearing precisely when he noted that "We're talking, first of all, about people who have been captured on the battlefield *right after they have been shooting at our soldiers.*"[28]

In that battlefield setting, the process for determining enemy combatant status is legitimately simplified, of course. It hardly follows, however, that broad military powers suited to battlefield situations are also justified (or even tolerable) for counter-terrorism measures elsewhere. Indeed, it does not require a law degree or sophisticated knowledge of military history to understand that the process applicable to a seizure by troops in battle cannot be the same as the process applicable to a seizure of an unarmed individual sitting in an American college classroom or walking down the street of an American city. That basic point is not complicated, but underlying it are four large problems that make it

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[25] Testimony of the Honorable William P. Barr, (Prepared Statement), June 15, 2005, p.1.
[26] Id., pp. 4, 9, 10.
[27] Id., pp. 8-9.
[28] Transcript of Proceedings [preliminary unedited print, subject to correction], p. 62 (emphasis added).

indefensible to extend battlefield powers to places far removed from actual combat. The problems in brief, explained more fully below, are:

1. Simplified procedures have far less justification and mistakes are far more likely when determining the status of individuals seized from a civilian population outside the zone of military combat. An adversarial hearing with substantial procedural safeguards is therefore essential, even for individuals who meet the narrowest definition of an "enemy combatant."

2. Under the law of war, individuals seized outside a zone of combat can be treated as "enemy combatants" only under limited circumstances. In the many counter-terrorism situations where those requirements are not met, international law specifies unambiguously that ordinary criminal procedure - - NOT the law of war - - is the legal regime applicable to the seizure of suspects outside a zone of combat. Criminal prosecutions are therefore the only acceptable procedure for most suspected terrorists, and attempts to bring others before a different forum, with slightly less rigorous procedures, will almost always prove counterproductive.

3. International practice confirms the preceding point: Other Western countries challenged by lethal terrorist movements often resort to military force, but they consistently apply ordinary criminal procedure - - NOT the law of war - - to seizures outside the zone of actual combat.

4. Allowing the rules of war to govern counter-terrorism efforts outside the zone of combat obliterates safeguards essential to democratic government, specifically:

- the due process principles that our allies seek to maintain for seizures within their own borders;
- the core requirements of basic domestic legislation, including the Posse Comitatus Act and the definitions of substantive crimes; and
- all of the constitution's criminal-procedure checks on the Executive Branch.

In sum, in the present struggle against terrorism, the appropriate process for determining the status of suspected "enemy combatants" seized outside zones of military combat is the ordinary criminal process.[29] And this is not merely a technical conclusion. Adherence to the criminal process in non-combat situations, as America's allies have consistently done, is a principle of overriding importance - - not only workable in practice, but also essential to maintain our democratic form of government and the rule of law.

The practical feasibility of the normal criminal process is a legitimate concern, and the Brennan Center Report explains in detail the reasons for confidence that Article III courts and courts-martial under the Uniform Code of Military Justice have the tools needed to try cases fairly and efficiently while fully protecting national security interests.[30] The remainder of this discussion explains the four large problems that make it unacceptable, indeed intolerable, for the military to use battlefield processes to assess seizures in places far removed from any zone of combat.

1. *Simplified procedures have far less justification and mistakes are far more likely when determining the status of individuals seized from a civilian population outside the zone of combat.* Despite efforts by Administration supporters to gloss over these differences, they are fundamental and incontestable:

- *The need* for immediate action, lethal force and streamlined procedures decreases dramatically as we move away from the heat of battle.

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[29] In the case of individuals who participate directly in armed conflict within the meaning of the law of war, if it is judged appropriate to determine their initial "enemy combatant" status by a hearing with substantial procedural safeguards (but not by a criminal trial), such individuals cannot be punished or held in detention for a fixed term. Rather, when enemy combatant status has been determined by procedures short of a criminal trial, the detainee can be held only for the duration of the conflict, and should be entitled to review of his status, at least annually, in accordance with the procedures described in section C, above.

[30] See Turner & Schulhofer, supra.

• *Non-military alternatives*, such as conventional law enforcement, are non-existent on the battlefield but readily available elsewhere.

• *The facts needed to identify an "enemy combatant"* are directly observable by eyewitnesses on the battlefield but are inevitably complex, indirect and circumstantial in the case of suspected enemies who attempt to blend in with the civilian population.

• Because of the preceding point, an informal proceeding carries far greater *risk of error* for suspects pulled from the general civilian population than for suspects seized in battle.

These differences between combat and non-combat seizures are even more pronounced in the struggle against terrorism than in conventional armed conflict. Because al Qaeda and like groups are not a State or a movement that aspires to control a defined territory, the notion of the enemy and its adherents is necessarily more fluid. As a result:

• *the risks of error are multiplied.* In conventional wars, the criteria for "enemy combatant" designation are relatively determinate - - formal membership in the armed forces of a sovereign state or other direct assistance to an organized military force. Today, the "enemy" includes shadowy, ill-defined terror organizations, along with loosely affiliated groups, many of which lack any formal structure. And under the Defense Department's current definition, individuals can qualify as "enemy combatants" on the basis of acts that assist one of the loosely affiliated groups, even in ways that are informal and of course inevitably covert. A simplified procedure for determining such facts carries an enormous risk of error.

• *the consequences of error are multiplied.* Under the laws of war, an "enemy combatant" is detained for the duration of the conflict. Conventional

> wars, of course, can last for many years, but the "war on terror" has already lasted longer than United States involvement in World War II; indeed it is likely to last for generations, And no State has the power to make continued detention unnecessary by calling an end to the hostilities against us. As a result, an erroneous finding of enemy combatant status could well mean erroneous detention for life.

Even among the Administration's supporters, some acknowledge that the "war on terrorism" works a fundamental change in the calculus of appropriate safeguards. Former Assistant Attorney General Jack Goldsmith, for example, notes that "[b]ecause the enemy does not wear uniforms and is not affiliated with an enemy state, and because of the potentially indefinite duration of the conflict, designation errors are both more likely and more serious."[31]

The unsuitability of the battlefield model and the risks of injustice under these circumstances are evident. Though military practice in traditional wars has not sharply distinguished between combat and non-combat seizures, the latter category never had the significance it has assumed today, and military tradition for addressing non-combat seizures largely predates modern conceptions of due process,

In any event, no Supreme Court decision has ever endorsed the use of battlefield procedures to resolve disputed status issues in non-combat settings. If anything, the key precedents - - *Milligan* and *Quirin* - - strongly imply that that approach is unacceptable.[32]

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[31] Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2124 (2005). From 2003-2004, Professor Goldsmith served as Assistant Attorney General, Office of Legal Counsel.

[32]In *Ex parte* Quirin, 317 U.S. 1, 19-20 (1942), the Court stressed that military jurisdiction, a highly sensitive matter, was permissible there because the detainees were "admitted enemy invaders" - - their status was not in dispute. In *Milligan*, status was in dispute, and the Court expressly rejected the sufficiency of military procedure for resolving it. The government argued that Milligan should be considered a prisoner of war because he allegedly had supported the Confederacy by plotting to seize federal munitions and to free Confederate prisoners. The accusation - - if true - - would have made Milligan an "enemy combatant" as the Defense Department currently defines the term, and the accusation *had* been found true by the military commission that tried and convicted Milligan. Yet with little explanation, the Court dismissed the "prisoner of war" argument as absurd, leaving the government no basis for attempting to establish the

An adversarial hearing with substantial procedural safeguards is therefore essential, even for individuals who meet the narrowest definition of an "enemy combatant." The process would not necessarily have to include the right to a jury trial or strict compliance with all the nuances of the hearsay rule. But the elements of an appropriate hearing are already well-defined in Supreme Court decisions examining the due process prerequisites for non-punitive detention in such settings as civil commitment and preventive detention before trial. Those elements would have to include, at a minimum, an independent tribunal; notice of the basis of the accusation; the right to counsel (including appointed counsel for the indigent); the right to be present throughout the proceedings; the rights to remain silent, to testify if the detainee wishes, to call witnesses if reasonably available and to question witnesses called by the tribunal; and proof by clear and convincing evidence.[33]

2. *Under the law of war, individuals seized outside the zone of combat can be treated as "enemy combatants" only under limited circumstances; in all other situations, ordinary criminal procedure is the only acceptable regime for determining the status of suspected terrorists found among the civilian population.*

Under international law, the rules that determine permissible conduct during warfare (known as the *jus in bello*) come into play in two and only two situations: "international armed conflict" and "non-international armed conflict." Both are defined with care because of the distinctive - - and dangerous - - system of rules that warfare brings into effect. In war, a combatant in uniform is permitted to kill his adversary, even when the adversary poses no immediate threat - - an act of killing that normally would be

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alleged facts in any military forum. The Court simply took it to be obvious that Milligan was a civilian and held that his alleged support for Confederate troops was a matter to be resolved by jury trial in the Indiana courts. *Milligan*, supra, 71 U.S., at 122, 127.

[33] See United States v. Salerno, 481 U.S. 739 (1987); Addington v. Texas, 441 U.S. 418 (1979).

murder. And a combatant captured by the other side can be held as a prisoner for the duration of the conflict, even when the captive has committed no illegal act. Because these rules displace the restrictive laws that ordinarily govern detention and the use of deadly force, it is essential that their domain be limited; governments cannot be left free to confer on themselves at will the largely unchecked powers of seizure, detention and summary killing that warfare permits. The boundaries of the situations triggering the regime of warfare are matters of utmost consequence, not to be lightly expanded or disregarded.

For that reason, international law defines "international armed conflict" and "non-international armed conflict" restrictively. The former requires at least one State on each side of the conflict.[34] The latter, despite its name, does not cover all other sorts of conflict; instead non-international armed conflict exists only when there is an conflict between a State and armed groups which "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."[35] The commentaries on the law of war, including those of our own Armed Forces, all make clear that in order to trigger the special rules applicable in warfare, there must be either an armed conflict between States or a conflict involving an organized military force that controls territory within a state.[36] If a conflict does not meet these criteria, the special laws of war do not apply, and domestic criminal procedure governs.[37]

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[34] See Third Geneva Convention, art. 2.

[35]Protocol II Additional to the Geneva Conventions of 12 August 1949, art. 1(1) (1977). Comparable language is used in other international documents to define the only class of conflicts, other than conflicts between sovereign States, which trigger the regime of broad powers to seize or kill unarmed, nonthreatening adversaries. See International Committee of the Red Cross, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 49 (Jean Pietet ed. 1952) ("an organized military force, [and] an authority responsible for its acts, acting within a determinate territory . . ."); International Criminal Tribunal for Rwanda, Musema (Trial Chamber), January 27, 2000, paras. 247-248 ("open hostilities between armed forces which are organized to a greater or lesser degree[, operating] within the territory of a single State.").

[36]Law of War Workshop Deskbook 31-32 (International and Operational Law Dept., Judge Advocate General's School, U.S. Army, 2000), available at: http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf.

[37]Id.

Under these standards, the law of war can legitimately be applied to certain suspected terrorists. But the Administration's conception of an "enemy combatant" is far too broad, taking in many whose brutal attacks are grave crimes but not acts of war within the specialized law of armed conflict.

The ongoing insurgency in Afghanistan, for example, qualifies as "non-international armed conflict." Taliban and al Qaeda guerrillas operating there are "enemy combatants," as are sympathizers elsewhere who directly participate in the conflict, for example, by carrying out acts of sabotage or violence intended to support that insurgency. The surviving perpetrators of the recent London transit bombings, whose announced goal was to force the withdrawal of British troops from Afghanistan and Iraq, therefore could presumably be treated as enemy combatants under traditional principles. But even so, it would be intolerable for suspects pulled from the civilian population in Britain to be classified as enemy combatants merely on the basis that our Administration considers sufficient - - a "finding" by President Bush or at most a summary proceeding like that afforded to fighters captured in battle. Instead, a fair and reliable status determination for accused combatants would require, at a minimum, an adversarial hearing with such safeguards as the right to counsel, confrontation of witnesses, and proof by clear and convincing evidence.

The further complication entailed in this approach is that the status-determination proceeding, even with substantial safeguards, cannot supplant the ordinary criminal process for suspected terrorists not tied to a territorial insurgency or for individuals who support an insurgency in the many ways that do not qualify as "direct participation,"[38] Despite Administration arguments to the contrary, there is no basis for the claim that

[38] The requirement of *direct* participation is a crucial limitation under the laws of war, and it cannot be satisfied merely by acts that support or assist the war effort; otherwise, any civilian would become a combatant merely by purchasing a war bond or working in a factory that produces ammunition. Instead, direct participation requires "acts of war which by their nature and purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces . . . . [G]eneral participation in the war effort" is not sufficient. Law of War Deskbook, supra, at 128-29 & n. 8.

terrorists not affiliated with a State or a territorial insurgency are engaged in "armed conflict," as that term is understood in the law of war. Nor is there any basis for the Administration's even more strained position, in its broad definition of an "enemy combatant," that any person who "supports" a party to the armed conflict[39] - - such as the individual in Switzerland who unwittingly contributes to an al Qaeda front organization[40] - - can be considered a "direct participant," in the sense required to trigger law-of-war powers.

When the suspected terrorist involvement is of this indirect nature, then whether or not the suspicions are founded, the individuals concerned cannot properly be classified as "enemy combatants." They must be pursued in the ordinary criminal process, with all the safeguards which that process affords even to the most brutal and dangerous killers.

This need to rely on the criminal process after seizure is an issue distinct from the scope of Presidential power to use military force and the reach of the "Authorization to Use Military Force." Throughout our history, Presidents have used military force for various purposes abroad, some of which involved "armed conflict" within the meaning of international law, and some of which did not. These uses of military force do not inevitably bring into play all dimensions of the law of war, nor do they inevitably displace criminal procedure. Our invasion of Panama in the 1980s is a clear example. The President used military force, not conventional law enforcement, to capture General Manuel Noreiga. But once he was captured, he was not simply held as a prisoner of war; he was brought to the United States and tried on criminal charges in an Article III court. As discussed in the next section, other countries typically use the same approach when they deploy military forces in aid of counter-terrorism efforts.

In sum, for suspects seized outside the zone of combat, the appropriate process for determining status as an "enemy combatant" - - as broadly defined by the Department of

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[39]See note 1 above.

[40]See *In re Guantanamo Detainee Cases*, supra, 355 F. Supp. 2d, at 475.

Defense - - technically must vary according to the kind of involvement alleged; the process would depend on whether the alleged participation was "direct" and whether the terrorist group was affiliated with an insurgency like that in Afghanistan. Yet it serves little purpose to pursue these elusive questions, since individuals alleged to be enemy combatants in the narrow sense still must be afforded extensive procedural protections. The additional safeguards attached to the criminal process are significant, but counter-terrorism officials would be able to avoid them only by undertaking a time-consuming effort to show that the evidence will establish exactly the right kind of terrorist involvement.

Under these circumstances, the determination of enemy combatant status cannot profitably be assigned to a distinctive process for a particular, contestable subset of the terrorism suspects seized off the battlefield. Captured suspects who concede their enemy combatant status by acknowledging membership and leadership roles in al Qaeda can, of course, be detained for the duration of the conflict, or they can be prosecuted for war crimes in courts-martial conducted under the Uniform Code of Military Justice. For all other suspects found among the general civilian population, their involvement should be determined through the ordinary processes of the criminal law, specifically the Article III courts for suspects arrested in or extradited to the United States, and the local criminal courts for other suspects captured abroad.

3. *International practice confirms the preceding point: Other Western countries challenged by lethal terrorist movements often resort to military force, but they consistently apply ordinary criminal procedure - - NOT the law of war - - to seizures outside the zone of actual combat.*

Over the past several decades, Britain, Spain, Italy and other European countries, as well as Israel, have confronted tenacious terrorist organizations and persistent

campaigns of highly lethal attacks on their civilian populations, often under circumstances easily compared to war, But even when they have brought troops into the battle, they have relied on criminal processes to determine the status and treatment of captured terrorists.

The British experience is illustrative.[41] In the late 1960s and early 1970s, terror attacks by the Irish Republican Army, aimed at driving Britain from Northern Ireland, triggered a public order crisis, with bombings and shootings daily. The British Army was deployed in efforts to restore peace. The IRA responded by taking its campaign of bombings and assassinations to Britain itself; a 1974 terror attack in Birmingham was described as an "act of war," and "the greatest threat since the end of the Second World War."[42] Belfast remained embattled for two decades, and the death toll over that period for Northern Ireland (a territory with a population less than a quarter that of New York City) exceeded 2750, more than 2000 of them civilians. The British Army spearheaded the counter-terrorism effort, but throughout the crisis, captured IRA members and suspects were processed in accordance with British criminal procedure, not military law.

Spain follows the same policy in its struggle against Basque separatists. The other European countries consistently adhere to that approach as well, and Israeli policies are comparable. In short, other Western nations, even when they deploy military force in their own battles against terrorism, apply ordinary criminal procedure, not the law of war, to suspects seizured outside the zone of actual combat.

4. *Allowing the rules of war to govern counter-terrorism efforts outside the zone of combat obliterates safeguards essential to democratic government.*

Where the rules of war control, they permit Army units and special forces to use lethal force, on or off the battlefield, abroad or even within the United States, to seize or

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[41] See Schulhofer, supra, 102 Mich. L. Rev., at 1931-54.
[42] Id., at 1933, 1937.

kill suspected enemy combatants. If truly applicable, as the Administration alleges, those rules permit American military personnel to override a wide range of rule-of-law safeguards, specifically the due process principles our allies apply within their own borders, the core limits on Executive power that underlie domestic legislation, and the criminal procedure safeguards inscribed in the Constitution itself.

(a) The law of war, if applicable, allows the United States to negate due process principles that our allies seek to maintain for seizures within their own borders.

In conventional wars, if an enemy spy or saboteur seeks to blend into the civilian population of a neutral or allied nation, the rules of warfare permit our agents to seize him peremptorily and whisk him out of the country (or, in lieu of seizure, possibly even to kill him on the spot), without respecting the requirements for a legal arrest under local criminal procedure. This kind of abduction or assassination is not unusual in traditional warfare. It poses no special problem if done with the permission of local authorities, and if local authorities refuse to cooperate, our right of self defense in wartime could make the abduction or assassination allowable even without their permission.

In the context of counter-terrorism efforts, however, the potential for conflict with the due process norms of our allies is acute, and the problem is not merely a hypothetical speculation. An Italian judge recently indicted 13 alleged CIA agents on charges that in 2003 they abducted a Muslim cleric (an suspected terror suspect) from the streets of Milan and had him flown to Egypt for interrogation. Italian security services may or may not have given tacit consent for the alleged operation, but Italian officials insist that the actions were flagrantly illegal under Italian law, no matter who may have approved them.[43]

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[43] Ian Fisher & Douglas Jehl, "Italy Denies Having Role in Seizure of Terror Suspect," N.Y. Times, July 1, 2005, p. A4.

Aspects of the Italian case remain unclear or disputed, and the CIA has refused all comment. But for present purposes, the point is that if the struggle against terrorism confers wartime powers outside the zone of actual combat, the alleged operation would be perfectly legal - - even if American agents had carried it out exactly as alleged. In short, the same acts of seizure and detention that the Administration insists on regarding as a normal aspect of the law of war, applicable throughout the world, are regarded by our allies as grave crimes, antithetical to legality as they understand it.

(b) For seizures within the United States, the rules of warfare nullify core structural principles of domestic legislation.

The law of war, if truly applicable within the United States, overrides longstanding legislative restraints on Executive power. All wars have that effect to some extent, but the stakes are much higher in a "war on terrorism" because of its indefinite duration: though nowhere near its end, this war has already lasted longer than the Spanish-American War, the Korean War, and American involvement in each of the two World Wars.

The threat to legislative checks on Executive power is compounded by the amorphous criteria for enemy-combatant status and by the uniquely dominant role of suspects mingling among civilians. In previous wars, virtually all combatants wore uniforms and confronted us on the battlefield; only a tiny percentage were clandestine agents. Today the reverse is true. The practical significance of using war powers to determine the fate of ostensible civilians is therefore magnified enormously.

The contrast between war powers and the normal restraints of domestic legislation, though obvious, is worth making concrete. The material-support statute provides one example. The criminal offense of providing material support to a terrorist organization addresses in meticulous detail the specific organizations and the kinds of support that can qualify, the awareness the defendant must have of the relevant facts, and

the extraterritorial reach necessary to insure that terrorists who operate overseas cannot escape American law. After some courts ruled that the statute, despite its detail, posed problems of vagueness, Congress amended it in December 2004 to further clarify its scope; the resulting provision now runs to 1,923 words. But if the law of war applies outside the zone of combat, as the Administration insists, those definitions and limitations have little significance, because an individual becomes an "enemy combatant," under the definition promulgated by the Department of Defense, whenever he is "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[44] The language elaborately crafted by Congress is superceded by 25 uninformative words. In fact, the operative terms "supporting" and "associated forces" provide all the explanation there is within this domain of law-of-war powers.

For over one hundred years, a foundational safeguard of American freedom has been the insistence on excluding the military from domestic law enforcement. Subject to narrow exceptions, the Posse Comitatus Act prohibits use of the Army "to execute the laws."[45] But if the rules of warfare govern the seizure of suspected terrorists within the United States, then these seizures of ostensible civilians become military operations, not law enforcement measures, and the Posse Comitatus Act ceases to apply. In the context of a war on terrorism, the "enemy combatant" category in effect permits the military to do exactly what the Posse Comitatus Act was designed to forbid,

(c) For seizures within the United States, the rules of warfare swallow up much of the Constitution and the Bill of Rights.

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[44] See *In re Guantanamo Detainee Cases*, supra, 355 F. Supp. 2d, at 475.
[45] 20 Stat. 152 (1878), as amended, 18 U.S.C.A. §1385 (2005).

In the distinctive context of combating global terrorism, if the law of war is applicable to seizures within the United States, it suspends many core constitutional restraints on the Executive Branch. *Hamdi* of course reaffirmed the longstanding principle that a state of war does not suspend constitutional protections altogether. Any U.S. citizen detained by the military, and presumably any non-citizen initially seized within the United States, has the right to a fair hearing with due process safeguards determined by a "balancing of interests," the so-called Mathews v. Eldridge analysis.[46] That approach, properly understood, makes substantial procedural safeguards mandatory, as described above.[47]

But these safeguards, as important as they are, fall well short of those which apply in situations of ordinary law enforcement. Anyone arrested within the United States has a constitutional right to be brought to court within 48 hours for an independent judicial determination of probable cause, the right to a speedy, public trial by jury, strong rights to confront and cross-examine all opposing witnesses, the right to be judged only under clear prohibitions established prior to the alleged conduct, and the right not to be convicted in the absence of proof beyond a reasonable doubt.

These significant protections, however, become largely or wholly inapplicable when the rules of warfare are properly invoked. Allowing the military to treat suspects found within our civilian population as "enemy combatants" would in effect obliterate these provisions of the Bill of Rights, because the safeguards applicable to determining criminal responsibility - - safeguards designed to serve as a check on the Executive Branch - - would cease to apply whenever the Executive Branch itself chose to invoke its war powers to render them inoperative.

The other important constitutional provision pertinent here is the Commander-in-Chief clause of Article II. The President's legitimate powers under that provision are

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[46] Mathews v. Eldridge, 424 U.S. 319 (1976).

[47] The minimum acceptable procedures for status-determinations in the case of seizures outside the zone of combat are discussed in section D.1., above.

vital to the national well-being, and especially so when our Armed Forces confront an adversary in combat operations anywhere in the world. But it is crucial to remember that the purpose of the Commander-in-Chief clause was to place the military under civilian control, not to place civilians under military control. The elastic concepts underlying the war on terrorism, if allowed to operate outside the zone of actual combat, serve to reverse this essential principle of American democracy.

Congress should make explicit, clarifying the "Authorization to Use Military Force," that anyone seized within the borders of the United States is entitled to have disputed allegations of terrorist activity resolved by the Article III courts in accordance with the Bill of Rights and the ordinary criminal process.

SUBMISSIONS FOR THE RECORD

Senate Committee on the Judiciary
Hearing on Detainees

Statement by Amnesty International USA
June 15, 2005

Amnesty International commends the Senate Committee on the Judiciary for examining the treatment of detainees, and seeking to determine how to treat individuals in accordance with U.S. and international law while maintaining the highest standards for national security. Amnesty International believes that the best and most effective way to promote security is to preserve human rights and the rule of law. Departure from long established, fundamental legal protections only promotes lawlessness and ultimately makes everyone less safe.

Amnesty International's 1.8 million members worldwide are dedicated to working against human rights abuses committed by governments and armed groups around the world. For more than four decades, our work has been guided by the Universal Declaration of Human Rights and other international standards, including the Geneva Conventions, which the United States championed and helped create over many decades. Our recently released annual report summarizes human rights concerns in 149 countries and territories. We strive to be objective and impartial.

Amnesty International joined the world in condemning the brutal attacks on September 11, 2001, denouncing them as crimes against humanity and demanding justice in accordance with the law. Amnesty International recognizes that governments not only have the right, but the obligation to ensure the security of their people.

The world looks to the United States as a leader to set the standards for protecting and promoting human rights, human dignity, and the rule of law. That is why it is especially devastating that policies and practices of the U.S. government today are inconsistent with U.S. law and international human rights standards. Evidence continues to mount of torture and other cruel, inhuman, or degrading treatment perpetrated by U.S. military and other personnel against detainees in Iraq, Afghanistan, Guantánamo, and in secret locations elsewhere. The extensive and compelling body of evidence comes from many sources, including the outcome of official U.S. investigations, statements by U.S. military personnel, agents of the Federal Bureau of Investigation and the International Committee of the Red Cross (ICRC), as well as testimony by detainees.

According to the preamble of the Universal Declaration of Human Rights, human rights are the "equal and inalienable rights of all members of the human family". All detainees, regardless of their status, must be treated in accordance with international law and standards. Rather than pursuing the masterminds of the September 11 attacks within the bounds of the law, apprehending and bringing them to justice before an established court of law, the administration instead chose to misconstrue and circumvent the rule of law, asserting that it was using new thinking to fight a new war. As a result, brutal tactics long justified by human rights abusing regimes-- torture, arbitrary, incommunicado and indefinite detention, and disappearances -- are now on the U.S. government's agenda.

Interrogations and Investigations

Since September 11, the United States has used interrogation tactics, some with the direct approval of Secretary of Defense Rumsfeld, that have long been recognized as torture by the United States and the international community. On April 7, 2005, the Wall Street Journal, published a two-part article by Jess Bravin detailing interrogation techniques used by the Japanese against U.S. soldiers in World War II, which were later prosecuted as war crimes. "Along with routine beatings, Japanese interrogators had used solitary confinement, sleep deprivation, blindfolding, head shaving, restricting meals, uncomfortable positions and other techniques to make prisoners talk. Japan failed to register some prisoners or facilities with the Red Cross." Following World War II, the United States prosecuted Japanese soldiers involved in such behavior for war crimes. The Bravin article stated that "Officers were held liable for their subordinates' mistreatment of prisoners -- even if they tried to stop the abuse." All of these interrogations tactics have been used in the "war on terror," some with the direct approval of Secretary of Defense Rumsfeld. To date, not a single high level military or civilian official has been held to account for torture and ill-treatment of detainees in U.S. custody. To the contrary, internal government investigations have claimed to absolve high level administration officials, though they did not interview them or have the mandate to investigate them.

The investigations conducted by the government have not been complete, transparent or independent. Most have been internal, many run by military officials who could only investigate people of their rank and below, with no ability to look up the chain of command or at the civilian leadership. The only investigation purported to be "independent" was comprised of a panel personally selected by Donald Rumsfeld. The investigation by Vice Admiral Church, intended to be a comprehensive report on all U.S. detention and interrogation operations, turned into a 378 page report that was classified with a brief 21 page summary made available to the public. By his own admission, Vice Admiral Church did not interview any top level civilian or military officials, and he did not have the mandate to assign responsibility or draw conclusions.

The biggest gap in accountability is with the Central Intelligence Agency. An internal investigation by the Inspector General of the CIA has not been shared with other investigators, been made public, or turned over to Congress. The CIA has been implicated in the most serious abuses of human rights, including the operation of secret detention facilities in places like Jordan, Thailand and Diego Garcia where known and unidentified detainees are being held arbitrarily, incommunicado, and indefinitely without visits by the Red Cross. The CIA has also been in charge of the "torture express," a collection of private jets used to shuttle detainees into the custody of countries with a documented history of torturing suspects in custody. This practice of "extraordinary rendition" is being justified by flimsy verbal assurances from countries such as Syria and Egypt that they won't torture the suspect in question. The U.S. government has failed to pass any regulation to reign in CIA operations and prevent torture and other cruel, inhuman, or degrading treatment. The latitude given to the agency, coupled with the secrecy surrounding its actions, only serves to exacerbate existing concerns about the human rights abuses that have come to light.

"Enemy Combatant" Status

The U.S. government has applied the ambiguous status of "enemy combatant" to people picked up in various situations around the world -- citizens and non-citizens alike-- asserting it has the

right to hold "enemy combatants" indefinitely, without charge or trial, until the end of the self-declared "war on terror," which by the administration's own admission may have no end. The notion that any government can detain a person for the rest of his or her natural life without charge or trial violates a most basic right. This ambiguous status underlies policies and practices that run counter to U.S. obligations under federal and international law.

Military Commissions

Military commissions, established under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on November 13, 2001, provide for the prosecution of "enemy combatants who violate the laws of war." The proposed military commission trials are executive bodies set up to obtain the conviction of foreign nationals on lower standards of evidence than would hold in the U.S. courts. They are an example of the U.S. government's assertion that the execution of the "war on terror" need not be restrained by the rule of law. It is particularly shocking that people could face execution after trials that so flagrantly violate fair trial standards. Some of the problematic aspects of the commissions are:

- The commissions entirely lack independence from the executive.
- The right to counsel of choice and to an effective defense is severely restricted.
- The government can use secret evidence which the defendant will be unable to rebut.
- The defendant can be excluded from certain parts of the proceedings and is not allowed to know what evidence was presented against him in the closed session.
- Information extracted under torture or other coercion can be admitted into evidence, in violation of Article 15 of the Convention Against Torture, which states "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."
- There will be no right of appeal to an independent and impartial court.
- Only foreign nationals are eligible for such trials, violating the prohibition on the discriminatory application of fair trial rights. A U.S. citizen, whether soldier or civilian, charged with a similar crime would not face trial by military commission, and would have the right to appeal to higher courts of law.

These are just of few of the problems with the military commissions. The commissions, created at the whim of the executive, can change the rules at any time. This, coupled with the fact that there is no case law or precedent on which to rely makes the preparation of a proper defense almost impossible. The inherent injustices created by the military commissions were so severe that Judge Robertson felt compelled to halt the proceedings. The decision in the case of Hamdan v. Rumsfeld has been appealed to the DC Circuit court and a decision is pending.

Combatant Status Review Tribunals

Unlike the small number charged before the military commissions (four detainees), hundreds of detainees were subjected to the Combatant Status Review Tribunals (CSRTs). The U.S. government instituted the CSRTs in order to make the claim that detainees have been given an opportunity to challenge their detention before a neutral tribunal satisfying the Supreme Court's decision confirming that U.S. courts have jurisdiction to hear legal challenges to the

ongoing indefinite detention at Guantánamo Bay. To date, the U.S. government has put 558 detainees through CSRTs to determine whether or not they are "enemy combatants," finding that 520 were. The CSRTs have as many fatal flaws as the military commissions, yet an "enemy combatant" designation can lead to an effective life sentence, allowing the U.S. government to continue to detain the person without charge or trial for the rest of his or her natural life.

Among the myriad problems with the CSRTs is that they do not allow detainees to be represented by an attorney, including those facing charges before the military commissions. The CSRTs provide detainees with a "personal representative" who does not advocate for the detainee and is not bound by confidentiality with the assertion that they would help the detainees contact witnesses or gather evidence the detainees wish to use in their defense. Government attorneys admitted in court that evidence obtained by torture was admissible in the CSRTs, and the CSRTs themselves were riddled with translation problems. In addition, detainees faced vague allegations presented in unclassified summaries, while other evidence was presented in a closed session which the detainee was not allowed to attend. In February, Judge Green ruled that the CSRTs do not meet the minimum requirements of due process.

Independent Commission

The administration has repeatedly stated that allegations of abuses by U.S. personnel are fully investigated in a transparent way. While there have been reviews by some U.S. government agencies of detention and interrogation policies and practices since the Abu Ghraib torture scandal came to light, none of the investigations to date has been fully independent or of sufficient scope, and the findings have largely been kept classified. Certain practices remain shrouded in secrecy, including the alleged involvement of the Central Intelligence Agency in secret detentions and secret transfers of detainees to countries with records of torture.

Despite growing evidence that U.S. policies and practices have violated the absolute prohibition of torture and ill-treatment and other rights -- in some cases leading to the death of detainees -- no senior officials have been held to account, and not a single U.S. agent has been charged under the Anti Torture Act or War Crimes Act. Only a few, mainly low-ranking soldiers, have been brought before courts-martial or given non-judicial or administrative sanctions.

A comprehensive, truly independent commission, and the appointment of Special Counsel to initiate prosecutions where warranted are important measures of redress that will not only ensure justice in the United States, but also ensure that the United States remains a powerful force for ensuring respect for human rights worldwide. For this to happen, the U.S. government cannot speak the language of human rights while at the same time violating human rights and disregarding international law. In these circumstances any criticism of the human rights records of others is drained of moral power.

Conclusion

Military commissions fall far short of the most basic due process standards, the CSRTs are an aberration, and neither of these processes legitimizes the existence of the broad and ambiguous category of "enemy combatant." It is time for the U.S. government to apply the human rights standards it is bound by and either charge any detainees accused of crimes and try them in a court that meets fair trials standards, or release detainees unconditionally and send them to a

place where they will not face torture or other serious abuse. Contrary to the administration's assertion, there is no tension between human rights and security, but instead a direct relationship between the two. Actions that jettison the rule of law and human rights signal that the rules no longer apply. It is difficult to ignore basic protections afforded detainees by domestic and international law and simultaneously invoke those protections for one's soldiers and citizens.

Human rights are an integral part of true security. They are the product of historic wisdom regarding how to order safe, prosperous, and peaceful societies. They help determine the truth, instead of relying on methods like censorship, stereotyping, rumor, innuendo, or torture as deeply flawed means of finding truth and making correct social decisions.

If the United States has nothing to hide, it should welcome an investigation by an independent commission. It is essential that Congress not try to create a third way somewhere between the rule of law and the administration's insistence on the absence of law. Congress should instead act to reverse this message, ensure an independent investigation into allegations of torture and ill-treatment, and help restore the rule of law. Policies that facilitate torture, in Guantánamo Bay, Abu Ghraib, Bagram, and beyond make everyone less secure.

Testimony of
The Honorable William P. Barr
Former Attorney General of the United States

June 15, 2005

Mr. Chairman, and Members of the Committee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al-Qaeda. By way of background, I have previously served as an Assistant Attorney General, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency. The views I express today are my own.

My remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al-Qaeda and, specifically, on the adequacy of the procedures governing their continued detention as enemy combatants and, in the cases of some detainees, their prosecution before military commissions for violations of the laws of war.

It is important to understand that the United States is taking three different levels of action with respect to the detainees. These are frequently confused in the popular media.

First, as a threshold matter, the United States is detaining all these individuals simply by virtue of their status as enemy combatants. The essence of war is the destruction of the enemy's forces – either by killing them or capturing them. When the American military captures and holds hostile forces, it does not do so as a punishment or as a prelude to eventual punishment. Our purpose is to incapacitate the enemy by eliminating their forces from the battlefield. Captured enemy forces are normally detained for as long as the enemy continues the fight.

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals ("CSRTs") to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an armed force covered by the protections of the Geneva Convention and hence entitled to POW status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various requirements of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination

in deciding whether the Convention applies is a "group" decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. Shortly after the attacks of 9/11, the President established military commissions to address war crimes committed by members of al-Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military commissions.

Let me turn to address some of the challenges being made to the way we are proceeding with these al-Qaeda and Taliban detainees.

I. The Determination That Foreign Persons Are Enemy Combatants

The Guantanamo detainees' status as enemy combatants has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces on the battlefield have a Due Process right under the Fifth Amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. In over 225 years of American military history, there is simply no precedent for this claim.

The easy and short answer to this claim is that it has been, as a practical matter, mooted by the military's voluntary use of the CSRT process, which gives each detainee the opportunity to contest his status as an enemy combatant. As discussed below, those procedures are clearly not required by the Constitution. Rather they were adopted by the military as a prudential matter. Nonetheless, those procedures would plainly satisfy any conceivable due process standard that could be found to apply. In its recent Hamdi decision, the Supreme Court set forth the due process standards that would apply to the detention of an American citizen as an enemy combatant.[1] The CSRT process was modeled after the Hamdi provisions and thus provides at least the same level of protection to foreign detainees as the Supreme Court said would be sufficient to detain an American citizen as an enemy combatant. Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Moreover, most of the guarantees embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's

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[1] Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

prisoner-of-war status, pursuant to the Geneva Convention,[2] could satisfy the core procedural guarantees owed to an American citizen.[3] In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel.[4] Furthermore, the United States has voluntarily given all detainees rights that are not found in *any* prisoner-of-war status hearing, including procedures to ensure the independence of panel members and the right to a personal representative to help the detainee prepare his case.[5]

Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in the zone of battle have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth Amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the Fifth Amendment does not have extra-territorial application to foreign persons outside the United States.[6] As Justice Kennedy has observed, "[T]he Constitution does not create, nor do

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[2] The procedures are created under Army Regulation 190-8. Opening Brief for the United States, Odah v. United States, at 31.

[3] Hamdi, 124 S.Ct. at 2651.

[4] Opening Brief in Odah at 33-34.

[5] Id. at 34-35.

[6] Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Eisentrager and Verdugo for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory."[7] Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. And finally, the nature of the power being used against these individuals is not the domestic law enforcement power – we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws – rather, we are waging war against them as foreign enemies, a context in which the concept of Due Process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decision-making. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a "neutral" arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this – an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

These efforts flow from a fundamental error – confusion between two very distinct constitutional realms. In the domestic realm of law enforcement, the government's role is disciplinary – sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of "the people."

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[7] Verdugo-Urquidez, 494 U.S. at 275 (Kennedy, J., concurring).

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its *national defense powers* to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory – even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

It seems to me that the kinds of military decisions at issue here – namely, what and who poses a threat to our military operations – are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that

the office holds the final authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.

I am not speaking here of "deference" to Presidential decisions. In some contexts, courts are fond of saying that they "owe deference" to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference – the point here is that the ultimate substantive decision rests with the President and that courts have no authority to substitute their judgments for that of the President.

The Constitution's grant of "Commander-in-Chief" power must, at its core, mean the plenary authority to direct military force against persons the Commander judges as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the conflict. At the heart of these kinds of military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person – detaining him – unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team.

Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them – i.e., deprive them of life – could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens' Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts from the domestic prosecutive arena as a basis for judicial supervision of our military operations in time of war would not only be wholly unprecedented, but it would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission – the rapid destruction of the enemy by all means at their disposal – to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war – especially irregular warfare – vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into

demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

The Supreme Court's decision in Rasul v. Bush does not undercut these long-standing principles. In Rasul, the Supreme Court addressed a far narrower question – whether the habeas statute applies extraterritorially – and expressly refrained from addressing these settled constitutional questions.[8] The Court, in concluding that the habeas statute reached aliens held at Guantanamo Bay, relied on the peculiar language of the statute and the "'extraordinary territorial ambit' of the writ at common law."[9] Of course, the idiosyncrasies of the habeas statute do not have any impact on judicial interpretation of the reach of the Fifth Amendment or other substantive constitutional provisions. Moreover, the Court's recognition in Rasul that the United States exercises control, but "not ultimate sovereignty" over the leased Guantanamo Bay territory confirms the inapplicability of the Fifth Amendment to aliens held there.

Nevertheless, even if Guantanamo Bay is somehow deemed sovereign United States territory, the Fifth Amendment is still inapplicable. The Supreme Court, in addition to the requisite detention on sovereign United States territory, demands that the aliens only "receive

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8 124 S. Ct. 2686 (2004).

9 Id. at 2697 n.12 (quoting R. Sharpe, Law of Habeas Corpus 188-189 (2d ed. 1989)).

constitutional protections" when they have also "developed substantial connections with this country."[10] Thus, under the Court's formulation, "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" sufficient to trigger constitutional protections. The "voluntary connection" necessary to trigger the Fifth Amendment's due process guarantee is sorely lacking with respect to enemy combatants. Whatever else may be said, there can be no dispute that these individuals did not arrive at Guantanamo Bay by free choice. Captured enemy combatants that have been transported to Guantanamo Bay for detention thus are not entitled to Fifth Amendment due process rights.

It should also be noted that the Supreme Court's decision in Rasul was a *statutory* ruling, not a *constitutional* one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.[11]

An important consequence follows: Congress remains free to restrict or even to eliminate entirely the ability of enemy aliens at Guantanamo Bay to file habeas petitions. Congress could consider enacting legislation that does so – either by creating special procedural rules for enemy alien detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from haling military officials into court altogether.

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[10] Verdugo, 494 U.S. at 271.

[11] See Rasul, 124 S. Ct. at 2695 (explaining that, in light of the Court's interpretation of the habeas statute, "persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review"); id. at 2701 (Scalia, J., dissenting) (emphasizing that "petitioners do not argue that the Constitution independently requires jurisdiction here" (citing statement by counsel for petitioners during oral argument)).

II. Determination of Status under the Geneva Convention

The President has determined that neither members of al-Qaeda nor Taliban fighters are entitled to the protections of the Geneva Convention. While some lower courts and some critics have carped about this decision, there can be no doubt that al-Qaeda and the Taliban fail to meet the Geneva Convention's eligibility criteria.

The Geneva Conventions award protected POW status only to members of "High Contracting parties."[12] Al-Qaeda, a non-governmental terrorist organization, is not a High Contracting party.[13] This places al-Qaeda – as a "group" – outside the laws of war. Furthermore, al-Qaeda and the Taliban fail to meet the eligibility criteria set forth in Article 4 of the Geneva Convention. To qualify for protected status, the entity must be commanded by a person responsible for his subordinates, be outfitted with a fixed distinctive sign, carry their arms openly, and conduct their operations in accordance with the laws of war.[14]

Al-Qaeda and the Taliban fail to satisfy even one of these four bedrock requirements. These enemies our armed forces face on the battlefield today make no distinction between civilian and military targets and provide no quarter to their enemies. They have no organized command structure and no military commander who takes responsibility for the actions of his subordinates. Al-Qaeda and the Taliban wear no distinctive sign or uniform and violate the laws of war as a matter of course. Consequently, these organizations do not qualify for the POW protections available under the Geneva Convention.

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[12] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2.

[13] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

[14] Id. at art. 4A(2).

For these reasons, the President rightly concluded that al-Qaeda and the Taliban do not qualify for POW status under Article 4 of the Geneva Convention.[15] The President's determination that the Geneva Convention does not apply to al-Qaeda and Taliban members is conclusive. This determination was an exercise of the President's war powers and his plenary authority over foreign affairs.[16] This most fundamental exercise of Executive authority is binding on the courts.[17] Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts.[18] Accordingly, "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW."[19]

As far as I can tell, none of the President's critics have advanced any set of facts that would call into question the merits of the President's decision. I have heard no serious argument that either al-Qaeda or the Taliban fall within the requirements of Article 4 and thus are entitled to protection under the Convention. Instead, what we see is a lot of sharp "lawyer's" arguments that the President is somehow precluded from making a group decision and that the eligibility of detainees must be determined through individualized hearings before "competent tribunals." These arguments largely rest on a misreading of Article 5 of the Convention.

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15 See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

16 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

17 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

18 See, e.g., Howard S. Levie, Prisoners of War in International Armed Conflict, 59 Int'l Stud. 1, 61 (1977); Adam Roberts, Counter-terrorism, Armed Force, and the Laws of War, 44 Survival no. 1, 23-24 (Spring 2002).

19 W. Thomas Mallison and Sally V. Mallison, The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict, 9 Case W. Res. J. Int'l 39, 62 (1977).

Article 5 of the Convention provides that:

> [t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[20]

There is nothing in this Article that forecloses the President from reaching a threshold decision that a particular military formation does satisfy the Treaty standards. Since the Convention's coverage depends, in the first instance, on whether a group in which the detainee participated has the requisite attributes, it necessarily calls for a "group" decision. Certainly, Article 5 does not mean that a group's eligibility can be relitigated through a series of individualized proceedings. By it terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualifies for POW status. I am not aware that any detainee has raised any "doubt" as to their status. On the contrary, the principle argument of critics has been that a detainee can successfully raise doubt, within the meaning of Article 5, simply by asserting he is eligible. But the United States has expressly refused to adopt a modification of the Treaty that sought to establish that regime.

It seems to me that, once a particular organization has been found not to qualify under Article 4, no individualized inquiry under Article 5 is appropriate or necessary unless a detainee is raising a plausible claim that he belongs to another category that does qualify under Article 4. The classic example is the case of a pilot who, after conducting his mission, is shot down, sheds his uniform trying to escape, and is later apprehended and accused of sabotage. The evident purpose of Article 5 is to allow the pilot to make the claim that he is covered by the Geneva

[20] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 5.

Convention because he carried out his belligerent acts as a member of the regular armed forces of a signatory power. Here, the detainees have raised no colorable claims that they are members of a force that falls within the categories set forth in Article 4.

III. The Propriety of Military Tribunals

Finally, I want to say a word about those detainees whom the United States is charging with violations of the laws of war. Throughout our history, we have used military commissions to try members of foreign forces for violations of the laws of war.[21] Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals.[22] As one commentator noted, military commissions "will not be rendered illegal by the omission of details required upon trials by courts-martial."[23] The courts therefore have specifically upheld the use of such commissions,[24] and the President has established military commissions to try members of the Taliban and al-Qaeda for violations of the laws of war.

In one sense we seem to making progress. Originally, when the President promulgated his military tribunal order, there was a hue and cry in some quarters that this was an end run around Article III courts and that all proceedings belonged in out civilian court system. It is undoubtedly this mindset that is still animating much of the sniping. But at this stage there does not appear to be any real argument that these trials belong in civilian courts. It now seems to be widely conceded that military commissions are, in fact, the place where war crimes should be

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[21] William Winthrop, Military Law and Precedents, 464, 832 (2d ed. 1920); Major William Birkhimer, Military Government and Martial Law, 533-35 (3d ed. 1914).

[22] See, e.g., Act of March 3, 1863, § 30 (12 Stat. 731, 736).

[23] Id.

[24] As the Court stated, "the detention and trial of [war criminals] – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." Ex Parte Quirin, 317 U.S. 1, 25 (1942).

prosecuted. The debate now seems to have re-centered on exactly what kind of military trial is appropriate. Consequently, those that lost this debate are now attempting to transmogrify military commissions into carbon copies of Article III courts. This effort is without legal merit. First, the Supreme Court recognized in Hamdi that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[25] Second, as I will explain, the argument opponents of military commissions advance is derived from a fundamental misapprehension of the underlying statute at issue.

One prominent war criminal whom the United States wishes to try is Hamdan, the former bodyguard and driver of Osama bin Laden. Some individuals – including the district court in that case[26] – have argued that a military commission does not afford enough process and that war criminals must receive the full benefits of a formal military court martial. These arguments ignore the long-standing use of military commissions to try war criminals and grossly misread the Uniform Code of Military Justice.

Those who argue that war criminals should receive a full court martial also incorrectly rely on Article 36 of the Uniform Code of Military Justice ("UCMJ"). That section states that the rules that a President establishes for a military commission "may not be contrary to or inconsistent with" the UCMJ.[27] Contrary to recent arguments, the UCMJ does not establish the baseline for all military commissions. Rather, only a certain few UCMJ provisions apply to military commissions. Thus, requiring military commission to comply with all the provisions of

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[25] Hamdi, 124 S. Ct at 2649.

[26] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004).

[27] 10 U.S.C. § 836(a).

the UCMJ would render those specific references superfluous and render the entire point of a commission unnecessary.

This conflicts with the aforementioned historical precedent and the UCMJ itself, which recognizes the distinction between commissions and courts martial. This limitation also would severely change the courts' traditional understanding that military commissions arise out of common law war powers and not out of any particular statute.[28] Thus, using the UCMJ to limit the President's use of military commissions would contravene the Executive's historic powers to create and manage commissions and would turn the UCMJ's own recognition of a distinction between commissions and courts martial on its head.[29]

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[28] See, e.g., In re Yamashita, 327 U.S. 1, 20 (1946).

[29] A traditional canon of statutory construction holds that courts should avoid interpreting a statute in a way that renders a portion of it worthless. Williams v. Taylor, 529 U.S. 362, 404 (2000).

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Quran desecration crock a win for Jihad spin docs

June 12, 2005

BY MARK STEYN SUN-TIMES COLUMNIST

Robert Mugabe, Zimbabwe's kleptocrat strongman, destroyed a mosque the other day. It was in Hatcliffe Extension, a shantytown on the edge of Harare razed by the "police." Mugabe is an equal-opportunity razer: He also bulldozed a Catholic-run AIDS center. The government destroyed the town in order to drive the locals out into the countryside to live on the land stolen from white farmers. Quite how that's meant to benefit any of the parties involved or the broader needs of Zimbabwe is beyond me, but then I'm no expert in Afro-Marxist economic theory.

The point is the world's Muslims seem entirely cool with Infidel Bob razing a mosque. Unlike the fallout over Newsweek's fraudulent story about the Quran being flushed down a toilet, no excitable young men went bananas in Pakistan; no western progressives berated Mugabe for his "cultural insensitivity." And sadly most of the big shot Muslim spokespersons were still too busy flaying the Bush administration to whip their subjects into a frenzy over Hatcliffe Extension's pile of Islamic rubble.

Last week, Ambassador Atta el-Manan Bakhit of the Organization of the Islamic Conference called on Washington to show "no leniency" to the "perpetrators" of "this despicable crime." "This disgraceful conduct of those soldiers reveal their blatant hatred and disdain for the religion of millions of Muslims all over the world," said His Excellency. The Egyptian foreign minister was also in a tizzy. "We denounce in the strongest possible terms what the Pentagon confirmed about the desecration of the Qu'ran," said Ahmed Aboul Gheit, calling for strong measures, heads to roll, etc.

And what was it the Pentagon "confirmed"? That since Gitmo became the global center of U.S. Quran Desecration operations, there have been five verifiable instances of official minor "disrespect" for the holy book, three of which may have been intentional, which averages out at one incident per year. The same report also turned up 15 documented instances of "disrespect" by Muslim detainees. "These included using a Quran as a pillow, ripping pages out of the Quran, attempting to flush a Quran down the toilet and urinating on the Quran."

When three times as many detainees "desecrate" the Koran as U.S. guards do, it seems clear that the whole Operation Desecration ballyhoo is yet another media crock and the Organization of the Islamic Conference and all the rest are complaining about nothing. Or is Quran desecration one of those things like Jews telling Jewish jokes or gangsta rappers recording numbers like "Strictly 4 My Niggaz"? Are only devout Muslims allowed to desecrate the Quran? No doubt that's why the Egyptian foreign minister and company had no comment on the recent suicide bombing at a mosque in Kandahar, which killed 20, wounded more than 50 and presumably desecrated every Quran in the building.

Yet, as is often the way, the Muslim world's whiny spokespersons have been effortlessly topped by the old hands of the anti-American left. Thus, according to Amnesty International, Gitmo is the "gulag of our time."

Well then, these are diminished times for gulags. According to the Encyclopaedia Britannica, some 15 million to 30 million prisoners died in the Soviet gulags. By comparison, Guantanamo at its peak held 750 prisoners; currently, there are 520; none have died in captivity, and, as I wrote 3-1/2 years ago, it has the distinction of being "a camp where the medical staff outnumber the prisoners." You'll get swifter, cleaner and more efficient treatment

than most Canadians do under socialized health care. It's the only gulag in history where the detainees leave in better health and weighing more than when they arrive. This means they're in much better shape when they get back to their hectic schedule of killing infidels: Of the more than 200 who've been released, around 5 percent -- that's to say, 12 -- have since been recaptured on the battlefield.

Why would an organization in the human rights business want to trivialize the murder of millions in totalitarian death camps by comparing them with a non-death camp that flatters every aspect of the inmates' culture? If Gitmo's a gulag, what words are left for the systemic rape being practiced by the butchers of Darfur? Or is it because they've so exhausted the extremes of their vocabulary on Guantanamo that the world's progressives have so little to say about real horrors like Sudan?

No serious allegation of torture at the camp has been substantiated, and in the al-Qaida training manual found in Manchester, England, a couple of years back Rule 18 couldn't be more explicit: When held captive by the infidel, members must "complain to the court of mistreatment while in prison" and say that "torture was inflicted on them." A healthy skepticism would thus seem to be advisable. Instead, Thomas Friedman of the New York Times runs around shrieking like a hysterical ninny that Washington needs to shut down Guantanamo right now -- not because of anything that actually occurred there -- but because of negative "perceptions" of the camp in the overseas press.

And would caving in to those negative perceptions lead to any better press? Nobody got killed in Gitmo, so instead America's being flayed as the planet's No. 1 torturer for being insufficiently respectful to the holy book of its prisoners, even though the Americans themselves supplied their prisoners with the holy book, even though Americans who fall into the hands of the other side get their heads hacked off, even though the prisoners' co-religionists themselves blow up more mosques and Qurans than the Pentagon ever does, even though the preferred holy book of most Americans is banned in the home country of many of the prisoners, where respect for other faiths is summed up in the headline, "Seven Christians Released In Saudi Arabia On Condition They Renounce Private Religious Practice."

That was in the British Catholic newspaper, the Universe, last week, by the way. Sadly, no U.S. newspaper found room for the story due to pressures of space caused by all the "Al-Qaida Press Secretary Denounces Insufficient Respect For Koran By Rumsfeld" front page splashes. But sure, go ahead, close Gitmo and wait for the rave reviews from the media -- right after the complaints that it's culturally insensitive to rebuild the World Trade Center when it's the burial site of 10 revered Muslim martyrs.

Guantanamo will be remembered not as a byword for torture but for self-torture, a Western fetish the jihad's spin doctors understand all too well.

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Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Committee Hearing on "Detainees"

June 15, 2005

Mr. Chairman, thank you for holding this hearing. I believe that the longterm detention of so-called "enemy combatants" at Guantanamo Bay is among the most important national security and civil liberties issues facing us today. I have been concerned for a long time that Congress has not done as much oversight as it should about how the facility at Guantanamo Bay is being operated and whether international and domestic laws are being complied with, so I very much appreciate the opportunity to hear from these witnesses today.

The rule of law not only maintains order, it differentiates civilized from uncivilized societies. Our founding fathers were responsible for one of the most important sets of laws in human history when they drafted our Constitution and Bill of Rights. After the devastating world wars of the last century, the world's nations came together and adopted laws governing war and peace to ensure stability and limit conflict in the future. The U.S. has relied on and abided by these laws, including the Geneva Conventions, as it has engaged in armed conflict around the world in the sixty years since the end of World War II.

Unfortunately, we have witnessed again and again in the past few years this Administration trampling on these laws and rules that have served our nation and the world quite well for so long. In doing so, I fear the Administration is putting American lives at risk. These laws protect our men and women in uniform. Some have argued that those laws no longer apply, or at least not in the same way, in the campaign against terror. I believe that we can fight terrorism while remaining true to American values and principles, however. When the Administration argues that it need not comply with these laws, American soldiers are put at risk. And every time new evidence of abuse at Guantanamo Bay or other prisons is revealed, we lose another battle in the effort to promote democracy and human rights in the Arab and Muslim world – and, I fear, we give the terrorists another recruiting tool.

Mr. Chairman, the situation at Guantanamo Bay has become so troubling and so counter-productive that a growing chorus of people is calling for that facility to be shut

down entirely. It may be that the word "Guantanamo" has become so synonymous in the Arab and Muslim world with American abuses, that we must close the prison down. But we did not have to reach this point. If this Administration had not argued that these detainees were not subject to the Geneva Conventions, if this Administration had not argued that these detainees had no right to counsel or to make their case in federal court, if this Administration had not insisted on trying the few of these detainees who are charged with crimes in tribunals lacking basic due process, if this Administration had not sought to exploit every ambiguity in the law to justify its unprecedented actions, we would not be where we are today. We would not be talking about closing Guantanamo.

So when we talk about closing down this facility, let us remember that the problem is not just Guantanamo. The problem is an Administration that thinks it does not have to play by the rules. Closing down Guantanamo Bay will do us no good if this Administration does not change its attitude. Wherever these detainees are held, they must be accorded basic due process rights and treated humanely, pursuant to internationally formulated and universally respected standards. Doing so is not an expression of weakness. It is an expression of our fundamental strength as a nation, our faith in the values that have guided this nation since its founding.

The brightest spot in this mess the Administration has created has been our federal courts. In several recent cases, the federal courts have weighed in and sent a clear message to the President: He cannot fight terrorism by throwing the rule of law and the Constitution out the window.

Last summer, the Supreme Court ruled decisively that U.S. citizens cannot be detained indefinitely, without access to counsel or judicial review. In a separate case decided the same day, the Supreme Court rebuked the Administration and ruled that terror suspects detained at Guantanamo Bay could challenge their indefinite detention in federal court. In other words, the Supreme Court clearly and authoritatively ruled that the President does not have a "blank check" to wage the fight against terrorism.

More recently, the lower courts also have affirmed the need to abide by the Constitution. In November, a federal judge ruled that the President had overstepped his constitutional powers and improperly ignored the Geneva Conventions in creating special military commissions to try the few individuals detained at Guantanamo Bay who have been charged with crimes. And just this past February, another federal court ruled that the procedures set up by the Defense Department to assess whether detainees are "enemy combatants" subject to indefinite detention violated the Fifth Amendment.

Fighting terrorism is the greatest challenge facing us today. But we do not help ourselves meet this threat by arbitrarily deciding to follow some laws while ignoring others. The Administration bears the burden of showing Congress and the American people why existing laws and procedures, including the Geneva Conventions and the Uniform Code of Military Justice, are inadequate. Only if this burden has been met should we begin a discussion of what changes, if any, are needed to protect the American people from terrorism while staying true to our values.

Office of the Inspector General
United States Department of Justice

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice

before the

Senate Committee on the Judiciary

concerning

Detainees

June 15, 2005

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Inspector General, U.S. Department of Justice,
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Mr. Chairman, Senator Leahy, and Members of the Committee on the Judiciary:

Thank you for inviting me to testify at this morning's hearing on detainees. Unlike other witnesses at today's hearing, my testimony will not focus on detainee issues related to ongoing military actions. Rather, I have been asked to testify regarding two Office of the Inspector General (OIG) reviews that examined the treatment of aliens detained on immigration charges as part of the Department of Justice's (Department or DOJ) terrorism investigations after the September 11 attacks.

In my testimony today, I will summarize the major findings and recommendations from the OIG's June 2003 report entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" and our report, released in December 2003, entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York." Given the focus of today's hearing, I will highlight the major findings from these investigations that relate to due process issues.

My statement is organized in four parts. In the first two parts, I summarize findings from the OIG's June 2003 detainee report and the December 2003 supplemental review. Next, I discuss the corrective actions taken by the Department and others in response to the recommendations contained in those reports. Finally, I conclude my statement with a short description of an ongoing OIG review that is examining Federal Bureau of Investigation (FBI) observations and actions regarding alleged abuse of detainees at facilities controlled by the U.S. military, including Guantanamo Bay.

I. SUMMARY OF THE OIG'S JUNE 2003 DETAINEE REVIEW

After the September 11 attacks, the OIG initiated a review to examine the treatment of aliens detained on immigration charges in connection with the

Department's September 11 terrorism investigation, known as PENTTBOM. The FBI initiated the massive PENTTBOM investigation to identify the terrorists who committed the September 11 attacks and anyone who knew about or aided their efforts.

One of the principal responses by law enforcement authorities after the attacks was to use federal immigration laws to detain aliens who were suspected of having possible ties to terrorism. Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others were arrested and detained for violating federal immigration laws.

Our review determined that 762 aliens were detained on immigration charges in connection with the PENTTBOM investigation in the first 11 months after the terrorist attacks. All 762 aliens were placed on what became known as the Immigration and Naturalization Service's (INS) "Custody List." They were placed on this list, and referred to as "September 11 detainees, because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The OIG review examined various issues relating to the September 11 detainees, including: 1) classification of those detained as September 11 detainees; 2) the timeliness of charging the detainees with immigration violations; 3) issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general; 4) the detainees' access to counsel; and 5) their conditions of confinement.

We focused on detainees held at the Metropolitan Detention Center (MDC) in Brooklyn, New York, operated by the Federal Bureau of Prisons (BOP), and at the Passaic County Jail (Passaic) in Paterson, New Jersey (a county facility under contract to the INS). We chose these two facilities because they held the majority of September 11 detainees and also because they were the focus of most complaints about detainee mistreatment.

When we issued our June 2003 report, we stressed that it was important to remember the context of our findings. In response to the September 11 terrorist attacks, the FBI had allocated massive resources to the PENTTBOM investigation, assigning more than 4,000 FBI special agents and 3,000 FBI support personnel to work on it within days of the attacks. The amount of information and leads about the attacks and potential terrorists that the FBI received in the weeks and months after the attacks was staggering. Moreover, as our report pointed out, the Department was faced with unprecedented challenges responding to the attacks, including the chaos caused by the

attacks and the possibility of follow-up attacks. In conducting our review, we were mindful of this context and the circumstances confronting Department employees at the time.

Yet, while we recognized these challenges, we found significant problems in the way the Department handled the September 11 detainees. I will now summarize some of the major problems we found.

A. Classification of Detainees

In the aftermath of the September 11 attacks, the FBI pursued thousands of leads relating to its PENTTBOM investigation, in New York and elsewhere, ranging from information obtained from a search of the hijackers' cars to anonymous tips called in by people who were suspicious of Arab and Muslim neighbors who kept odd schedules.

If the FBI encountered an alien in connection with pursuing any of these leads, whether or not the alien was the subject of the lead, the FBI asked the INS to determine the alien's immigration status. If the alien was found to be in the country illegally – either by overstaying his visa or entering the country illegally – the alien was detained by the INS.

The FBI then was asked to make an assessment of whether the arrested alien was "of interest" to its terrorism investigation. If the FBI indicated that the alien was "of interest," "of high interest," or "of undetermined interest," the alien was placed on the INS Custody List and treated as a September 11 detainee.

These initial classifications by the FBI had significant ramifications for the detainees. First, the Department instituted a policy that any detainee on the INS Custody List had to be detained until cleared by the FBI. Although never communicated in writing, this "hold until cleared" policy was clearly understood and applied throughout the Department. As a result, the September 11 detainees were not allowed to be released on bond according to normal INS procedures and were not allowed to depart or be removed from the United States before FBI clearance, even if an Immigration Judge ordered their removal or the detainees voluntarily agreed to leave. Second, the initial classification decision by the FBI often determined where the detainees would be confined and therefore their conditions of confinement.

Our review found that these classification decisions were not handled uniformly throughout the country. FBI and INS offices outside New York City attempted to screen out or "vet" cases in which illegal aliens were encountered only coincidentally to a PENTTBOM lead or showed no indication of any connection to terrorism. In these cases, the alien was not placed on the INS Custody List and was processed according to normal INS procedures.

However, this vetting process was not used in the New York City area. Rather, the FBI in New York did not attempt to distinguish between those aliens who it actually suspected of having a connection to the September 11 attacks or terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. As a result, anyone picked up in connection with a PENTTBOM lead in the New York area was deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the origin of the lead or any genuine indications of a possible connection to terrorism. For example, if an agent searching for a particular person on a PENTTBOM lead arrived at a location and found other individuals who were in violation of their immigration status, those individuals were detained and considered to be arrested in connection with the PENTTBOM investigation.

Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to attempt to distinguish between aliens who it actually suspected of having a connection to terrorism and aliens who, while guilty of violating immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. In most parts of the country this was done; in New York, where the bulk of the September 11 detainees were arrested, it was not.

B. Notice of Charges

Our review found that many September 11 detainees did not receive notice of the charges against them in a timely manner. Normally, after an alien was arrested for violating federal immigration law, the INS notified the alien of the charges and initiated a removal proceeding by serving a Notice to Appear (NTA) on the alien and the Immigration Court. The NTA must include the alien's specific acts or conduct that was in violation of the law.

Prior to the September 11 attacks, the INS was required by federal regulation to make this charging determination within 24 hours of arrest. The Department changed the regulation soon after the September 11 attacks to allow the INS 48 hours to make the determination. The revised regulation also included an exception to the 48-hour rule that provided that in the event of an emergency or other extraordinary circumstances, the charging decision could be made within an additional reasonable period of time. However, the regulation did not define "extraordinary circumstances" or "reasonable period of time." Moreover the regulation contains no requirement as to when the INS must <u>notify</u> the alien of the charges; the regulation only addressed when the INS must <u>make</u> its charging decision.

Our review determined that the INS did not record when the charging decisions were actually made, but it did record when the charges were served

on the alien. According to the INS, before the September 11 attacks its goal was to serve charges on aliens in writing within 48 hours of arrest. After September 11, the INS's goal was to serve charges on aliens within 72 hours.

We found that the INS served only 60 percent of the September 11 detainees with NTAs within its goal of 72 hours. Many detainees did not receive their charging documents for weeks, and some for more than a month, after being arrested.

The delays in receiving notice of the charges affected the September 11 detainees in various ways. First, it did not give detainees notice of the specific immigration charges they faced. Second, it affected the detainees' ability to obtain effective legal counsel given the lack of specific charges. Third, it delayed the detainees' opportunity to request bond re-determination hearings and seek release.

C. The Clearance Process

Our review found that the Department's "hold until cleared" policy was based on the belief – which turned out to be erroneous – that the FBI's clearance process would proceed quickly. For example, many Department officials told us that they believed that the FBI would take a few days or a few weeks to clear aliens arrested on PENTTBOM leads but who had no additional indications of a connection to terrorism.

That belief was inaccurate. The FBI cleared less than 3 percent of the 762 September 11 detainees within 3 weeks of their arrest. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days. More than a quarter of the 762 detainees' clearance investigations took longer than 3 months.

The delays in the clearance process were attributable to various factors. The FBI did not provide adequate field office staff to conduct the detainee clearance investigations in a timely manner and failed to provide adequate FBI Headquarters staff to coordinate and monitor the detainee clearance process. We also found that, in New York, once the FBI investigated a lead and the INS arrested an alien in connection with the lead, FBI agents generally moved on to the next lead rather than investigate or clear the person arrested. In addition, FBI Headquarters did not set any time limits for completing the clearance investigations. The FBI also requested CIA checks on the detainees, but the FBI often took months to review the information it received from the CIA. We also found delays between when local FBI offices cleared the detainees and when FBI Headquarters processed the final clearances.

The untimely clearance process for September 11 detainees had significant ramifications for the detainees, who were denied bond and were not permitted to leave the country until the clearance process was completed, even when they had received final orders of removal or voluntary departure orders.

D. Bond and Removal Issues

The Department instituted a "no bond" policy for all September 11 detainees as part of its decision to hold the detainees until the FBI could complete its clearance investigations. Several INS officials told the OIG that, at least initially, they expected the FBI to provide them with information to present at bond hearings to support the "no bond" position. Instead, INS officials told the OIG that often they received no information from the FBI about September 11 detainees and, consequently, had to request multiple continuances in the detainees' bond hearings.

Our review determined that the INS raised concerns about this situation, particularly when it became clear that the FBI's clearance process was much slower than anticipated and the INS had little information in many individual cases on which to base its continued opposition to bond. As a result, the INS was placed in the position of arguing for "no bond" even when it had no information from the FBI to support that argument, other than the fact that the detainee was arrested in connection with a PENTTBOM lead.

In late January 2002, the FBI brought this issue to the Department's attention, and the Department abruptly changed its position as to whether the INS should continue to hold aliens after they had received final departure or removal orders until the FBI had completed the clearance process. Beginning in late January 2002, the Department allowed the INS to remove aliens with final orders without FBI clearance.

E. Conditions of Confinement

Although the INS made the decision where to house September 11 detainees, it relied primarily on the FBI's assessment of the detainees' possible links to terrorism. Aliens deemed by the FBI to be "of high interest" to its terrorism investigation generally were held in BOP high-security facilities, such as the MDC in Brooklyn, New York. Generally, although not always, aliens deemed by the FBI to be "of interest" or "of undetermined interest" were detained in lower-security facilities. FBI agents generally made this assessment of interest without guidance or standard criteria, based on the limited information available at the time of the aliens' arrests.

Where a September 11 detainee was confined had significant ramifications because, as we describe below, detainees held at the MDC experienced highly restrictive conditions of confinement.

In examining the treatment of detainees at the MDC, we appreciated the fact that the influx of high-security detainees stretched the MDC's resources. Its employees often worked double shifts during a highly emotional period of time, close to the scene of the terrorist attacks. We also recognized the uncertainty surrounding the detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks.

However, our review found serious problems in the treatment of the September 11 detainees housed at the MDC. First, the BOP imposed a total communications blackout for several weeks on the September 11 detainees held at the MDC. Then, after the blackout period ended, the MDC combined a series of existing policies and procedures for inmates in other contexts and applied them to the September 11 detainees. For example, the MDC initially designated the detainees as "Witness Security" inmates in an effort to restrict access to information about them, including their identity, location, and status. Designating the detainees at the MDC in this manner frustrated efforts by detainees' attorneys, families, and even law enforcement officials to determine where the detainees were being held. As a result of this designation, we found that MDC staff frequently – and mistakenly – told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the detainee was there.

Second, the MDC's restrictive and inconsistent policies on telephone access for detainees prevented some detainees from obtaining legal counsel in a timely manner. Most of the September 11 detainees did not have legal representation prior to their detention at the MDC. Consequently, a policy instituted by the MDC that permitted detainees only one legal call per week severely limited the detainees' ability to obtain and consult with legal counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone numbers or did not handle the particular type of immigration situation faced by the detainees.

In addition, detainees told us that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed

legal call. We believe that counting calls that reached a voicemail, resulted in a busy signal, or went to a wrong number was inappropriate.

Moreover, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear. In many instances, the unit counselor inquired whether September 11 detainees wanted their weekly legal call by asking, "are you okay?" Several detainees told the OIG that for some time they did not realize that an affirmative response to this casual question meant they had opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

As a result of these policies, it took some detainees a long period of time to even contact a lawyer.

Third, we found that the MDC held detainees in conditions that were unduly harsh. It created a new special housing unit (called the Administrative Maximum Special Housing Unit, or ADMAX SHU) to hold the September 11 detainees until the FBI cleared them. In this unit, the detainees were placed in full restraints whenever they were moved, including handcuffs, leg irons, and heavy chains. Four MDC officers had to be present each time a detainee was escorted from the cell.

The detainees also were subjected to having two lights illuminated in their cells 24 hours a day. This practice persisted even after electricians rewired the cellblock to allow the lights to be turned off individually.

Fourth, we concluded that the evidence showed a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners.[1]

In the next section, I will summarize the findings from our supplemental review of detainee treatment at the MDC, which investigated in detail allegations of physical and verbal abuse at the facility.

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[1] In contrast to our findings at the MDC, our review found that the September 11 detainees confined at Passaic had much different, and significantly less harsh, experiences. According to INS data, Passaic housed 400 September 11 detainees from the date of the terrorist attacks through May 30, 2002. This was the largest number of September 11 detainees held at any U.S. detention facility. Passaic detainees housed in the general population were treated like "regular" INS detainees who also were held at the facility. Although we received some allegations of physical and verbal abuse, we did not find the evidence indicated a pattern of abuse at Passaic.

II. SUMMARY OF THE OIG'S DECEMBER 2003 SUPPLEMENTAL REVIEW

With regard to the allegations of physical and verbal abuse at the MDC, we continued our investigation after our June report and issued a supplemental report in December 2003. In our supplemental report, we concluded that the evidence substantiated allegations of abuse and we recommended that the BOP discipline certain correctional officers. We also described additional problems in how the MDC handled the September 11 detainees.

While we did not find evidence that the detainees were brutally beaten, or subjected to the kinds of abuse that occurred in Abu Ghraib, we did find evidence that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods. In addition, we found that some MDC staff made slurs and threats at detainees. We determined that the way these MDC officers handled some detainees was in many respects unprofessional, inappropriate, and in violation of BOP policy.

We also found that some MDC staff acted unprofessionally by placing detainees' faces against a T-shirt taped to the wall that had a picture of the U.S. flag and the phrase "These colors don't run" on it. One lieutenant said officers used the T-shirt to "acclimate detainees to the MDC" and send a message to them.

In our report, we also discussed other troubling findings concerning the treatment of detainees at the MDC. Of particular note, we found that the MDC videotaped detainees' meetings with their attorneys. On many videotapes, we were able to hear portions of what the detainees and their attorneys were discussing. This violated a federal regulation (28 C.F.R. § 543.13(e)) and BOP policy, and it interfered with the detainees' access to counsel.

We also found other problems in the treatment of detainees. For example, we found that the detainees often were strip searched in public view, sometimes in the presence of female officers, and that many of these strip searches were videotaped in their entirety. We concluded that on occasion staff members used strip searches to intimidate and punish detainees. We observed on videotape an incident in which four staff members cornered a detainee in a recreation cell, ordered him to strip for a search, and threatened that if he did not do what the staff members said they would send him to a penitentiary where he would be treated worse than at the MDC.

One of the most troubling aspects of our investigation was the BOP's failure to provide us in a timely fashion videotapes showing the treatment of

the detainees. In October 2001, the BOP began videotaping detainees whenever they were moved outside of their cells within the MDC. During the course of our investigation, we made several requests to MDC officials for videotapes related to the detainees. However, the officials' responses to our requests were inconsistent and inadequate. For example, in answer to our requests we often obtained additional videotapes that we previously had been told were destroyed or reused. Moreover, in August 2003 we discovered 308 videotapes in a storage room at the MDC which MDC officials had failed previously to provide to us. Many of these videotapes corroborated allegations by the detainees and contradicted statements made by some correctional officers in our interviews.

Then, in February 2005, over a year after our investigation was completed, the BOP discovered additional videotapes of the detainees at the MDC. We previously had requested many of these tapes, but the MDC had failed to provide them to us. After BOP Headquarters informed us of the existence of these videotapes, we, along with the BOP Office of Internal Affairs, reviewed them. Some of these tapes further supported our findings. We have initiated an investigation, which is ongoing, to determine why these tapes were not disclosed sooner and who was responsible for this delay.

In an Appendix to our December 2003 report, we provided the BOP with our recommendations regarding discipline for specific MDC employees. That section of the report was not released publicly because of the potential of disciplinary proceedings against the correctional officers. In the Appendix and subsequent correspondence with the BOP, we recommended that the BOP consider taking disciplinary action against 13 MDC employees, counseling two additional MDC BOP employees, and informing the employers of four former MDC employees who no longer work for the BOP about our findings regarding them. We also recommended that the BOP take disciplinary action against several other staff members who we observed on videotapes physically abusing detainees or behaving unprofessionally.

Unfortunately, more than 18 months after issuance of our report, the BOP still has not taken any disciplinary action against any MDC employee. The Department initially provided our report to the Civil Rights Division to determine whether criminal prosecution of any individuals was warranted. In March 2004, the Civil Rights Division declined prosecution and the matter was referred to the BOP for appropriate disciplinary action. However, since then the BOP has been investigating and reviewing these matters. We have been in discussion with the BOP about this matter and have expressed our concerns about the length of time it has taken them to address these disciplinary recommendations.

I believe, as I have stated previously, that the disciplinary process in this case has taken far too long. In December 2003, when our report was issued, the Department stated that physical or verbal abuse of any detainee would not be tolerated. Yet, more than 18 months later, the BOP still has not imposed discipline on any individual for any action we described in our report. I understand that the BOP's review of these matters is in its final stages. I urge the BOP to complete the review expeditiously and take appropriate action.

III. THE OIG'S SYSTEMIC RECOMMENDATIONS

In addition to recommending discipline for individuals, our June 2003 report and our December 2003 supplemental report made a series of recommendations to address the problems we found with the way the Department, the FBI, and the BOP investigated and handled the immigration detainees in connection with the September 11 investigation. They included recommendations to ensure clearer and more objective criteria to guide classification decisions regarding the handling of immigration detainees, to ensure a more timely clearance process, to require timely notice of charges, to require more careful consideration of where to house detainees and under what kinds of restrictions, to provide better training to staff on how to treat such detainees, to provide better oversight of their conditions of confinement, and to ensure that detainees' conversations with attorneys are not recorded.

While the Department's initial response to our report was not one of total agreement, we were pleased to see that the Department accepted most of our recommendations and has taken steps to implement them.

For example, in response to our recommendation that the Department and the FBI develop clearer criteria to guide its classification decisions in cases involving mass arrests of illegal aliens in connection with terrorism investigations, the Department imposed a requirement that the Office of the Deputy Attorney General approve the addition of all new cases to the September 11 special interest detainee list. With respect to future terrorism investigations, the FBI established protocols for classifying aliens suspected of having ties to terrorism.

The FBI also agreed that it would expeditiously provide the Department of Homeland Security (DHS) and the BOP with a statement as to whether or not the FBI had a continued interest in an individual alien who was detained, normally in writing. The Department also agreed that, absent an expression of interest from the FBI within a short period of time, an individual alien should be treated according to routine procedures for handling detained aliens.

In addition, the BOP established a new policy that provides clear and specific procedures for the classification of aliens arrested on immigration

charges who may be of interest to a terrorism investigation. This policy also covers telephone access for such inmates, including guaranteed access to telephones for legal calls. Moreover, in response to our recommendation that the BOP take steps to educate its staff that it is illegal to audio monitor attorney-client meetings, the BOP revised its policies to clarify that visits between an attorney and a detainee or inmate may not be audio taped.

Further, the BOP issued new procedures in response to our recommendation that videotapes of detainees with alleged ties to terrorism be retained for longer periods of time. In our investigation, the evidentiary value of the videotapes we reviewed was significantly limited because the BOP policy was to destroy or record over tapes that were more than 30 days old. In response to our recommendation, the BOP has issued a policy that it will keep for at least 6 months all videotapes that depict the escorted movements of inmates who are confined pursuant to national emergencies.

We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse. As a result, we recommended that the BOP ensure that all immigration detainees housed in a BOP facility receive notice of the facility's policies. In response, the BOP agreed to ensure that immigration detainees receive timely written notice of the facility's policies, including the procedures for filing complaints.

The DHS also has taken action in response to our recommendations. For example, the DHS issued a new Detention Standard that requires DHS staff to review the conditions of confinement for immigration detainees housed in BOP facilities, including the basis for their classification and placement in highly restrictive units, their access to counsel, and their legal telephone calls and visitation privileges. In addition, the DHS agreed to ensure that immigration officials consistently conduct "post-order custody reviews" for all detainees who remain in custody after 90 days, as required by immigration regulations. Further, the DHS has established procedures to ensure that charging determinations for detained aliens are made within 48-hours, and that the alien is notified of the charges within 72 hours of arrest and detention.

However, in our view two recommendations still have not been sufficiently addressed. The first is the BOP's delay in implementing discipline, which I discussed above.

The second involves our recommendation that the DOJ, the FBI, and DHS immigration officials enter into a memorandum of understanding (MOU) to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. A draft MOU has been created and is currently under review by the FBI and the DHS, but it still has not been

finalized – 2 years after we made our recommendation. We have been informed recently that a meeting is planned in the near future at which the agencies hope to resolve any outstanding issues so that the MOU can be finalized. We believe enactment of this MOU is critical to ensuring a more effective process for sharing information between agencies and to helping avoid problems such as delays, conflicts, and concerns about accountability that are inherent in having aliens detained under the authority of one agency while relying on an investigation conducted by another agency.

IV. OIG'S REVIEW OF FBI OBSERVATIONS OF AND REPORTS REGARDING DETAINEE TREATMENT AT MILITARY FACILITIES

One other matter that I wanted to bring to the Committee's attention involves an ongoing OIG review that is examining FBI employees' observations and actions regarding alleged abuse of detainees at Guantanamo Bay, Abu Ghraib, and in Afghanistan. The OIG is examining whether FBI employees participated in any incident of detainee abuse in military facilities at these locations, whether FBI employees witnessed incidents of abuse, how FBI employees reported observations of abuse, and how those reports were handled by the FBI. It should be noted, however, that the actions of military personnel are not within the jurisdiction of the DOJ OIG and therefore are not the subject of the OIG's review. Rather, those actions are the subject of reviews by Department of Defense officials.

In this ongoing review, the OIG has interviewed detainees, FBI employees, and military personnel at Guantanamo. In addition, the OIG recently distributed a detailed questionnaire to approximately 1,000 FBI employees who served assignments at Guantanamo Bay, in Iraq, and in Afghanistan. The questionnaire requests information on what the FBI employees observed, whether they reported observations of concern, and how those reports were handled. The OIG anticipates receiving responses to its questionnaire shortly, and will conduct appropriate follow-up interviews as necessary. In addition, as part of this review the OIG has received and reviewed FBI records relevant to this investigation.

The OIG's investigation is ongoing, but we have allocated substantial resources to this review and will attempt to complete it as expeditiously as possible.

This concludes my prepared statement. I would be pleased to answer any questions.

STATEMENT OF
BRIGADIER GENERAL THOMAS L. HEMINGWAY
LEGAL ADVISOR TO THE APPOINTING AUTHORITY
FOR
THE OFFICE OF MILITARY COMMISSIONS

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON
DETAINEES

JUNE 15, 2005

Mr. Chairman and Members of the Committee: I am Brigadier General Thomas L. Hemingway. I am the Legal Advisor to the Appointing Authority for the Office of Military Commissions. I am pleased to discuss the operations of the Office of Military Commissions, the protections afforded accused before Military Commissions, and the current status of cases pending before Military Commissions

America is at war. This war is not a metaphorical war; it is as tangible as the blood, the dust, and the rubble that littered the streets of Manhattan on September 11th, 2001. The reality of this war could be seen in the faces of those who stood in stark horror as they saw helpless, innocent people fall and jump to their deaths from the Twin Towers. In response to the attacks on the United States on September 11, 2001, the President established military commissions to try those non-citizen

members of al Qaeda and other persons engaging in specified terrorist activities who are alleged to have committed violations of the law of war and related offenses.

The use of military commissions predates the formation of our republic. Since the Revolutionary War, the United States has used military commissions to try enemy combatants for law of war violations. In the Mexican-American War, during the Civil War, following the Civil War, during and after World War II, military commissions were used to try enemy combatants for violations of the laws of war. In the President's Military Order establishing military commissions, he mandated that the accused shall be afforded full and fair trials. The President also determined that the Federal Rules of Evidence are not practicable for military commissions given the nature of the conflict. This determination is based on the unique factors present in conducting judicial proceedings against suspected war criminals at a time when the United States is actively engaged in an on-going armed conflict. Instead of the Federal Rules of Evidence, military commissions have adopted an internationally accepted standard for admissibility of evidence - probative value.

The President's Military Order focuses on the unique factors of the current ongoing hostilities and affirms that national security interests require the continued application of US national security laws in developing commission instructions and regulations consistent with the accused's right to a fair trial. These orders, instructions and regulations afford an accused the following rights:

1. Presumption of innocence

2. **Trial before an impartial and independent panel of three to seven officers**
3. **Notification of charges in language understood by the accused**
4. **Call witnesses and present evidence**
5. **Cross-examine witnesses and examine evidence**
6. **Election not to testify at trial with no adverse inference**
7. **Appointment of military counsel at no cost to defendant and right to hire civilian counsel at no expense to the government**
8. **Privileged communications with defense counsel**
9. **Adequate support and resources to defense counsel**
10. **Appointment of interpreters and translators**
11. **Open proceedings, except as absolutely necessary to protect national security**
12. **Proof of guilt beyond a reasonable doubt**
13. **Review of the record of trial by a three-member review panel**

The rules of evidence and procedure established for trials by military commission compare favorably to those being used in the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. These rules are consistent with our national commitment to adhere to the rule of law.

The Office of Military Commissions has taken key steps in moving the commission process forward. To date, the President has determined that twelve detainees currently at Guantanamo are subject to his Order. The Appointing Authority, Mr. John D. Altenburg, has approved charges against four accused and referred these

charges to military commissions for trial. Those trials commenced late in the summer of 2004. The Office of Military Commissions has been working diligently to convene military commissions; however, the trials are stayed pending an appellate court decision in the case of Mr. Hamdan. Military and civilian counsel for Mr. Hamdan brought an action in the United States District Court to review the legality of trial by military commissions. The district court recognized the authority of the President to establish military commissions to try offenders or offenses that by statute or by the law of war may be tried by military commission and a review panel as an appeals mechanism; however, the Court raised concerns about the commission process whereby an accused may be excluded from the hearing to protect classified and protected information. Because this protection is essential to the continued effectiveness in our current war on terror, the government has appealed this ruling. The delays to the commission process are directly attributable to the exercise of the accused's ability to challenge that process in the federal courts. While the appeal is pending, investigations and submissions of charges against additional accused continue.

This is the first time since World War II that the United States has had a need to convene military commissions. While it is important to move quickly back to trial, the Office of Military Commissions' movement forward is measured with full awareness and consideration of the rights of an accused and the needs of our Nation.

The ongoing Global War on Terrorism continues to pose many unique challenges in an asymmetrical battlefield. Neither the United States nor the international community contemplated a non-state organization having the capability to wage war on a global scale. Military commissions are the appropriate forum to preserve safety, protect national security, and provide for full and fair trials consistent with our standards and those of the international community.

TESTIMONY BY HUMAN RIGHTS FIRST
HEARING ON DETAINEES
BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

Statement of Deborah Pearlstein, Director, U.S. Law and Security Program
Washington D.C.
June 15, 2005

Human Rights First welcomes these important hearings, and appreciates the opportunity to share our views on the detention, treatment, and trial of those held in U.S. custody in connection with the "war on terrorism." We are particularly grateful for Senator Specter's leadership in engaging on the complex policy challenges these issues present.

Based on our own experiences working on these issues, I would like first to offer a few basic principles we hope the Committee will consider as it exercises its critical oversight responsibility. I then turn to our assessment of the primary problems arising out of current detention practices. Finally, I offer Human Rights First's recommendations on the policy challenges facing this Committee today.

We believe it is vital that Congress move beyond a focus on particular cases, particular failures, or the latest press reports of wrongdoing – and to establish a bipartisan, independent commission to look comprehensively at U.S. detention and interrogation operations in the "war on terror." We believe such a commission is most consistent with Congress' role in passing forward-looking legislation (rather than engaging in issues currently pending before the courts). It would send a critical signal that Congress is serious about restoring America's commitment to protecting basic human rights. And it

would help deprive our enemies of a weapon they have used for the past several years to inflame public opinion against the United States.

First Principles

For nearly 30 years, Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to advance the values we believe all Americans share: a respect for justice and human dignity, and a commitment to the rule of law. We have worked hard to provide dispassionate legal analysis and pragmatic policy advice to help craft solutions to the most pressing human rights problems facing the world today.

It was with these values – and this approach to our work – that Human Rights First responded to the attacks of September 11 by creating a new U.S. Law and Security Program to engage on the human rights questions presented by U.S. national security policies. We approach this work starting from three guiding principles.

First, Al Qaeda poses a serious security threat to the American people, and the U.S. Government has the right and duty to protect Americans from attack. We thus welcome efforts to improve coordination among federal, state and local agencies, and between law enforcement and intelligence officials. Equally welcome are greater efforts to protect the nation's infrastructure supporting energy, transportation, food and water; efforts to strengthen the preparedness of our domestic front-line defenders, police, firefighters and emergency medical teams, as well as those working in public health.

In examining these issues, we have reached out to experts in the U.S. military and intelligence communities to understand the nature of the security challenges the U.S faces, and to discuss solutions that respect human rights. We have found many people in the military and intelligence communities are deeply concerned about a number of the Administration's policies, which have deviated from the rule of law and American values.

While we do not underestimate the seriousness of the threat posed by groups like Al Qaeda, we do not believe that the threat confounds the rule of law. In this as in all areas of government policy, determining what power government should have – what detention powers, what interrogation powers, which review mechanisms – begins with determining what power government really needs. A set of decisions have already been made in the past four years that, there is broad agreement, have produced negative consequences for law and security policy; these can and should be corrected, and we propose specific mechanisms below for doing this. But Congress is primarily a forward-looking body, constitutionally designed to legislate *prospectively*. As you undertake to identify the right policy for terrorism-related detention, we would urge you to begin not with the powers it is possible for government to exercise – or the powers the government has asserted in the past four years – but by identifying the powers government *must have* in order to address the threat it perceives. The burden falls first on those responsible for our domestic and national defense to express specifically what these needs are.

The second principle is that the governments that are most effective in safeguarding human security are those that operate strictly under the rule of law: that is, under a system in which people are governed by public laws that are set in advance, applied equally in all cases, and are binding and enforceable on both individuals and on the government that serves them. For this reason, we have worked hard to engage all three branches of government in fulfilling their responsibilities to sustain our rule-of-law system. We have participated as monitors at Guantanamo Bay as the President's military commission trials began; advocated in the courts to ensure in all cases independent judicial review; and urged the vigorous exercise of congressional oversight in all aspects of U.S. counterterrorism activities – most recently in leading bipartisan calls for Congress to appoint an independent commission to study the challenges of detention and interrogation in Afghanistan, Iraq, at Guantanamo and elsewhere. In this context, we strongly welcome the hearings today.

At the same time, there are clear constitutional limits on Congress's role in upholding the rule of law. Among other things, the Constitution's prohibition of ex post facto rules affecting punishment as well as bills of attainder caution against post hoc legislation designed to address mistakes of the past. The Constitution's commitment to separate, coequal branches of government requires Congress to respect the independence of the judiciary; to support regular judicial review; and above all not to interfere in the disposition of cases while they are pending in the federal courts. This has been the lesson of the Supreme Court during the past two centuries, and it remains good law today. *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113

(1948) ("[J]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.").

Finally, we believe that every human being is entitled to be treated with fairness, dignity and respect – and that the United States has fallen, and continues to fall, well short of this standard in its detention and interrogation operations worldwide. A system that permits indefinite, incommunicado detention – with no certainty about one's fate and no hope of a fair hearing – that permits prolonged solitary confinement, or that permits torture or other cruel, inhuman or degrading treatment is contrary to our Constitution and laws, and is beneath our dignity as a people. Whatever mechanisms of detention and trial this Committee supports, the system must be open to independent humanitarian observers, subject to judicial review, and susceptible to oversight and correction to ensure that illegal conduct is met with swift and sure punishment at all levels of responsibility.

Identifying the Problem

Charting a sensible course forward means first confronting squarely the serious nature of the policy dilemmas now facing the United States. As we have described in detail in our recent report, *Behind the Wire*, the Administration currently operates a global detention system, from Iraq to Afghanistan to Guantanamo Bay and beyond, of indefinite legal status and uncertain future; there are currently more than 11,000 individuals in U.S. custody in this system worldwide. To the extent there is any mechanism in place for evaluating the legality of these detentions – including the Combatant Status Review

Tribunals, Annual Review Tribunals, and military commission trials established at Guantanamo Bay – it is patchwork in nature and inadequate in meeting basic U.S. and international procedural standards. At the same time, individual claims of torture, abuse, and unjust detention in this system emerge daily, including the most disturbing Pentagon figures that more than 100 people have died in U.S. custody since 2002; this includes 28 cases so far deemed homicides, at least half of those describing people who were literally tortured to death. (To be clear, this is not a problem about a handful of actors from Abu Ghraib. *Only 1* of the criminal homicides occurred at Abu Ghraib, and none at Guantanamo. The rest occurred at others of the two-dozen some detention facilities the United States maintains.)

Experts in the military and intelligence communities have made clear that current policies have been devastating both to the safety of our troops and the security interests of the nation. As a distinguished coalition of retired admirals and generals wrote last fall: "Understanding what has gone wrong and what can be done to avoid systemic failure in the future is essential . . . to ensure that the effectiveness of the U.S. military and intelligence operations is not compromised by an atmosphere of permissiveness, ambiguity, or confusion." Even more starkly, as one U.S. Army interrogator returning from Afghanistan noted: "The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect." Mackey & Miller, *The Interrogators* (2004). Current U.S. detention and interrogation practices have inflamed U.S. enemies and alienated potential allies, and they continue to run contrary to the security imperatives Congress sits to protect.

To the extent this system has involved U.S. citizens (such as Yaser Hamdi and Jose Padilla), or involves the hundreds detained at Guantanamo Bay, the U.S. federal courts have been and remain vigorously engaged. We have argued in many of these cases – in Human Rights First's name, and as counsel for former federal judges, former members of Congress, former American prisoners of war, senior law enforcement officials, and others – that unchecked detention solely at the Executive's discretion is unconstitutional, and that detention of any individual must be according to law. While we have at times been frustrated by the pace at which these cases proceed – U.S. citizen Jose Padilla, for example, is entering his fourth year of military detention without charge or trial – we are committed to supporting the role of the courts in adjudicating the cases now pending. Congress cannot productively, or constitutionally, legislate retrospectively to address the circumstances those cases now present.

What Congress can and should do is examine comprehensively what has gone wrong in U.S. detention and interrogation operations, and how those policies and practices can be fixed going forward. It can also make sure we do not repeat the same mistakes we have made in cases yet to come before the courts. We offer the following recommendations.

Correcting Course

(1) Establish a 9/11-style commission – independent, bipartisan, and of unassailable credibility – to identify what has been done well but also what has gone wrong in U.S. detention and interrogation operations. The

commission would draw on these lessons to recommend laws and policies that will enable the U.S. Government to chart a way forward to accountability and correction

Human Rights First has welcomed the investigations both completed and still underway into the circumstances surrounding the abuses that occurred during U.S. detention and interrogation. Even so, more than one year after the Abu Ghraib photos were published, the United States has not taken the steps necessary to ensure that such abuses will not happen again. At the same time, many important questions about the U.S. global detention system remain shrouded in secrecy: what is the legal basis of detaining those held, and what are the plans for their future? Does the International Red Cross now have access to all held in U.S. custody, or do we continue to hold "ghost detainees" beyond the reach of humanitarian aid or law? And critically, what methods of interrogation and conditions of detention do U.S.-held detainees face, and are we now in compliance worldwide with basic constitutional and treaty prohibitions on torture, as well as cruel, inhuman and degrading treatment of any kind?

As Human Rights First detailed at length in our report, *Getting to Ground Truth*, government investigations so far have suffered from a lack of independence; failures to investigate all relevant agencies and personnel; cumulative reporting (increasing the risk that errors and omissions are perpetuated in successive reports); contradictory conclusions; questionable use of security classification to withhold information; failures to address senior military and civilian command responsibility; and an absence of any comprehensive game plan for corrective action.

Indeed, those who the Pentagon's own reports have identified as responsible for derelictions of duty not only have not been disciplined, they have been promoted. To pick a few examples, General Dan K. McNeill – who oversaw operations in Afghanistan during the time that detainees were tortured to death at the Bagram Air Force Base and claimed there were no indications of abuse contributing to the deaths despite autopsy reports finding severe trauma to the detainees' bodies, received a fourth star and was promoted to Commanding General U.S. Army Forces Command. The month after the Abu Ghraib photos became public, Maj. Gen. Geoffrey Miller – formerly in charge of interrogations at Guantanamo and credited with instituting the use of dogs at Abu Ghraib – was made senior commander in charge of detention operations in Iraq. Maj. Gen. Barbara Fast – the highest-ranking intelligence officer so far tied to the Abu Ghraib scandal – recently took charge of the Army's main interrogation training facility at Fort Huachuca, Arizona. Maj. Gen. Walter Wojdakowski – who oversaw military police and intelligence units responsible for operations at Abu Ghraib, and who was criticized in army investigations for weak and ineffectual leadership that led to the abuses – is now the acting deputy commander of Army forces in Europe. And Secretary Donald Rumsfeld – who has asserted full responsibility for the torture that occurred – remains the Secretary of Defense. As our friends in the military are the first to say, this is not a way to set an example. Or to prevail against groups like Al Qaeda

The case for an independent commission is clear, and Congress should act now.

(2) Enact legislation clarifying that all trials for war crimes conducted under color of U.S. law going forward must be pursuant to the procedures of the Uniform Code of Military Justice.

Since the announcement in November 2001 of novel military commissions to try those suspected of committing crimes during the course of armed conflict, there has been neither a single conviction, nor indeed has any case yet proceeded to trial. The Pentagon spent the first nearly three years following the announcement scrambling to create a new trial system – including facilities, personnel, judges and rules – out of whole cloth. The rules, as announced and later modified, failed to comply with basic U.S. or international fair trial standards, and a bipartisan array of experts from the United States and abroad – including many in the U.S. military JAG corps – expressed dismay over the system.

The proceedings, when they began in August 2004, bore the signs of the circumstances under which they were created: resources for defense counsel were inadequate, interpreter services were insufficient for even the trial judges to understand the defendants, the legal structure was too poorly developed to provide ready answers to questions that arose during proceedings, and the defendants were held in conditions so harsh (in particular, in prolonged solitary confinement) that they undermined the fairness of trial proceedings. It was thus unsurprising when, late last year, a federal court sitting in Washington, D.C. stayed the commission proceedings for failure to comply with U.S. or international law. That decision is now pending appeal.

The United States of America can do better than this – indeed, it has a war crimes trial system that is well established, universally respected, and has been followed by the U.S. military for the past 50 years. While legislation affecting the four cases currently pending before the commissions and in the federal courts would be, we believe, an inappropriate interference with the judiciary at this time, Congress can and should make clear going forward that the Uniform Code of Military Justice (the familiar system of courts martial) must be followed for those believed to have committed or planned crimes in the course of armed conflict overseas.

(3) Enact legislation clarifying that information adduced under torture or other cruel, inhuman or degrading treatment – or the threat of such treatment – is inadmissible as evidence in any legal proceeding under color of U.S. law.

Under the military commission rules as drafted, evidence is admissible in commission trials if it has "probative value to a reasonable person." Because lack of "probative value" is the only indicated grounds for exclusion of evidence, there appears to be no legal basis for a defendant to challenge admission of evidence on the ground that it had been produced through mental or physical coercion, or even torture.

Numerous documents, however, have been released through Freedom of Information Act requests and otherwise reflecting serious allegations of abuse of detainees by U.S. interrogators. Many of these allegations come from members of the FBI, the DIA and other federal agencies. For example, in late 2002, "FBI agents observed that a canine

was used in an aggressive manner to intimidate [a Detainee]...after he had been subjected to intense isolation for over three months....[during which time he] was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)." Another FBI agent reported "find[ing] a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18-24 hours or more."

Statements from detainees subjected to this kind of treatment would not be admissible in any court of law in the United States, and they should not be admissible as evidence in a military commission trial or in any other proceeding to prosecute those suspected of war crimes or terrorist activity. As the Supreme Court has long made clear:

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of confession of violations of the law of the land evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had a been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. . . [T]he forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

Gallegos v. Colorado, 370 U.S. 49, 51 (1962). While the first prosecutions under military commission rules are already under way, Congress could productively clarify that no such evidence shall be admissible as evidence in any proceeding going forward.

Conclusion

Congressional engagement on issues of fair detention and trial for those believed to pose a security risk is essential. We strongly welcome Senator Specter's initiative in convening this hearing. We thank you for considering our views.

Declaration of Vice Admiral Lowell E. Jacoby (USN) Director of the Defense Intelligence Agency

Pursuant to 28 U.S.C. § 1746, I, Vice Admiral Lowell E. Jacoby, hereby declare that to the best of my knowledge, information, and belief, and under penalty of perjury, the following is true and correct:

Summary

I submit this Declaration for the Court's consideration in the matter of *Jose Padilla v. George W, Bush et al.*, Case No. 02 Civ. 4445, pending in the United States District Court for the Southern District of New York. This Declaration addresses the following topics:

- my qualifications as an intelligence officer and Director of the Defense Intelligence Agency;
- the roles and mission of the Defense Intelligence Agency;
- the intelligence process;
- interrogations as an intelligence tool;
- interrogation techniques;
- use of interrogations in the War on Terrorism;
- intelligence value of Jose Padilla; and
- potential impact of granting Padilla access to counsel.

Based upon information provided to me in the course of my official duties, I am familiar with each of the topics addressed in this Declaration. I am also familiar with the interrogations of Jose Padilla ("Padilla") conducted by agents of the Federal Bureau of Investigation ("FBI") after his detention in Chicago on 8 May 2002 and by agents of the Department of Defense ("DoD")

after DoD took control of Padilla on 9 June 2002. I have not included information obtained from any interrogations in this Declaration, however.

I assess Padilla's potential intelligence value as very high. I also firmly believe that providing Padilla access to counsel risks loss of a critical intelligence resource, resulting in a grave and direct threat to national security.

Experience

I am a Vice Admiral in the United States Navy, with more than 30 years of active federal commissioned service. I currently am the Director of the Defense Intelligence Agency. I report to the Secretary of Defense. In addition to other assignments, I have previously served as the Director of Intelligence (J2) for the Chairman of the Joint Chiefs of Staff; the Director of Intelligence for the Commander of the U.S. Pacific Command; the Commander of the Joint Intelligence Center Pacific; and the Commander of the Office of Naval Intelligence.

I have received the National Intelligence Medal of Achievement from the Director of Central Intelligence. My military decorations include two Defense Distinguished Service Medals, the Navy Distinguished Service Medal, the Defense Superior Service Medal, and two Legions of Merit. I hold a Masters degree in National Security Affairs from the Naval Postgraduate School.

The Defense Intelligence Agency

The Defense Intelligence Agency ("DIA") is a DoD combat support agency with over 7,000 military and civilian employees worldwide. DIA is a component of DoD and an important member of the United States Intelligence Community—a federation of 14 executive

branch agencies and organizations that work separately and cooperatively to conduct intelligence activities necessary to protect the national security of the United States.

DIA activities include collection of information needed by the President and Vice President, the National Security Council, the Secretaries of State and Defense, and other Executive Branch officials for the performance of their duties and responsibilities. One of DIA's highest priorities is to collect intelligence on terrorists, including al Qaida members, by interrogation and other means.

The Defense HUMINT Service ("DHS"), under DIA's Directorate for Operations, handles all human-source intelligence collection within DoD.

The Intelligence Process

The security of this Nation and its citizens is dependent upon the United States Government's ability to gather, analyze, and disseminate timely and effective intelligence. DIA has expended considerable efforts to develop effective intelligence techniques.

Generally speaking, the intelligence cycle can be broken down into five basic steps:

Process

1. **Planning and direction.** Senior United States policy makers establish the intelligence requirements for DIA. DIA formulates more specific plans and directions to meet those requirements. Finished intelligence products also generate new requirements.
2. **Collection.** Raw intelligence data can be gathered by various means. Human-Source Intelligence ("HUMINT") is the oldest and historically

the primary method of collecting intelligence. HUMINT includes clandestine acquisition of materials as well as overt collection of information through methods such as interrogation.

3. **Processing and exploitation.** Intelligence data, including human-source reports, must be converted to a form and context to make them more comprehensible to the intelligence analysts and other users.

4. **Analysis and production.** Intelligence analysts absorb the incoming information, evaluate it, and prepare a variety of intelligence products.

5. **Dissemination.** After reviewing intelligence information and correlating it with other information available, analysts typically disseminate finished intelligence to various users.

One critical feature of the intelligence process is that it must be continuous. Any interruption to the intelligence gathering process, especially from an external source, risks mission failure. The timely, effective use of intelligence provides this Nation with the best chance of achieving success in combating terrorism at home and abroad, thus helping to prevent future catastrophic terrorist attacks.

Protecting the specific sources and methods used during the intelligence process is of paramount importance to the integrity of the process. DIA employs all available safeguards to ensure that its sources and methods are not intentionally or inadvertently made public or disclosed outside the Intelligence Community, because of the resulting damage to intelligence collection efforts.

Interrogation as an Intelligence Tool

Interrogation is a fundamental tool used in the gathering of intelligence. Interrogation is the art of questioning and examining a source to obtain the maximum amount of usable, reliable information in the least amount of time to meet intelligence requirements. Sources may include insurgents, enemy combatants, defectors, refugees, displaced persons, agents, suspected agents, or others.

Interrogations are vital in all combat operations, regardless of the intensity of conflict. Interrogation permits the collection of information from sources with direct knowledge of, among other things, plans, locations, and persons seeking to do harm to the United States and its citizens. When done effectively, interrogation provides information that likely could not be gained from any other source. Interrogations can provide information on almost any topic of intelligence interest.

The Department of the Army's Field Manual governing Intelligence Interrogation, FM 34-52, dated 28 September 1992, provides several examples of the importance of interrogations in gathering intelligence. The Manual cites, for example, the United States General Board on Intelligence survey of nearly 80 intelligence units after World War II. Based upon those surveys, the Board estimated that 43 percent of all intelligence produced in the European theater of operations was from HUMINT, and 84 percent of the HUMINT was from interrogation. The majority of those surveyed agreed that interrogation was the most valuable of all collection operations.

The Army Field Manual also notes that during OPERATION DESERT STORM, DoD interrogators collected information that, among other things, helped to:

- develop a plan to breach Iraqi defensive belts;
- confirm Iraqi supply-line interdiction by coalition air strikes;
- identify diminishing Iraqi troop morale; and
- identify a United States Prisoner of War captured during the battle of Kafji.

Interrogation Techniques

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences

on the interrogation process. Indeed, foreign governments have used these techniques against captured DoD personnel.

Even the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949—which the President has determined does not apply to enemy combatants such as Padilla—recognizes that a detainee's ability to communicate with members of his or her family or government may be suspended when such a person is suspected of engaging in activities hostile to the security of the detaining State.

Use of Interrogations in the War on Terrorism

Terrorism poses an asymmetric threat to the United States. "Asymmetric warfare" generally consists of unanticipated or non-traditional approaches to circumvent or undermine an adversary's strengths while exploiting its vulnerabilities through unexpected technologies or innovative means. "Asymmetric warfare" may also consist of leveraging inferior tactical or operational strength against American vulnerabilities to achieve disproportionate effect with the aim of undermining American will in order to achieve the asymmetric actor's strategic objectives.

Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Our terrorist enemies have also clearly demonstrated their willingness—and in fact have expressed their intent—to use any type of potential weapon, including weapons of mass destruction.

This asymmetric threat creates difficult and unique challenges for DIA because of the many variables in identifying and addressing the threat. The complexi-

ties of the problem—and the dire consequences at stake—require innovative and aggressive solutions.

As explained above, the intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism. There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods. Thus, it is vitally important to maintain an ongoing intelligence process, including interrogations.

The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism. These enemy combatants hold critical information about our enemy and its planned attacks against the United States that is vital to our national security.

These interrogations have been conducted at many locations worldwide by personnel from DIA and other organizations in the Intelligence Community. The results of these interrogations have provided vital information to the President, military commanders, and others involved in the War on Terrorism. It is estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts of the Intelligence Community and others.

In fact, Padilla's capture and detention were the direct result of such effective intelligence gathering efforts. The information leading to Padilla's capture came from a variety of sources over time, including the interrogation of other detainees. Knowledge of and disruption of al Qaida's plot to detonate a "dirty bomb" or arrange

for other attacks within the United States may not have occurred absent the interrogation techniques described above.

Interrogating members of al Qaida, or those individuals trained by al Qaida, poses additional challenges and risks. Al Qaida is a highly dangerous and sophisticated terrorist organization that has studied and learned many counterintelligence techniques. An al Qaida training manual, "Military Studies in the Jihad Against the Tyrants," provides instructions regarding, among other things: the collection of intelligence; counter-interrogation techniques; and means of covert communication during periods of capture. As detainees collectively increase their knowledge about United States detention facilities and methods of interrogation, the potential risk to national security increases should those methods be released. Moreover, counsel or others given access to detainees could unwittingly provide information to the detainee, or be used by the detainee as a communication tool.

Conclusion

In summary, the War on Terrorism cannot be won without timely, reliable, and abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida—would undermine our Nation's intelligence gathering efforts, thus jeopardizing the national security of the United States.

Intelligence Value of Jose Padilla

Padilla is currently being detained in the Naval Consolidated Brig, Charleston at Naval Weapons Station, Charleston, South Carolina. The President has determined that Padilla is closely associated with al Qaida, an

international terrorist organization with which the United States is at war. The President has further determined that Padilla possesses intelligence, including intelligence about personnel and activities of al Qaida, that, if communicated to the United States, would aid our efforts to prevent further attacks by al Qaida on the United States, its armed forces, other government personnel, or its citizens.

Padilla has been implicated in several plots to carry out attacks against the United States, including the possible use of a "dirty" radiological bomb in Washington DC or elsewhere, and the possible detonation of explosives in hotel rooms, gas stations, and train stations.

As noted in the unclassified Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, dated 27 August 2002, Padilla has, among other things:

- met with senior Usama Bin Laden lieutenant Abu Zabaydah in Afghanistan about conducting terrorist operations in the United States;
- conducted research in the construction of a "uranium-enhanced" explosive device at an al Qaida safehouse in Pakistan;
- discussed plans to build and detonate a "radiological dispersal device" (also known as a "dirty bomb") within the United States;
- received training from al Qaida operatives in furtherance of terrorist activities;
- met with other senior al Qaida operatives to discuss Padilla's involvement and participation in terrorist activities targeting the United States; and

- spent time in Afghanistan, Pakistan, Saudi Arabia, Egypt, and Southwest Asia.

Thus, Padilla could potentially provide information about, among other things:

- details on any potential plot to attack the United States in which he has been implicated, including the identities and whereabouts of al Qaida members possibly still at large in the United States and elsewhere;
- additional al Qaida plans to attack the United States, its property, or its citizens;
- al Qaida recruitment;
- al Qaida training;
- al Qaida planning;
- al Qaida operations;
- al Qaida methods;
- al Qaida infrastructure;
- al Qaida capabilities, including potential nuclear capabilities;
- other al Qaida members and sympathizers; and
- al Qaida activities in Afghanistan, Pakistan, Saudi Arabia, Egypt, Southwest Asia, the United States, or elsewhere.

The information that Padilla may be able to provide is time-sensitive and perishable. As noted above, any information obtained from Padilla must be assessed in connection with other intelligence sources; similarly, Padilla is a potential source to help assess information obtained from other sources. Any delay in obtaining

information from Padilla could have the severest consequences for national security and public safety.

Potential Impact of Granting Padilla Access to Counsel

Permitting Padilla any access to counsel may substantially harm our national security interests. As with most detainees, Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention. DIA's assessment is that Padilla is even more inclined to resist interrogation than most detainees. DIA is aware that Padilla has had extensive experience in the United States criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla.

Because Padilla is likely more attuned to the possibility of counsel intervention than most detainees, I believe that any potential sign of counsel involvement would disrupt our ability to gather intelligence from Padilla. Padilla has been detained without access to counsel for seven months—since the DoD took control of him on 9 June 2002. Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.

At a minimum, Padilla might delay providing information until he believes that his judicial avenues of relief

have been exhausted. Given the nature of his case, his prior experience in the criminal justice system, and the length of time that has already elapsed since his detention, Padilla might reasonably expect that his judicial avenues of relief may not be exhausted for many months or years.

Moreover, Padilla might harbor the belief that his counsel would be available to assist him at any point and that seven months is not an unprecedented time for him to be without access to counsel.

Any such delay in Padilla's case risks that plans for future attacks will go undetected during that period, and whatever information Padilla may eventually provide will be outdated and more difficult to corroborate.

Additionally, permitting Padilla's counsel to learn what information Padilla may have provided to interrogators, and what information the interrogators may have provided Padilla, unnecessarily risks disclosure of the intelligence sources and methods being employed in the War on Terrorism.

In summary, the United States has an urgent and critical national security need to determine what Padilla knows. Padilla may hold extremely valuable information for the short-term and long-term security of the United States. Providing Padilla access to counsel risks the loss of a critical intelligence resource, and could affect our ability to detain other high value

terrorist targets and to disrupt and prevent additional terrorist attacks.

STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, COMMITTEE ON THE JUDICIARY
HEARING ON DETAINEES
JUNE 15, 2005

It has been well over three years since the Administration began to hold detainees at the U.S. Naval Base in Guantanamo Bay, Cuba. The first batch of 20 detainees arrived in January 2002. There are now more than 500 detainees at Guantanamo, although the exact number remains unclear.

Today's hearing is a welcome, if long overdue, opportunity to discuss what we should do with the Guantanamo detainees and what role Congress should take in developing long-term policies for detaining and trying terrorism suspects. I commend the Chairman for taking the initiative to confront these important and difficult issues.

No Coherent Process

The Administration's policies on detainees are clearly not working, and the Administration does not have a coherent theory for how to proceed. Late in 2001, military commissions were defended by our current Attorney General as tribunals that "can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals." That was more than three years ago. But far from assuring swift justice, there has been no justice at all. We have yet to see a single military commission complete a hearing or convict a suspected terrorist, and the whole process is now hopelessly tied up in litigation.

Until a year ago, the Administration seemed to hold tight to the notion that by detaining prisoners at Guantanamo Bay -- a location where it asserted prisoners had no right of access to the courts -- it could shield itself from judicial challenge. But the Supreme Court decision in *Rasul v. Bush* rejected this flawed legal theory. Now it seems that all the Administration has left to cling to is the amorphous notion of a "war on terror" that has no end.

If the Administration had applied the Geneva Conventions from the start, as former Secretary of State Powell strongly urged it to do, we would not be in the mess we are in today. Combatants who merited POW status could have been held for the duration of active hostilities. Those who did not meet the POW standards could be prosecuted under our existing criminal laws, or for violating the laws of war. These standards and procedures were used for decades by our military, including in the first Gulf War. Unfortunately, the Administration made its determination on the basis of flawed understandings of the Geneva Conventions and against the advice of military and State Department attorneys. We now see the repercussions of those poorly conceived policies.

Alternatively, if the Administration had made better use of the Federal courts, we would not be in this mess. The handful of suspected terrorists who were indicted for their

crimes have been severely punished. Shoe bomber Richard Reid was sentenced to life in prison. John Walker Lindh, the so-called "American Taliban," was sentenced to 20 years, as was the Ohio truck driver who plotted to destroy the Brooklyn Bridge. Even Zacharias Moussoui, whose case has been complex and challenging for all involved, has now pleaded guilty; the only question remaining is whether he faces life in prison or death.

The Fruits Of Unilateralism

What has become clear over the past three years is that the Administration's policies were poorly reasoned and extremely shortsighted. The Administration's insistence on unilateralism – a tendency and a problem that has colored and undermined so many of the Administration's policies – has led to poor decisions and poor practices in detention policies, as well. From the start, the Administration's answer to every question about our detention policies has been, "Trust us." Trust us that we know the law, and that we will comply with it. Trust us to treat detainees humanely and in accordance with our laws and treaties. Trust us that Guantanamo will make Americans safer. More than three years later, the one thing we know for certain is that any trust we may have had was misplaced.

First, the Administration did not know or follow the law. The list of Federal court reversals of this Administration's policies and practices is long. From the Supreme Court's rejection of the claim that Guantanamo Bay is a land of legal limbo – or, as one Administration official has said, "the legal equivalent of outer space" – to a recent district court holding that the current military commission regulations are unlawful, there is much that needs attention and correction. The Administration has also flagrantly violated our international treaty obligations. International law, not to mention the Defense Department's own policies, requires the registration and accounting of all detainees. Yet we know that senior Administration officials approved a policy of keeping detainees off of the official roles in order to hide them from the International Committee of the Red Cross. The Administration also continues to defend its use of extraordinary rendition to transfer terrorism suspects in U.S. custody to the custody of countries where they are likely to be tortured, a patent violation of the Convention Against Torture.

Second, the Administration has not lived up to its promise to treat detainees humanely. Even with the Administration's continued stonewalling against any independent investigation into the mistreatment of detainees, we continue to learn of more abuses on almost a daily basis. If American POWs were treated in this way, the Administration would be up in arms. Yet when these actions take place in Iraq, Afghanistan, or Guantanamo, the Administration refuses to acknowledge any wrongdoing. The dangerous implications that this posture has for our own troops and citizens are obvious.

Third, and this brings us to the bottom line: The net effect of all of these problems is that Guantanamo has not made our country safer. It is increasingly clear that the Administration's policies have seriously damaged our reputation in the world and that they are making us less safe. The stain of Guantanamo has become the primary recruiting tool for our enemies. President Bush often speaks of spreading democratic

values across the Middle East, but Guantanamo is not a reflection of the values that he encourages other nations to adopt. The United States has often criticized other nations for operating secret prisons, where detainees are hidden away and denied any meaningful opportunity to contest their detention. Now we have our own such prisons. Even if the Administration fails to see the hypocrisy in this situation, the rest of the world does not.

A Festering Threat

Guantanamo Bay – along with Abu Ghraib – is an international embarrassment to our nation and to our ideals, and it remains a festering threat to our security. America was once viewed as a leader in human rights and the rule of law, but Guantanamo has undermined our leadership, damaged our credibility and drained the world's goodwill for America at alarming rates. Even our closest allies cannot condone the policies embraced by this government, not to mention the significant damage that has been caused by allegations and proven incidents of detainee abuse in Iraq, Afghanistan, and Guantanamo. These are not the policies of a great and just nation like ours, and this is not the American system of justice.

The 9/11 Commission understood that military strength alone is not sufficient to defend our nation against terrorism; there must also be a role for working cooperatively with the rest of the world. In its report, the Commission stated that "the U.S. government must define what the message is, what it stands for. We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors." Our current detention policies fall woefully short of this ideal.

The Administration got itself into this mess because it refused to accept Congress as a partner in the war on terror and insisted on acting unilaterally. Following the start of combat in Afghanistan in October 2001, I urged President Bush to work with Congress to fashion appropriate rules and procedures for detaining and punishing suspected terrorists. Our current Chairman, Senator Specter, did the same. We both noted at the time that our government is at its strongest when the Executive and Legislative branches of government act in concert. Unfortunately, the President was determined to go it alone.

Up until now, this Republican-led Congress has been content to go along for the ride. As the Administration dug itself deeper and deeper into a hole, we stood idly by. Instead of providing checks and balances, we wrote one blank check after another.

Congress's Constitutional Role

This must change. The Constitution provides that Congress, not the President, has the power to "make Rules concerning Captures on Land and Water." Congress, not the President, has the power to "define and punish Offenses against the Law of Nations." And Congress, not the President, has the power of the purse.

What is the Administration's plan for Guantanamo Bay, assuming there is one? What does the Administration intend to do with the more than 500 detainees still imprisoned there? How many will be released, and when? How many will be charged and tried, and when?

Chicken Dinners And Other Diversions

The Administration consistently insists that these detainees pose a threat to the safety of Americans. Vice President Cheney said that just the other day. If that is true, there must be evidence to support it. If there is evidence, then they should prosecute these people.

But we also know that some of the detainees have been wrongly detained. And I suspect there are others who have not yet been released, against whom the evidence is weak at best. It is one thing if they are being detained in accordance with the Geneva Conventions. But if not, they do not belong there.

This week the Administration and its defenders have been trying to change the subject from the legal morass that Guantanamo has become, by producing props of chicken dinners and such, seeming to argue that it is more Club Med than prison. Let's get real. People have been kept in cages for three years, with no end in sight and no workable process to lead us there.

Guantanamo Bay is causing immeasurable damage to our reputation as a defender of democracy and a beacon of human rights around the world. The Administration has yet to articulate a coherent plan to repair the damage. The Congress has abdicated its oversight responsibilities for far too long. The Administration has placed this nation in an untenable situation, and it is time for Congress to demand a way out.

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Testimony

of

Joseph Margulies

before the

U.S. Senate Committee on the Judiciary

June 15, 2005

Senator Specter, Senator Leahy, and Members of the Committee:

Thank you for the opportunity to address you this morning. My name is Joseph Margulies, and I am an attorney with the MacArthur Justice Center, at the University of Chicago Law School. I am also a cooperating attorney with the Center for Constitutional Rights, in New York, and was lead counsel in *Rasul v. Bush*, involving the lawfulness of the detentions at the Guantánamo Bay Naval Station, in Cuba.

My statements today are directed to the unlawful nature of the Combatant Status Review Tribunals, or CSRTs, held in Guantánamo. My colleagues and I welcome, however, the opportunity to provide the Committee with additional information about other aspects of the Administration's detention policy, including, for example, the Executive's determination not to apply the protections of the Geneva Conventions to detainees in Guantánamo, the applicability of the laws of war in the present context, and the impermissible practice of "extraordinary rendition."

I.
Introduction

In this document, I take *Rasul* as the starting place, and direct myself to some of the problems that have arisen since the case was decided by the Supreme Court almost exactly one year ago. *Rasul* reaffirmed a simple, but indispensable principle of

constitutional democracy: there is no prison beyond the law. After *Rasul*, prisoners seized in ostensible connection with the war on terror cannot be held in a legal black hole, subject to whatever conditions the military may devise for so long as the President sees fit, with no opportunity to demonstrate their innocence and secure their release. Instead, federal courts have the authority and responsibility to determine for themselves the lawfulness of a prisoner's continued incarceration.

But the promise of *Rasul* remains unfulfilled. Within days of the decision, the military announced the creation of the Combatant Status Review Tribunals. Respectfully, Senators, the CSRTs create nothing more than the illusion of a lawful process. As I said in my argument to Judge Joyce Hens Green in the federal district court in December, 2004, the CSRT mocks this nation's commitment to due process, and it is past time for this mockery to end.

I will address three aspects of the CSRTs: the failure to provide an adequate process; the willingness to rely on evidence secured by torture; and the superficial similarity to so-called Article 5 hearings.

II.
THE CSRT IS THE PERFECT STORM OF PROCEDURAL INADEQUACY

Drawing from a universe of potential procedures, the military has adopted the worst features available to it, and combined them in a grotesque parody of due process.

First, the CSRT applies an overly expansive definition of "enemy combatant," one that sweeps within its reach wholly innocent or inadvertent conduct. In the Supreme Court in this case, the Government defined "enemy combatant" as a person who "is part of or supporting forces hostile to the United States *and* engaged in an armed conflict

against the United States."[1] But in the CSRT, the military unilaterally took it upon itself to change this definition from the conjunctive to the disjunctive, and now an "enemy combatant" is anyone who is part of or supporting forces *or* who engaged in armed conflict. Moreover, that "support" may be entirely accidental or unintentional, as for instance, contributing to a charity without realizing its connection to the Taliban.[2] No amount of due process can rescue a system that simply asks the wrong question.

Second, using this expansive definition, the CSRT presumes the accuracy of the military intelligence it receives, placing the burden on the prisoner to disprove his status.[3]

Third, though the prisoner has the burden, the tribunal relies on secret evidence withheld from him.[4]

Fourth, this evidence may have been secured by torture or other forms of coercive interrogation. I discuss this particular problem in more detail below.

Fifth, the prisoner – a foreign national who has been held for months or years virtually *incommunicado* – must confront and overcome this secret evidence without the benefit of counsel.[5]

And finally, the CSRT routinely denies the prisoner the opportunity to uncover and present evidence that would prevent a miscarriage of justice. In the same way, the

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[1] Brief for the Respondents, *Rasul, et al. v. Bush et al.*, 124 S.Ct. 2686 (2004), at 5-6.

[2] *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 482, 475 (D.D.C. 2005).

[3] *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, July 29, 2004, at §§ (g)(11)-(12), *available at* http://www.defenselink.mil/ news/Jul2004/d20040730comb.pdf.

[4] *In re Guantanamo Detainee Cases*, 355 F. Supp.2d at 468-472.

[5] *Id.* at 468.

CSRT consistently refuses to inquire into the reliability or provenance of the evidence offered by the military.[6]

The result is simply this: the CSRT asks the wrong question, and then applies a wholly deficient process to produce consistently unfair and arbitrary results.

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In its court papers, the Government makes much of the fact that, viewed in isolation, each procedural piece of the CSRT has been applied in other hearings. It is worth examining that contention in more detail.

- Certainly it is true, for instance, that some proceedings do not provide for the assistance of counsel. But not where the Government also places the burden on the prisoner to disprove secret evidence, or where an adverse determination may lead to permanent loss of liberty.

- Likewise it is true that some proceedings rely, although very rarely, on secret information withheld from the claimant. But not where the prisoner has the burden of disproving the very evidence he cannot see, must do it without the assistance of counsel, and where his failure may lead to his permanent incarceration. And even in the examples relied on by the Government, the entire body of evidence was at least reviewed by an Article III court. Here it is not.

- Certainly there are cases where the Government places some restrictions on the right to prepare and present evidence. But not where the Government may rely on evidence secured by torture, then prevent any impartial inquiry into the reliability of this evidence.

- There are cases where the issue was decided by a 3-member panel, whether military or otherwise. But not where superiors have explicitly and repeatedly prejudged the issue, and the burden is on the prisoner to rebut that prejudgment.

In sum, let me be as blunt as I can. I am aware of no case, and the Government has cited to none, where a potentially permanent loss of liberty is made to depend on a process so devoid of procedural fairness, a process so apt to produce an unjust or

[6] *Id.* at 473.

arbitrary result. Whether viewed in isolation or in their entirety, the procedures used by the CSRT are a mockery of our commitment to due process.

III.
FOR THE FIRST TIME IN U.S. HISTORY, THE CSRT ALLOWS THE GOVERNMENT TO IMPRISON PEOPLE BASED ON EVIDENCE SECURED BY TORTURE

Each of the various pieces of the CSRT puzzle could be the subject of considerable testimony. Let me focus on one: the CSRT relies on evidence that may have been secured by torture or other forms of coercive interrogations, with no inquiry into its reliability.

The record in these cases indicates the "evidence" against most prisoners consists largely of their uncorroborated statements to interrogators, or the uncorroborated statements of other prisoners. Yet we know several things that should give us pause: we know the Government uses interrogation techniques beyond that authorized by the Geneva Conventions;[7] we know the Government has repeatedly revised and expanded the permissible interrogation techniques allowed at Guantánamo;[8] we know *from the Government* that a number of prisoners have been abused in various ways;[9] and we know that a substantial number of prisoners allege they have been tortured and mistreated, at Guantánamo and elsewhere.[10]

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[7] *See, e.g., Final Report of the Independent Panel to Review DOD Detention Operations ("The Schlesinger Report"),* August 2004.

[8] *See, e.g.,* Appendix A, *Chronology of United States Policy on Torture and Interrogations.*

[9] *See, e.g.,* Appendix B, *Summary of United States Government Documents Evidencing Detainee Torture and Abuse.*

[10] *See, e.g.,* Amnesty International USA, *Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power,* May 13, 2005, AI Index AMR 51/063/2005, *available at* http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf; Physicians for Human Rights, *Break Them*

Despite this, the CSRT makes no provision to exclude this evidence – or even to inquire into its reliability – nor does the Government suggest otherwise.

Let me discuss one case in particular. I represent Mr. Mamdouh Habib. Mr. Habib was seized in Pakistan and rendered to Egypt, where he was held for 6 months. The U.S. Government, through the Department of State, has long decried use of torture by Egyptian authorities. While he was in Egypt, Mr. Habib was subjected to diabolical tortures that have now been described in a number of public documents, including the decision by Judge Green.[11]

Yet the CSRT, based entirely on his uncorroborated statements, found him to be an "enemy combatant." Mr. Habib told the CSRT that his statements had been secured by torture, and the CSRT took his allegations seriously enough that it directed the Government to investigate, but that investigation is not part of the CSRT, which merely presumed the accuracy of the military's evidence, as it must do under the rules.[12]

I met repeatedly with Mr. Habib and I can assure this Committee that we intended to press his allegations very vigorously. Five days after the allegations about his rendition and mistreatment came to light, however, the Department of Defense announced that Mr. Habib would be released, and he is now back in Australia with his family.

Mr. Habib's case is not unusual:

- Prisoners who have been released report that the Bosnian-Algerians were repeatedly tortured at Guantánamo, and at least one of the

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Down: Systematic Use of Psychological Torture by U.S. Forces (2005), *available at* http://www.phrusa.org/research/torture/pdf/psych_torture.pdf.

[11] *In re Guantanamo Detainee Cases*, 355 F.Supp.2d at 473.

[12] *Id.*

Algerians, Mr. Ait Idir, told the CSRT he had been beaten by the guards at the base. The CSRT conducted no inquiry.[13]

- Mr. Al-Rawi and Mr. El-Banna, seized in Africa, allege they were beaten for weeks at a time in US custody.[14] Mr. Martin Mubanga alleges he was tortured.[15] The CSRT made no inquiry into these allegations.

- The CSRT regarding Faruq Ali Ahmed relied on testimony from a detainee who, according to personal representative "has lied about other detainees to receive preferable treatment and to cause them problems while in custody." Yet the CSRT undertakes no inquiry at all. It merely presumes the testimony of the other prisoner to be true.[16]

- In the CSRT regarding Mr. Al Kandari, the legal advisor to the CSRT says "the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first-hand knowledge of the events they describe."[17]

Senators, any process that allows evidence that may have been secured by torture or abuse to go unexamined, and uses that evidence to support a man's imprisonment, has no place in American law.

IV.
THE SUPERFICIAL SIMILARITY TO ART. 5 HEARINGS DOES NOT RESCUE THE CSRT

Finally, let me address the superficial similarity between the CSRT and so-called Article 5 hearings.

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[13] *See* Mustafa Ait Idir Unclassified Summary of the Basis for Tribunal Decision, *Boumediene, et al. v. Bush, et al.*, Civil Action No. 04-cv-1166 (D.D.C.) (RJL).

[14] *See* Bisher Al Rawi Classified Summary of Basis for Tribunal Decision, Unclassified Summary of Basis for Tribunal Decision, *El-Banna, et al., v. Bush, et al.*, Civil Action No. 04-cv-1144 (D.D.C.) (RR).

[15] *See* Martin Mubanga, Unclassified Summary of Basis for Tribunal Decision, *El-Banna et al., v. Bush, et al.*, Civil Action No. 04-cv-1144 (D.D.C.) (RR).

[16] *See* Faruq Ali Ahmed Unclassified Summary of Basis for Tribunal Decision, *Abdah, et al. v. Bush, et al.*, Civil Action No. 04-cv-1254 (D.D.C.) (HHK).

[17] *See* Al Kandari Unclassified Summary of Basis for Tribunal Decision, *Al-Odah, et al. v. United States of America, et al.*, Civil Action No. 02-cv-0828 (D.D.C.) (CKK).

As a number of courts have now recognized, the CSRT and Article 5 hearings serve radically different purposes, and operate under entirely different circumstances.[18] The Article 5 hearing takes place in the field, immediately after capture, and is designed to make a swift, 'rough and ready' determination of the prisoner's legal status so that he may be treated appropriately:

- If he is determined to be a prisoner of war, he is given POW status and treated in accordance with the Geneva Conventions;
- If there is reason to believe he has committed a war crime, he is turned over for military prosecution;
- If there is reason to believe he violated civilian law, he is turned over to civilian authorities for domestic prosecution;
- And if he is innocent, he is returned to the place of capture and released.

In other words, an adverse determination at an Article 5 hearing *leads either to detention under the Geneva Conventions, or to the additional process* appropriate to the prisoner's legal status. This additional process helps insure against an unjust result. Because the Article 5 hearing is undertaken quickly, in the field, and followed by appropriate legal process, it may be summary in form.

By contrast, the CSRT is undertaken months or years after arrest or capture, thousands of miles from the battlefield, after scores of interrogations. Furthermore, an adverse determination in a CSRT is not followed by additional legal process; the prisoner will have no further opportunity to demonstrate his innocence. Yet this determination can lead to a permanent loss of liberty under uniquely severe conditions. Just as the Article 5 hearing may be summary because it is followed by additional process that

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[18] *See, e.g.*, *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004).

guards against arbitrary outcomes, the CSRT must be robust because it is followed by what may be life imprisonment under singularly onerous conditions.

Yet despite the differences between the CSRT and an Article 5 hearing – differences that call for more procedural protections in the CSRTs – in fact there are fewer:

- In a CSRT, the burden is on the prisoner to disprove his status. In an Article 5, by contrast, the prisoner is presumed to be a POW;

- In a CSRT, the entire senior military and civilian chain of command has repeatedly prejudged the result, and declared the prisoners to be "enemy combatants." Indeed, they have been described as "the worst of the worst," and "trained killers." In an Article 5 hearing, by contrast, the prisoner begins the hearing as a POW protected by the Geneva Conventions. In every other adjudicative context, due process calls for a hearing followed by an announcement of the result; here, senior officials announced the result, then assigned junior officers to hold the hearing.

CONCLUSION

The lawyers involved in these cases welcome the inquiry by this Committee. We hope by your guidance and oversight we are able to fulfill the promise of *Rasul*, and demonstrate once again that we are a nation of laws, and not of men. Thank you.

Joseph Margulies
Chicago, Illinois
June 13, 2005

Appendix A

Chronology of United States Policy on Torture and Interrogations

January 9, 2002 — *Application of Treaties and Law to al Qaeda and Taliban Detainees*, U.S. Department of Justice, Office of Legal Counsel Memorandum by John Yoo, Deputy Assistant Attorney General to Williams J. Haynes II, General Counsel, Department of Defense.

The DOJ OLC memo provides a legal analysis asserting that the Geneva Conventions do not apply to detainees captured as part of the war in Afghanistan and transferred to Guantánamo Bay Naval Station. The memo claims that under the War Crimes Act, the only potential crimes that are covered by the Geneva Conventions (which the Administration argues are not applicable to these detainees) are "grave breaches" were are those "causing great suffering or serious bodily injury to POWs, killing, or torturing them."

January 19, 2002 — *Status of Taliban and Al-Qaida*, Memorandum by Secretary of Defense Donald Rumsfeld to Richard B. Myers, Chairmen of the Joint Chiefs of Staff.

Secretary Rumsfeld states that "al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoners of war status for purposes of the Geneva Conventions of 1949."

January 25, 2002 — *Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, White House Counsel Memo by Alberto R. Gonzalez, Counsel to the President, to President George W. Bush.

The Gonzales legal memo supports the January 9, 2002 DOJ OLC Memo, above, recommending that President Bush declare al Qaeda and Taliban detainees beyond the scope of the Geneva Conventions, and claiming that such action would protect American personnel from culpability under the War Crimes Act. Gonzalez also states that the "war" on terror is a "new kind of war" which "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint" some of its protections.

January 26, 2002 — *Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan* by Colin Powell, Secretary of State to Counsel to the President and to the Assistant to President for National Security.

Powell suggests that the January 25, 2005 Memorandum, above, does not present to the President the full range of options before him nor discuss the pros and cons of each option. This memo

concludes that the pros of applying the Geneva Conventions to the conflict in Afghanistan far outweigh the cons, which include undermining law of war protections for U.S. troops and constituting a reversal of a century of U.S. military policy.

February 1, 2002 *Letter from Attorney General John Ashcroft to The President*

Attorney General Ashcroft urges the President to determine that the Geneva Convention does not apply to the conflict in Afghanistan on the theory that Afghanistan is a failed state because this approach affords "the highest level of legal certainty available under American law." He also asserts that this approach will foreclose judicial review and minimize "various legal risks of liability, litigation, and criminal prosecution" related to field conduct, detention, or interrogation by U.S. personnel.

February 2, 2002 *Comments on Your Paper on the Geneva Conventions*, Memorandum from Williams Taft IV, State Department Legal Advisor, to Counsel to the President.

Taft urges the President to apply the Geneva Conventions to the conflict in Afghanistan because to do so is consistent with the plain language of the Conventions and "the unvaried practice of the United States" for fifty years. He notes that failure to apply the Conventions "deprives our troops there of any claim to the protections of the conventions in the event that they are captured." The memo also points out that the CIA lawyers asked that the President's pledge to abide by the spirit of the Conventions not apply to CIA operatives.

February 7, 2002 *Humane Treatment of al Qaeda and Taliban Detainees*, White House Memo by President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff.

In this memo, the President makes the following conclusions:

- The Geneva Conventions do not apply to the U.S. conflict with Al Qaeda;
- The President claims the authority to suspend the Geneva Conventions in the conflict with the Taliban-government in Afghanistan, but does not exercise this authority; and

- Common Article 3 of the Geneva Conventions does not apply to al Qaeda or Taliban detainees, but Taliban detainees are considered unlawful combatants, and as such, "do not qualify as prisoners of war under Article 4" of the Geneva Conventions.

The memo asserts that the United States will "treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner appropriate with the principle of Geneva."

August 1, 2002 — *Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A*, U.S. Department of Justice, Office of Legal Counsel Memorandum by Jay S. Bybee, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President.

The DOJ OLC memo asserts the following legal analyses:

- Torture is defined as methods that cause "severe physical pain or mental pain or suffering," with "severe pain" being "equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death;"

- Concludes that torture requires specific intent to cause prolonged mental harm such that a defendant's good faith belief that the acts were not torture constitutes a "complete defense to such a charge;"

- To constitute torture, "acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality;"

- The rationale for employing torture techniques during interrogations of suspected al Qaeda operatives is self-defense of the country; and

- The President is not bound by the Convention Against Torture or federal anti-torture legislation because of "the executive branch's constitutional authority to protect the nation from attack."

October 2002 — *Counter-Resistance Techniques*, Memorandum from General James T. Hill, Commander, U.S. Southern Command to Chairmen of the Joint Chiefs of Staff, October 25, 2002.

Counter-Resistance Strategies, Memorandum from Major General Michael E. Dunlavey, Commander, Guantánamo Joint Task Force 170, to Commander, United States Southern Command, October 11, 2002.

Counter-Resistance Strategies, Memorandum from Lt. Colonel Diane E. Beaver, Staff Judge Advocate, Guantánamo Joint Task Force 170, to Commander, Guantánamo Joint Task Force 170, October 11, 2002.

Request for Approval of Counter-Resistance Strategies, Lt. Jerald Phifer, Director J-2, Guantánamo Joint Task Force 170 to Commander, Guantánamo Joint Task Force 170, October 11, 2002.

In this series of four memoranda, the command at Guantánamo requests approval for specific interrogation techniques:

Category I:

- Yelling at the detainee (including threatening language as long as there is no actual intended threat);
- Deception techniques, including the interview identifying himself or herself as a citizen of a foreign country with a reputation for harsh treatment of detainees.

Category II

- The use of stress positions, including prolonged standing (4 hours);
- Isolation of up to 30 days, or longer with approval;
- Use of hoods during transportation and interrogations;
- Change of interrogation venue;
- Use of falsified documents or reports;
- Prolonged interrogation (20 hours);
- Sensory deprivation;
- Forced grooming, including the shaving of facial hair;

- Removal of clothing;
- Manipulation of phobias, "such as fear of dogs," to induce stress;
- Removal of hot meals; and
- Removal of all "comfort" items (including religious items).

Category III

- Threat of death or severe pain to detainee or his family;
- Exposure to cold weather or water;
- Use of wet towel to cause perception of suffocation; and
- Use of mild, noninjurious physical contact such as poking or light pushing.

November 27, 2002 *Action Memo: Counter-Resistance Techniques*, William J. Haynes, II, General Counsel of the Department of Defense, to Secretary of Defense

Reviews Guantánamo command's request for counter-resistance strategies and recommends approval of Category I and II techniques as well as the last techniques in Category III, above. Haynes declares that the methods in Category III "may be legally available" but are "not warranted" at this time.

December 2, 2002 Secretary of Defense Donald Rumsfeld approves and adopts General Counsel Haynes recommendations in the November 27, 2002 Action Memo, above.

January 15, 2003 *Counter-Resistance Techniques*, Memorandum by Donald Rumsfeld Assistant Secretary of Defense to Commander, U.S. Southern Command.

Rescinds December 2, 2002 approval of the use of all Category II techniques and one Category III techniques during interrogations. Rumsfeld instructs, however, that "should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me."

January 15, 2003 — *Memorandum for the General Counsel of the Department of Defense: Detainee Interrogation*, by Donald Rumsfeld, Secretary of Defense to William J. Haynes, II, General Counsel of Department of Defense

Seeks to establish a working group to assess all aspects of detainee interrogations.

March 6, 2003 — *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operation Considerations*, Prepared by Working Group appointed by Williams J. Haynes II, General Counsel of Department of Defense, to Donald Rumsfeld, Secretary of Defense.

The draft policy report concludes that the Geneva Conventions are inapplicable to al-Qaida and that Article 4 of the Geneva Conventions is inapplicable to the Taliban. It also states that the 1994 Convention Against Torture defines torture as "specifically intending to inflict severe physical or mental pain or suffering." The report also asserts that the Executive is not bound by customary international and that the federal torture statute, 18 U.S.C. § 2340, is inapplicable because Guantánamo is within the United States. The Working Group proposes approval of additional interrogation techniques at Guantánamo, including:

- Slapping of the face and stomach;
- Removal of all clothing, which can be done by military police if subject resists; and
- Increasing anxiety by use of aversions, including the presence of dogs.

April 16, 2003 — *Counter-Resistance Techniques in the War on Terrorism*, Memorandum from Donald Rumsfeld, Secretary of Defense to Commander, U.S. Southern Command.

This memorandum establishes the Department of Defense's final policy on approved interrogation techniques for use at Guantánamo based upon the findings of the Working Group. The policy specifically authorizes the use of 24 interrogation techniques, including:

- Offering or removing incentives, including religious items;
- Inducing fear;
- Playing on ego;

- "Mutt and Jeff" techniques;
- Dietary manipulation;
- Altering environment to create "mild discomfort;"
- Sleep adjustment; and
- Isolation.

December 30, 2004 *Standards Applicable Under 18 U.S.C. §§2340-2340A*, U.S. Department of Justice, Office of Legal Counsel Memorandum by Jack Goldsmith, Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General.

This memorandum "supercedes the August 2002 memorandum in its entirety." It broadens the definition of torture used in the original memo, but does not address the authority of the Executive to override treaty obligations.

Appendix B with Redacted FBI Documents

Summary of United States Government Documents Evidencing Detainee Torture and Abuse at Guantánamo

The Department of Defense has attempted to justify the detentions of prisoners in the Guantánamo Bay Naval Station on the basis of statements allegedly made by the prisoners and presented to the Combatant Status Review Tribunals ("CSRTs"). Many current and released detainees, however, claim they have been tortured or subjected to physical or psychological abuse while at Guantánamo. At the hearing on the government's motion to dismiss the *In re Guantánamo Detainee Cases*, government counsel represented that, although there were several instances in which military personnel acted contrary to Department of Defense policy and were reprimanded or retrained, there had not been any torture of the detainees. Transcript of Proceedings, Dec. 1, 1004, at 130-131.

This claim has been flatly contradicted by government documents recently disclosed under FOIA in *ACLU, et al v. Dep't of Defense*, Civil Action No. 04-4151 (AKH) (S.D.N.Y.). The following summaries from those documents indicate that FBI agents have participated in the interview of at least 747 detainees in Guantánamo (Ex. A), and that for several years the FBI's Behavioral Analysis Unit Objected to and complained to the military commander at Guantánamo about interrogation tactics employed there by the military. The FBI records include eyewitness accounts by government officials of "extreme interrogation techniques" (Ex. B) used against detainees in Guantánamo.

Specifically, FBI agents observing interrogations of detainees at Guantánamo reported the following incidents:

- A female interrogator named Sergeant Lacey, renowned for leaving detainees "curling into a fetal position on the floor and crying in pain," ordered a soldier to place a curtain over the two-way mirror between the interrogations room she was using and an observation room while she grabbed the genitals of a detainee who was shackled with his hands cuffed to the waist and bent his thumbs back, causing him to grimace in pain and pull away and against the restraints. *See* Letter from Deputy Assistant T.J. Harrington to General Donald J. Ryder (Ex.. C).

- A detainee was gagged and much of his head wrapped with duct tape as a punishment for chanting the Koran. When an FBI Agent asked how the duct tape would be removed, he received no response. *Id.*

- Military personnel used dogs "in an aggressive manner" to intimidate a detainee. The same detainee was totally isolated for a three-month period in a cell constantly flooded with light, by the end of which the detainee was showing signs of "extreme psychological trauma," including talking to nonexistent people and crouching in the corner of his cell covered by a sheet for hours on end. *Id.*

- Detainees in interrogation rooms were left chained "hand and foot in a fetal position on the floor, with no chair, food or water," for periods of 18, 24 hours or

more, with the result that the detainees had "urinated or defecated on themselves." *See* Email to Valerie Caproni dated August 2, 2004 (Ex. D).

- A detainee was left in an unventilated interrogation room with the air-conditioning turned off making the temperature "probably well over 100 degrees." The detainee is described as being "almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night." *Id.*

- Another detainee was left in an interrogation room where the air-conditioning was turned a point where "the temperature was so cold in the room that the barefoot detainee was shaking with cold." The FBI observer states "When I asked the MP's what was going on, I was told that interrogators from the day had ordered this treatment, and the detainee was not to be moved." *Id.*

- A detainee was left in an interrogation room where "the temperature [was] unbearably hot" and "extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the floor." *Id.*

- Another detainee was wrapped in an Israeli flag and subjected to sensory over-stimulation with prolonged loud music and strobe lights. (Ex.. E)

Other documents disclosed in the FOIA litigation reveal government officials' objections to the interrogation tactics observed at Guantánamo:

- An email from a FBI Behavioral Analysis Advisor observed "aggressive" and "extreme interrogation tactics," which he and his colleagues summarized in communications between May and October 2002. (Ex. F)

- An email dated December 2003, describing an incident in which Defense Department interrogators impersonated FBI agents which using "torture techniques" against an detainee. The FBI official writing the email concluded, "If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done [sic] the 'FBI' interrogators. The FBI will [sic] left holding the bag before the public." (Ex. G)

- The same document also states that no "intelligence of a threat neutralization nature" was garnered by the "FBI" interrogation, and that the FBI's Criminal Investigation Task Force (CITF) believes that the Defense Department's action have destroyed any chance of prosecuting the detainee. The email's author writes that he or she is documenting the incident "in order to protect the FBI." *Id.*

5/16/04

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b7C -1

[redacted]

Detainee Interviews (Abusive Interrogation Issues)

Referral/Direct

- In late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. Military. As a result an EC dated 5/30/03, was generated summarizing the FBI's continued objections to the use of [redacted] techniques to interrogate prisoners. This EC is attached and includes a collection of military documents discussing and authorizing the techniques. We are not aware of the FBI participating directly in any [redacted] interrogations.

- It should be noted that FBI concerns and objections were documented and presented to Major General Geoffery Miller, who oversaw GTMO operations. MG Miller is now in Iraq serving as the commander in charge of the military jails. MG Miller appeared in the New York Time on 5/5/04 defending "coercive and aggressive" interrogation methods.

- FBI operations in Afghanistan, Iraq and GTMO have each been queried and all have reported back that they do not have any direct knowledge of any abusive interrogation techniques being used. Each location was aware of rumors of abuse which have surfaced as a direct result of pending Military investigations into abusive interrogation techniques.

- The FBI has participated in the interview of 204 individuals in Iraq and 747 in GTMO. Our Afghan operation needs additional time to prepare a list of those interviewed in theater. Attached are the lists from GTMO and Iraq.

- A key word search of the Iraq interviews identified one individual alleging abuse by military personnel. In this instance a woman indicated she was hit with a stick and she wanted to talk only to German officials.

Referral/Direct

- FBI personnel assigned to the Military Tribunal effort involving GTMO detainees has during the review of discovery material seen, on a few rare occasions, documentation of [redacted] techniques being noted in interviews conducted by Military personnel. In these instances the material was called to the attention of military's Criminal Investigative Task Force (CITF), and Office Military Commissions (OMC) personnel.

Clem 2/6L

FBI 1836

Message

[redacted] (IR) (FBI) b6 -1

To: [redacted] (INSD) (FBI) b7C -1

Subject: GTMO

As you may be aware, I was in GTMO and I did observe aggressive interrogation practices and as a Behavioral Analysis Advisor on interrogation techniques was aware of extreme interrogation techniques that were planned and implemented against certain detainees.
These events were summarized in memos and an EC written by myself and my colleagues between Oct. and May of 2002.
I have been discussing these events with GC Valerie Caproni.

SSA [redacted] b6 -1
b7C -1

[redacted]

DETAINEES-3132

7/9/2004

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

July 14, 2004

Major General Donald J. Ryder
Department of the Army
Criminal Investigation Command
6010 6th Street
Fort Belvoir, Virginia 22060-5506

Re: Suspected Mistreatment of Detainees

Dear General Ryder:

I appreciate the opportunity I had to meet with you last week. As part of a follow up on our discussion on detainee treatment, I would like to alert you to three situations observed by agents of the Federal Bureau of Investigation (FBI) of highly aggressive interrogation techniques being used against detainees in Guantanamo (GTMO). I refer them to you for appropriate action.

1. During late 2002, FBI Special Agent James Clemente was present in an observation room at GTMO and observed Sergeant (first name unknown) Lacey conducting an interrogation of an unknown detainee. (SA Clemente was present to observe the interrogation occurring in a different interrogation room.) Sgt. Lacey entered the observation room and complained that curtain movement at the observation window was distracting the detainee, although no movement of the curtain had occurred. She directed a marine to duct tape a curtain over the two-way mirror between the interrogation room and the observation room. SA Clemente characterized this action as an attempt to prohibit those in the observation room from witnessing her interaction with the detainee. Through the surveillance camera monitor, SA Clemente then observed Sgt. Lacey position herself between the detainee and the surveillance camera. The detainee was shackled and his hands were cuffed to his waist. SA Clemente observed Sgt. Lacey apparently whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male). On more than one occasion the detainee appeared to be grimacing in pain, and Sgt. Lacey's hands appeared to be making some contact with the detainee. Although SA Clemente could not see her hands at all times, he saw them moving towards the detainee's lap. He also observed the detainee pulling away and against the restraints. Subsequently, the marine who had previously taped the curtain and had been in the interrogation room with Sgt. Lacey during the interrogation re-entered the observation room.

SA Clemente asked what had happened to cause the detainee to grimace in pain. The marine said Sgt. Lacey had grabbed the detainee's thumbs and bent them backwards and indicated that she also grabbed his genitals. The marine also implied that her treatment of that detainee was less harsh than her treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.

2. Also in October 2002, FBI Special Agent Robert Morton was observing the interrogation of a detainee when Dave Becker, a civilian contractor, came into the observation room and asked SA Morton to come see something. SA Morton then saw an unknown bearded, long-haired detainee in another interrogation room. The detainee had been gagged with duct tape that covered much of his head. SA Morton asked Mr. Becker whether the detainee had spit at the interrogators. Mr. Becker laughed and stated that the detainee had been chanting the Koran and would not stop. Mr. Becker did not answer when SA Morton asked how the duct tape would be removed from the detainee.

3. In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subjected to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). It is unknown to the FBI whether such extended isolation was approved by appropriate DoD authorities.

These situations were referenced in a May 30, 2003 electronic communication (EC) from the Behavioral Analysis Unit of the FBI to FBI Headquarters. That EC attached, among other documents, a draft Memorandum for the Record dated 15 January 2003 from Capt. Mark E. McCary (USAFR), that refers to the first two events among others in a time line of events related to discussions concerning the use of aggressive interrogation techniques. Marion Bowman of the FBI"s Office of General Counsel discussed the contents of those communications with Mr. Dietz, Deputy General Counsel (Intelligence) and Mr. Del'Orto, Deputy General Counsel of DoD, around the time the EC was received. Although he was assured that the general concerns expressed, and the debate between the FBI and DoD regarding the treatment of detainees was known to officials in the Pentagon, I have no record that our specific concerns regarding these three situations were communicated to DoD for appropriate action.

General Donald J. Ryder

If I can provide any further information to you, please do not hesitate to call.

Sincerely yours,

T.J. Harrington
Deputy Assistant Director
Counterterrorism Division

[redacted] ((MSG016 RTF SECRET Page 1

b6 -1
b7C -1

From [redacted] (INSD) (FBI) b6 -1
To Caproni, Valene E (OGC) (FBI) b7C -1
cc
Subject FW GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Here is the second summary One more to go
-----Original Message-----
From [redacted] BS) (FBI)
Sent Monday, August 02, 2004 10 46 AM b6 -1
To [redacted] (INSD) (FBI) b7C -1
Subject RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

b6 -1
Mr [redacted] b7C -1

As requested, here is a brief summary of what I observed at GTMO

On a couple of occassions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water Most times they had urinated or defacated on themselves, and had been left there for 18 24 hours or more On one occassion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved On another occassion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees The detainee was almost unconcious on the floor, with a pile of hair next to him He had apparently been literally pulling his own hair out throughout the night On another occassion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor

Any questions, feel free to call or ask via email [redacted] b2 -1
b6 -1
b7C -1

-----Original Message-----
From [redacted] (INSD) (FBI) b6 -1
Sent Thursday, July 29, 2004 10 58 AM b7C -1
To [redacted] (BS) (FBI)
Subject RE GTMO

[redacted]

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted]

SECRET

DETAINEES-1760 1760

5053

[redacted] - ((MSG001 RTF Page 1

b6 -1
b7C -1

From Caproni, Valerie E (OGC) (FBI)
b6 -1 To [redacted] (INSD) (FBI)
b7C -1 cc
Subject RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

b5 -3 [redacted]

-----Original Message-----
b6 -1 From [redacted] (INSD) (FBI)
b7C -1 Sent Monday, August 16, 2004 2 49 PM
To Caproni, Valerie E (OGC) (FBI)
Subject FW GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

This should be the last one Let me know followup or not

-----Original Message-----
b6 -1 From [redacted] (OM) (FBI)
b7C -1 Sent Friday, July 30, 2004 1 56 PM
To [redacted] (INSD) (FBI)
Subject RE GTMO

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11-03-2004 BY 615 [redacted]

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

b6 -1 [redacted]
b7C -1

Following a detainee interview exact date unknown, while leaving the interview building at Camp Delta at approximately 8 30 p m or later, I heard and observed in the hallway loud music and flashes of light I walked from the hallway into the open door of a monitoring room to see what was going on From the monitoring room, I looked inside the adjacent interview room At that time I saw another detainee sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing I left the monitoring room immediately after seeing this activity I did not see any other persons inside the interview room with the Israeli flag draped detainee, but suspect that this was a practice used by the DOD DHS since the only other persons inside the hallway near this particular interview room were dressed in green military fatigues, similar to the ones worn by DOD DHS and the DOD MP Uniformed Reservists At no time did I observe any physical assaults take place of this detainee nor any others while assigned to GTMO

I understood prior to deployment to GTMO, that such techniques were not allowed, nor approved by FBI policy While at GTMO no such techniques were never conducted to my knowledge by any of the

DETAINEES-1414

1414

[redacted] {(MSG001 RTF Page 2

b6 -1
b7C -1

CITF personnel assigned at GTMO

Approximately one or two days later, DHS tactics were discussed at a weekly held CITF staff meeting Many of the CITF investigators discussed how some of the DHS tactics had been counterproductive in building rapport with detainees who were being interviewed by CITF members Acting FBI SSA [redacted] advised that no CITF personnel including FBI agents were to take part in any such interviews or interrogations which fell outside the FBI's policy of interviewing detainees ASSA [redacted] also advised us that if we became aware of any similar instances where agressive DHS tactics had been observed to notify him, provide details, and he would make these instances known to appropriate GTMO DOD and DOJ officials It should be noted that while at GTMO, ASSA [redacted] acted in an exemplary manner and represented the FBI as a consumate professional This summary details the only incident I have to report regarding observing a non-FBI approved tactic being used on a detainee at GTMO

b6 -1
b7C -1

[redacted]
FBI Omaha
Des Moines R A
[redacted]

b2 -1

-----Original Message-----
From [redacted] (INSD) (FBI)
Sent Thursday, July 29, 2004 9 59 AM
To [redacted] (OM) (FBI)
Subject RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Could you please provide a short summary of what you observed Thanks

-----Original Message-----
From [redacted] (OM) (FBI)
Sent Friday, July 09, 2004 4 20 PM
To [redacted] (INSD) (FBI)
Subject RE GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

b6 -1
b7C -1

[redacted]

While at GTMO I observed some non-FBI policy treatment which was conducted by non-Bureau and non-CITF personnel being used on one detainee I did not observe any physical mistreatment of any detainee

b6 -1
b7C -1

[redacted]
FBI Omaha
Des Moines R A
[redacted]

b2 -1

-----Original Message-----

DETAINEES-1415

1415

Message

[redacted] (IR) (FBI) b6 -1

To: [redacted] (INSD) (FBI) b7C -1

Subject: GTMO

As you may be aware, I was in GTMO and I did observe aggressive interrogation practices and as a Behavioral Analysis Advisor on interrogation techniques was aware of extreme interrogation techniques that were planned and implemented against certain detainees.
These events were summarized in memos and an EC written by myself and my colleagues between Oct. and May of 2002.
I have been discussing these events with GC Valerie Caproni.

SSA [redacted] b6 -1
b7C -1

[redacted]

DETAINEES-3132

7/9/2004

[redacted] Fwd: Impersonating [redacted]I at GTMO Page 1

b6 -1
b7C -1

b6 -1 From: [redacted]
b7C -1 To: Bald, Gary, BATTLE, FRANKIE, CUMMINGS, ARTHUR, ...
Date: Fri, Dec 5, 2003 9:53 AM
Subject: Fwd: Impersonating FBI at GTMO

b6 -1 Frank [redacted]
b7C -1

I am forwarding this EC up the CTD chain of command. MLDU requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD's interrogation practices, however, we were not aware of these latest techniques until recently.

b2 -3 Of concern, DOD interrogators impersonating Supervisory Special Agents of the FBI told a detainee that
b6 -4 [redacted] These same interrogation teams then [redacted]
b7C -4 [redacted] The detainee was also told by this interrogation team
b7E -1 [redacted]
b7F -1

These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee.

If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done the "FBI" interrogators. The FBI will left holding the bag before the public.

b6 -1 SSA [redacted]
b7C -1 CTD/MLDU

CC: [redacted] b6 -1
b7C -1

[redacted]

DETAINEES-3168

STATEMENT OF REAR ADMIRAL JAMES M. MCGARRAH, DIRECTOR OF ADMINISTRATIVE REVIEW OF THE DETENTION OF ENEMY COMBATANTS, DEPARTMENT OF THE NAVY, WASHINGTON, D.C.

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today.

In May of last year, Deputy Secretary of Defense Paul Wolfowitz named Secretary of the Navy Gordon England the Designated Civilian Official (DCO) to supervise the process to review annually the cases of all detainees held under DoD control at the U.S. Naval Base, Guantanamo Bay, Cuba. Secretary England appointed me as the Director of the Office for the Administrative Review of the Detention of Enemy Combatants, the organization charged with carrying out the review process. We solicited input from the International Committee of the Red Cross, from non-governmental organizations, and from the Ambassadors of countries with detainees at Guantanamo Bay, and then worked across all U. S. Government agencies to develop a rigorous and fair review process called the Administrative Review Board (ARB). The purpose of the ARB process is to assess annually whether each enemy combatant at Guantanamo continues to pose a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention. Based on this assessment, the ARB panel can recommend to Secretary England that individual detainees be released, continue to be detained, or be transferred with conditions to their country of nationality. Secretary England, as the DCO, is the final decision maker for this process.

While the ARB procedures were being developed last summer, the U.S. Supreme Court issued three rulings related to detained enemy combatants. Among other things, the Court in one of those cases held that federal courts have jurisdiction, under the federal habeas corpus statute, 28 U.S.C. Section 2241, to hear challenges to the legality of the detention of Guantanamo Bay detainees. In another one of those cases, a plurality of the Court cited Section 1-6 of Army Regulation 190-8 as an example of military regulations that would suffice to satisfy the due process requirements that the plurality indicated would apply to a U.S. citizen held as an enemy combatant in the United States. In light of those decisions, the Deputy Secretary of Defense established the Combatant Status Review Tribunal (CSRT) process to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to contest

the enemy combatant designation. The CSRT process was based on Army Regulation 190-8, which provides policy, procedures and responsibilities for the handling of prisoners of war and certain other detainees. Specifically, it outlines provisions for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW), which requires a competent tribunal to determine the status of belligerents in cases where any doubt arises as to whether a belligerent satisfies the requirements for prisoner of war status. The CSRT is a one-time process, and provides each detainee with the following opportunities consistent with Army Regulation 190-8:

- The opportunity for review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their decisions by majority vote, based on the preponderance of the evidence;
- The opportunity to attend all open portions of the proceedings;
- The opportunity to call witnesses on his behalf, if those witnesses are relevant and reasonably available;
- The opportunity to question witnesses called by the tribunal;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity freely to decline to testify

The CSRT process also provides more process and protections than Army Regulation 190-8:

- The detainee is given the opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for his hearing.
- The CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal

- The CSRT Recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant
- In advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification
- The detainee is allowed to introduce relevant documentary evidence
- The result of every CSRT is automatically reviewed by a higher authority, who is empowered to return the record to the tribunal for further proceedings, if appropriate.

Secretary England appointed me as the Convening Authority for the CSRT process. The CSRT tribunal panels were the decision makers in this process. In my Convening Authority review, I could either approve a panel's decision or return a case for further deliberations. In less than six months, tribunal hearings were conducted on all 558 detainees under Department of Defense control at Guantanamo Bay. Of the 558 cases heard, the CSRT panels determined that 520 detainees were properly classified as enemy combatants, and that 38 detainees no longer met the criteria for designation as enemy combatants. Those found no longer to meet the criteria for enemy combatant designation were processed for release. Twenty-three have been released; the Department of Defense continues to work closely with Department of State to effect the release of the remaining fifteen detainees.

The first Administrative Review Board was conducted on December 14, 2004. The ARB process is ongoing, with the expectation that we will complete the first annual review for all eligible detainees by the end of this calendar year. The ARB process provides each eligible detainee with the following opportunities:

- The opportunity for review by a neutral decision-making panel of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their assessments, in writing and by majority vote, on whether there is reason to believe the enemy combatant no longer poses

a threat to the United States or its allies and any other factors bearing on the need for continued detention;

- The opportunity to attend all open portions of the proceedings;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity to receive assistance from a military officer to ensure he understands the process, and to prepare for his hearing.

Again, the intent of the ARB process is to assess annually whether each detainee continues to pose a threat to the U.S. or its allies and to recommend whether each detainee should continue to be detained, released, or transferred.

In order to accomplish this assessment, we coordinate within the Department of Defense, and with the Department of State, Department of Justice (including the FBI), Central Intelligence Agency, Department of Homeland Security, and the National Security Council staff to acquire information relevant to each detainee's situation. Additionally, unless national security concerns dictate otherwise, we coordinate through the Department of State to provide each detainee's home nation the opportunity to provide information, including the opportunity to submit information from the detainee's family.

A process like the ARB is not required by either the Geneva Convention or international law; it is discretionary on the part of the U. S. Government. There are no absolutes and this process does contain some risk to American citizens, for example, the possibility of releasing a detainee who returns to the fight against U.S. forces.

However, to do it right, the ARB and CSRT processes have required time, and have not been without their challenges. For example, the pursuit of off-island witness input for CSRT hearings was very time consuming, and we have received very little input from home countries in the ARB process. But we must do this right, because there are two sides to the fairness coin. First, fairness to the American people requires that those in

detention who still pose a threat should not be released and permitted to return to terrorist activities. Second, fairness to the detainee, as well as our clear desire not to detain persons any longer than necessary, would suggest that those who no longer pose a threat to the United States or our allies be released or transferred to their own countries.

However, because of the highly unusual nature of the Global War on Terrorism, and because we do not want to detain any combatant any longer than is necessary, we have taken this unprecedented and historic action to establish a process to permit enemy combatants to be heard while a conflict is ongoing.

Mr. Chairman, thank you again for the opportunity to provide you this information. I am happy to answer any questions you or your committee members might have regarding the CSRT or ARB processes.

Testimony

of

Stephen J. Schulhofer

before the

U.S. Senate Committee on the Judiciary

June 15, 2005

Senator Specter, Senator Leahy, Committee Members:

My name is Stephen Schulhofer. I am a Professor at New York University School of Law and a founder of the Liberty and National Security Project at the Brennan Center for Justice. Thank you for this opportunity to contribute to your deliberations. Thank you especially for scheduling these extremely important hearings.

The issues arising out of the detentions at Guantánamo Bay and elsewhere are of utmost importance to our national security. It is essential that we find out whether captured fighters have useful intelligence, and it is essential that we prevent them from returning to the battlefield.

It is also essential to convince the world that America is fighting for freedom, for democracy and for the human dignity of all peoples. We know that we are, but the sad truth is that much of the world does not automatically see it that way. Millions of people around the globe begin with great skepticism about our good intentions. And we cannot defeat terrorism if we win battles at Tora Bora and Falluja but lose the battle for the cooperation and respect of the world's one billion law-abiding Muslim citizens.

Guantánamo is now hurting us - - hurting us very badly. Some of the prisoner abuse allegations are disputed, but far too many have been confirmed by our own officials. And in some instances, our legalistic defenses, taking refuge in definitional technicalities, have made us look even worse.

In any case, no one disputes that more than 500 prisoners now held at Guantánamo have been there for years, with no access to the courts or to any independent tribunal. No one disputes that we hold alleged terrorists at Bagram and at undisclosed locations around the world, without ever saying who they are or where they are, without filing any accusations against them, and without making public any of the supposedly damning evidence we have of their crimes.

Our armed forces have done a superlative job, responding to an unprecedented challenge. And right after September 11th, many decisions had to be made quickly, under enormous pressure. Today's agenda must not be to point fingers or to cast blame. But we have to face the facts of where we are today and the price we are paying every minute, throughout the world, for the predicament in which we now find ourselves.

Guantánamo, Abu Ghraib and what they represent have become potent recruiting tools for extremists. Al Qaeda has been disrupted and much of its pre-September 11th leadership has been captured or killed. But from all the evidence, new leaders are coming forward, and new jihadists are lining up to join. Our own Army has missed its recruiting goals for many months now. But the enemy apparently continues to replenish its ranks.

Beyond its effect as a recruiting tool for al Qaeda, Guantánamo poses other serious problems. In the United States, Western Europe and around the world there are millions of decent Muslims who would never consider becoming terrorists, no matter what we do at Guantánamo. But these good, law-abiding citizens now mistrust the United States. Many of them live in fear that they could be framed by enemies or accidentally caught in the wrong place at the wrong time. Some fear that they or their children could even wind up at Guantánamo. Immigrants in the United States know that they must keep their distance from federal authorities, and many are now even afraid to cooperate with their local police. They worry that if they report a suspicious new person

in their community or if they admit to knowing him, they themselves could come under suspicion or even be deported.[1]

For half a century, the United States has exported democracy and human rights to the whole world, but Guantánamo has tarnished America's name and poisoned our reputation. We don't yet know all the missteps or how they occurred, but for now that doesn't matter. We have a "tylenol" problem. What we stand for has been contaminated. Whatever the cause, we have to let the world know that we are committed to restoring the integrity of our most important product and that we are taking immediate steps to make it tamper-proof from now on. We can begin to limit the damage, but only if we act forthrightly and quickly.

The solutions are not all that difficult. I would suggest two guiding principles. First, we should hew closely, wherever possible, to previously established institutions and procedures. This approach avoids confusion, minimizes start-up costs and above all carries the presumption of consistency and legitimacy that has been so disastrously missing from our actions at Guantánamo Bay. Second, our preoccupation should *not* be to see how many safeguards we can avoid or how little in the way of due process the Constitution will tolerate. That's the thinking that has brought us to where we are today. Instead, we must ensure that detention conditions and review procedures provide maximum feasible transparency and accountability, subject only to substantial national security imperatives.

National Security Imperatives - - the Three Hardest Questions

[1]Sean O'Neill, et al., "Muslim Anger as Guantánamo Bay Britons Fly Home," The Times (London), January 26, 2005, discussing how, as a result of treatment received by the British detainees at Guantánamo, "relations between the police and the Muslim community were plunged into crisis." Somini Sengupta & Salman Masood, Guantánamo Comes to Define U.S. to Muslims, N.Y. Times, May 21, 2005.

Reservations about relying on existing military and criminal justice procedures center on three concerns - - that ordinary civilian and military courts cannot protect sensitive information, that traditional procedures foreclose opportunities for effective interrogation, and that the potential devastation of a successful terrorist attack requires us to err on the side of security rather than liberty - - that we simply cannot afford to take chances. These are understandable concerns, but on examination, they do not hold up.

Sensitive information. Ordinary civilian courts and courts-martial have extensive experience handling cases that involve top-secret documents and other sensitive material. Building on the Classified Information Procedures Act (CIPA), both court systems have developed detailed mechanisms for protecting confidential information. CIPA permits courts to filter out the classified portions of relevant evidence, to provide substitutions that convey equivalent information without compromising sensitive sources, and to insure that access to classified material is strictly limited to personnel who have appropriate security clearances.

Misinformed media commentators often ridicule the capacity of the ordinary courts to try sensitive cases expeditiously and effectively, but experience demonstrates very clearly that complex federal prosecutions can proceed successfully - - and *have* proceeded successfully, consistently so. As shown in a thorough report just released by the Brennan Center for Justice,[2] CIPA procedures have permitted terrorism cases, espionage cases and other prosecutions involving confidential material to go forward smoothly while preserving the essentials of a fair and accurate trial and without a single incident of compromising sensitive information.

As novel situations have arisen, the federal courts have demonstrated notable flexibility in developing new procedures to preserve secrecy while protecting the

[2] Serrin Turner & Stephen J. Schulhofer, The Secrecy Problem in Terrorism Trials (Brennan Center for Justice, 2005).

adversary process. Congress could facilitate these accommodations by enacting appropriate refinements to CIPA.[3] Although legislation would be helpful, courts retain the ability to fill in gaps when unanticipated situations arise. There is simply no evidence - - none - - that federal courts and conventional courts-martial are unable to protect sensitive evidence while at the same time affording an effective adversarial trial in keeping with high standards of fairness.

Interrogation. The notion that criminal justice rules preclude all interrogation, require the presence of an attorney or pose an insuperable barrier to getting essential information is wildly misinformed. Neither *Miranda v. Arizona* nor even the Fifth Amendment itself imposes any restriction whatsoever on F.B.I. investigators, much less on military intelligence personnel, when they question detainees for information to guide preventive counter-measures, or to provide battlefield intelligence, or even to serve as admissible evidence supporting the arrest and prosecution of others.[4] Regardless of the detention time-limits and procedures that Congress or the courts may ultimately establish, the core prohibitions on torture and other highly coercive interrogation methods will apply to intelligence interrogations in any event, and the more restrictive limitations of *Miranda* and the Fifth Amendment will not.

A different objection to affording prompt judicial hearings is the concern that successful interrogation may require that terrorism suspects be kept in prolonged isolation. Let us acknowledge the possibility that after months or (as is now the case) *years* of detention incommunicado, a suspect may eventually crack and yield information,

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[3] Areas now ripe for legislative refinement include security clearance procedures for counsel, rules concerning public access, and procedures for review of classification decisions. See id., at 80.

[4] See Chavez v. Martinez, 538 U.S. 760 (2003). Moreover, even after receiving *Miranda* warnings, the great majority of criminal defendants waive their rights to consult an attorney, choose to talk, and eventually make incriminating statements. See, e.g., George C. Thomas III, Plain Talk About the Miranda Empirical Debate: A "Steady State" Theory of Confessions, 43 UCLA L.Rev. 933, 935-36, 946-53 (1996); Richard A. Leo, Inside the Interrogation Room, 86 J. Crim.L. & Criminology 266, 280 (1996). And for the few who invoke their right to counsel, defense counsel typically serve as a bridge and often *facilitate* cooperation.

not yet stale, that might not have been obtained otherwise. But if that prospect can suffice to foreclose access to any independent oversight or review for years on end, then individual liberty can be erased, for periods without limit, at the unchecked discretion of the military, and the rule of law literally becomes a dead letter. In *Hamdi*, the Supreme Court recognized explicitly that such a radical alteration of our constitutional system cannot rest on so slender a reed: "Certainly we agree that indefinite detention for the purpose of interrogation is not authorized."[5]

To put in some perspective the claimed need for extended detention, it is essential to consider the experience of other Western nations. In the face of unremitting terrorist attacks in Northern Ireland, Britain sought to lengthen the period of incommunicado detention beyond its usual norm of 48 hours. The European Court of Human Rights held that because of the emergency conditions, detention prior to judicial review could be permitted for *a maximum of five days*, and then only subject to the proviso that there be an unconditional right of access to a solicitor after the first *48 hours*.[6]

Turkey, confronting persistent attacks by separatists who had caused instability and thousands of deaths in its Kurdish region, sought to detain suspected terrorists for exceptional periods without access to judicial review. The European Court held that despite grave emergency conditions, detention incommunicado for up to *fourteen days was incompatible with the rule of law*.[7]

In connection with the second *intifada* and the Israeli military's extensive combat operations on the West Bank in 2002, the Israel Supreme Court held that incommunicado detention of suspected enemy combatants for up to *eighteen days was unacceptably long*; the IDF has since limited its periods of detention prior to the first court hearing to *a maximum of eight days*.[8]

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[5] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (plurality opinion).
[6] See Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906, 1950-51(2004).
[7] See id., at 1950.
[8] See id., at 1927-30.

These benchmarks must play an important part in any effort to understand the international reaction to Guantánamo detentions that have continued incommunicado for more than three years, with no end in sight. I believe we all know that Israeli forces confront tight resource constraints and a grave threat to their national survival, as well as legal doctrines that since 1999 have largely succeeded in precluding the use of highly coercive interrogation techniques. Yet IDF interrogators have worked well for years within the eight-day boundary imposed by their commitment to the rule of law. Surely the American military, the best in the world, can function effectively under similar conditions.

Staying on the Safe Side. The nub of the matter is that global terrorism under modern conditions poses a threat of unprecedented destruction and loss of life. We can no longer reflexively assume that it is better for ten guilty suspects to be released than for a single innocent person to be imprisoned. The attraction of a new principle - - when in doubt, detain - - is readily understandable.

The problem, unfortunately, is that in the battle against global terrorism, there is no such thing as the safe decision that eliminates risk. To be sure, if suspects are detained indefinitely at Guantánamo, the actual terrorists among them will certainly be neutralized. To that extent, the pool of potential terrorists will be reduced. But that pool is not static. New recruits are constantly joining, and we know that our own policies influence the flow of these recruits, often in the opposite direction from the one we intend. The innocent civilians we inadvertently detain have families back in their home countries, they have former schoolmates and perhaps entire villages that wonder why their friends are being held in secrecy. The people back home doubt whether there is really any evidence against them and grow furious at what they see as America's hypocrisy and abuse of power.

To rely on secret evidence, to use hearsay accusations insulated from rebuttal, and to detain whenever in doubt eliminates much of the risk that a dangerous suspect will be

released, but that approach may create thousands of new enemies for every existing terrorist it removes from the fight. Yes, adhering to our best due process traditions will mean taking some chances. It will require some courage, courage the American people surely can muster. But there is no simple, risk-free alternative.

Specific Solutions

It will be helpful to focus on four distinct groups of detainees. We should put aside for a moment the small number of prisoners actually accused of war crimes. These prisoners now face trial before a military commission, but to date, fewer than 15 detainees have been found eligible for this process. Hundreds of detainees have NOT been accused of any crime and are NOT facing any sort of trial. This is the major difficulty now clouding the entire anti-terror effort - - 99% of the Guantánamo detainees, more than 500 people, have not been charged with any misconduct, and they continue to be held even though many of them claim to be ordinary civilians. The immediate problem is to establish a credible procedure to resolve these old cases quickly, focusing first on detainees allegedly captured on battlefields in Afganistan.

Second, we must establish an efficient and sustainable system for dealing with combatants who may be captured in battle from this point forward. Third, we need a procedure for prisoners held at Guantánamo now (or apprehended in the future) who were *not* captured in combat but instead were arrested by law enforcement authorities or seized by other government agents on ordinary city streets and other areas far removed from the battlefield. Finally, we have to deal with the small number of detainees, present and future, who may be charged with criminal offenses.

Of course, all four of these tasks fall squarely within Congress' lawmaking responsibilities under Article 1, section 8 of the Constitution.[9]

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[9] "The Congress shall have Power To . . . make Rules concerning Captures on Land and Water; [and] To make Rules for the Government and Regulation of the land and naval Forces . . . . " U.S. Const., art. 1, § 8, cl. 11 & 14.

The solution, in a nutshell, is simply for Congress to make clear that these cases can be and should be addressed in accordance with the ordinary processes of military law and federal criminal procedure. Methods of unquestioned legitimacy are already in place for dealing with combatants captured on a battlefield, suspected terrorists apprehended elsewhere, and individuals allegedly responsible for war crimes or other serious offenses. All that remains to be done is for legislation to remove technical impediments and start the ball rolling, so that existing processes can be set free to do their traditional work. To be sure, difficult problems may arise, but they are best addressed incrementally within the framework of existing institutions and procedures. There is no reason to cast aside two hundred years of experience in an effort to build a new legal system from scratch. The preferable, incremental approach is explained more specifically below.

1. Current prisoners captured in battle.

Hundreds of foreign nationals allegedly captured in battle are currently held at Guantánamo and other places where the United States exercises exclusive jurisdiction and control. Most of these prisoners were seized in late 2001 or early 2002. Habeas corpus challenges to their detention have received initial support from the Supreme Court in the *Hamdi* and *Rasul* cases, and litigation to determine just what process is due these detainees continues to work its way through the courts. A final resolution by that route may be years away, as judges seek to iron out minimally acceptable procedures and the substantive facts required to justify detention.

The courts cannot and should not prejudge all these questions. But the time courts will require to sort out the issues will come at a heavy cost in terms of the continuing erosion of trust in our government and continuing damage to global respect for American ideals. No responsible corporation would allow the fate of its brand to languish for years in this way. Here Congress can make an enormously valuable contribution by settling the principal issues quickly, in terms that can carry a strong presumption of legitimacy.

Because many of these detainees *deny* that they were engaged in battle against the United States or our coalition partners, *Hamdi* and *Rasul* hold that they are entitled to a hearing that comports with the requirements of due process. But they were not afforded a battlefield hearing promptly after capture, as contemplated by U. S. Army Reg. 190-8 and Article 5 of the Third Geneva Convention. It is now far too late for a 190-8 battlefield hearing. And the newly minted Combatant Status Review Tribunals established to take the place of Reg. 190-8 are mired in litigation, because of doubt that they provide the *independent* forum and other safeguards required by *Hamdi*.[10]

There is a straightforward and essentially costless solution to this festering problem. Congress could restore credibility to the process overnight, by simply granting these detainees the immediate statutory remedy of a habeas corpus hearing as outlined in *Hamdi*. 28 U.S.C. § 2241 should therefore be amended to confirm that habeas hearings using the *Hamdi* procedures are available to review detention not supported by the judgment of either a court or a battlefield tribunal convened in close proximity to the time and place of capture. After a fair proceeding of this sort before an Article III judge, prisoners found to be enemy combatants can be detained under judicial orders of unquestionable legitimacy.

Under *Hamdi*'s balancing analysis, detention predicated on a scaled-down hearing of this sort cannot be punitive, nor can it be perpetual. Legislation should therefore make explicit that such detainees are entitled to be held in conditions of transparency and accountability, with all the privileges and protections available to prisoners of war under the Geneva Conventions. Similarly, legislation should confirm, as stressed in *Hamdi*, that such detainees must be "released and repatriated without delay after the cessation of active hostilities."[11]

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[10] Detainees must receive "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. . . . [D]ue process requires a neutral and detached judge." 124 S. Ct., at 2648 (internal citations and quotation marks omitted).

[11] Id., at 2641 (internal citations and quotation marks omitted).

Detainees accused of war crimes are obviously another matter. They should be prosecuted and, if guilty, suitably punished - - the sooner the better. Their prosecutions should proceed promptly in existing military or civilian courts, as discussed below. And of course, detainees who are determined to be neither combatants nor war criminals should be immediately repatriated to their home countries, where they will be either released or detained and prosecuted as their own governments see fit.

There will be enormous benefits all around from legislation that resolves these issues quickly and puts the Guantánamo nightmare behind us.

2. Prisoners captured in future battles

For the future, the appropriate treatment of individuals captured in battle is straightforward. Army Regulation 190-8 already sets forth detailed rules for promptly resolving questions relating to the status of alleged belligerents captured in the course of armed conflict. Congress need only require, pursuant to its Article 1 § 8 power, that the armed forces follow the standard Regulation already in place. Its procedures, of proven workability, afford ample scope for adapting rules of evidence and other requirements to battlefield conditions. And adhering to this previously established approach protects against perceptions that the United States is inventing new rules of its own choosing in order to create legal black holes in which ordinary safeguards do not apply.

Again, Congress should make clear that detainees not facing criminal charges are entitled to communicate regularly with their families, that they must be afforded decent treatment, including all the Geneva Convention privileges and protections available to prisoners of war, and that, as *Hamdi* emphasizes, they have the right to be repatriated as soon as the active hostilities in which they participated have ceased.

3. Prisoners *not* captured in battle

When most of us think of the Guantánamo detainees, we picture Taliban or al Qaeda fighters captured on battlefields in Afganistan. These are the detainees who fit the definition of an "enemy combatant" that the Supreme Court carefully spelled out in *Hamdi*, specifically "an individual who, [the government] alleges, [supported] forces hostile to the United States or coalition partners in Afganistan and who engaged in an armed conflict against the United States there."[12]

But a substantial portion of the Guantánamo detainees, probably several hundred of them, are NOT enemy combatants in the specific *Hamdi* sense. The government does NOT allege that they were captured in battle - - in Afganistan or elsewhere. These detainees were arrested by ordinary law enforcement agents or caught in other situations not involving military combat. The government claims the authority to treat as "enemy combatants" not only those who fit the *Hamdi* definition - - prisoners captured in battle - - but also suspected terrorists seized on metaphorical battlefields, American and foreign cities far removed from actual combat operations.

With respect to citizens arrested within the United States who deny membership in any organized enemy armed forces, authority of that sort was never claimed, much less tested, in the World War II *Quirin* case.[13] And the constitutional validity of such a power has now been rejected explicitly by five justices in the *Hamdi-Padilla* cases.[14]

The opposing view - - which the U. S. government continues to support - - is that American and foreign cities are part of a universal battlefield in a global war on terror and

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[12] Id., at 2639 (plurality opinion) (internal quotation marks omitted)
[13] See Turner & Schulhofer, supra at 52-55.
[14] See *Hamdi*, 124 S. Ct., at 2660 (Scalia J., joined by Stevens, J., dissenting); Rumsfeld v. Padilla, 124 S. Ct. 2711, 2729, 2735 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting).

that suspected al Qaeda operatives are in effect enemy soldiers operating out of uniform behind our lines.

That analogy, if accepted, would obliterate much of the U.S. Constitution, together with most criminal justice procedures of the United States and our allies, because the safeguards applicable to determining criminal responsibility would cease to apply whenever the President unilaterally designates a terror suspect as an enemy combatant. The Justice Department even takes the position that a person who contributes to a charity, not realizing that it is a front to finance al Qaeda, would be properly classified as an "enemy combatant" and could be detained at the discretion of the military.[15] Indeed if the "universal battlefield" analogy is valid, it leads to the conclusion that an "enemy combatant" spotted in the concourse of an American airport could, under the accepted laws of war, simply be shot on sight. Armed conflict under international law cannot be an infinitely elastic concept that displaces domestic criminal law whenever executive and military authorities wish to do so.[16]

In addressing this issue, Congress should make clear that within the borders of the United States, disputed allegations of terrorist activity must be resolved by the Article III

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[15] See Rasul v. Bush, No. 02-0299, Transcript on Motion to Dismiss, December 1, 2004, at pp. 25-26. In response to Judge Joyce Hens Green's question concerning the status of a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afganistan but really is a front to finance al Queda activities," Justice Department attorney Brian D. Boyle replied that the woman's lack of intention to aid terrorism "is not a factor that would disable the military from detaining the individual as an enemy combatant. . . . It would be up to the military, and great deference would need to be paid to its judgment."

[16] Under the widely prevailing view, "international armed conflict" requires at least one State on each side of the conflict, and "armed conflict not of an international character" requires "an organized military force, [and] an authority responsible for its acts, acting within a determinate territory . . ." International Committee of the Red Cross, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 49 (Jean Pietet ed. 1952), or, in another formulation, "open hostilities between armed forces which are organized to a greater or lesser degree[, operating] within the territory of a single State." International Criminal Tribunal for Rwanda, Musema (Trial Chamber), January 27, 2000, paras. 247-248. And whatever room there might be to widen definitions like these, the more important point is that creative legal efforts to stretch traditional concepts, in order to give our

courts in accordance with the Constitution and the ordinary criminal process. Similarly, suspects seized abroad, but outside zones of active combat, must be prosecuted if the facts warrant, but otherwise they should be returned to their home countries for further proceedings or released as their own governments see fit.[17] Terrorism suspects who may, in the future, be apprehended outside a zone of battle must be processed in accordance with established standards for formal extradition and the other accepted norms of international criminal justice.

4. Detainees accused of criminal conduct.

For suspected terrorists accused of crimes, including war crimes, the proposed military commission system is deeply flawed. The commissions can draw on none of the usual sources of legitimacy, and their procedures lack elementary guarantees of public acceptability and reliable results. As an entirely new legal invention,[18] the commissions' most basic ground rules have yet to be authoritatively settled. Their proceedings accordingly are certain to remain, at best, cumbersome and slow-moving for months and probably years to come.

All to what end? The novelty of the commissions, their secrecy, and the highly contested flexibility of their procedures defeat their very purpose, by shielding terrorists

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government more leeway, have become counterproductive. Our overriding goal now must be to accept and embrace accountability, not to insulate our actions by seeking refuge in legal technicalities.

[17] The scaled down procedures contemplated by *Hamdi* are expressly premised on the unusual governmental interests at stake in the case of battlefield captures, *Hamdi*, 124 S. Ct. at 2647-48 (plurality opinion). Those procedures therefore are presumably inapt in cases involving detainees not seized in combat.

[18] Contrary to claims repeatedly advanced by Justice Department advocates, the procedures contemplated for the new military commissions, to the extent that they can be known, were not in any relevant sense endorsed by the Supreme Court's judgment upholding the military commission that tried the *Quirin* saboteurs. Indeed, the *Quirin* opinion states explicitly that a majority of the Court was unable to reach agreement on the procedural issues. *Ex parte* Quirin, 317 U.S. 1, 20 (1942); see Turner & Schulhofer, supra, at 53-55.

from a convincing and clearly visible accounting of their responsibility and by postponing indefinitely the day of judgment that the American public deserves to see.

The straightforward solution is to refer all such cases for prosecution in Article III courts or courts-martial under the existing, well-established rules of federal criminal procedure and the Uniform Code of Military Justice. As shown in the Brennan Center report,[19] these systems provide well-tested procedures, readily adaptable to new challenges, that preserve the essentials of a reliable adversary trial, while fully protecting classified information and other national security interests. With such a powerful yet uncomplicated solution right at our finger tips, it is simply tragic that we allow ourselves to continue losing the propaganda war, while hardened terrorists paint themselves as victims and elude the authoritative condemnations and punishments that are now long overdue. We can and must do better.

Thank you very much for your attention.

[19] Turner & Schulhofer, supra.

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
SENATE JUDICIARY COMMITTEE

STATEMENT OF

LIEUTENANT COMMANDER CHARLES D. SWIFT, JAGC, USN

BEFORE THE

SENATE COMMITTEE ON JUDICIARY

ON

DETAINEES

15 JUNE 2005

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
SENATE JUDICIARY COMMITTEE

Senator Specter, Senator Leahy, Committee Members:

My name is Charles D. Swift. I am presently commissioned as a Lieutenant Commander in the United States Navy, Judge Advocate General's Corps. I would like to thank the Committee for inviting me to testify regarding the critical issue of the procedures and fairness of Military Commissions. My testimony today is made in the context of my assignment as Military Defense Counsel of Salim Ahmed Hamdan, a Yemeni National facing trial by Military Commission. As such, it does not necessarily represent the views of the United States Navy or the Department of Defense.

I have had the honor of serving my country in the United States Navy for over 18 years and the privilege to be a member of the United States Navy Judge Advocate General's Corps for the past 11 years. My experiences in the JAG Corps have convinced me beyond any doubt of the truth of F. Lee Bailey's statement that if he were innocent of a crime, he would rather be tried by a court-martial, but if he were guilty, he would rather take his chances in a civilian court.

Of course military justice has not always been synonymous with fairness. Prior to the establishment of the Uniform Code of Military Justice (UCMJ) military proceedings often deserved the analogy that military justice was to justice what military

music was to music. Such an unfavorable view arose from the fact that military justice placed the interests of the military commander in a paramount position to the protection of the accused, lacked an independent decision-maker to ensure impartiality of the proceeding, and in contrast to a core value of our founders, relied on individuals instead of the rule of law to ensure the system's fairness.

The advent of the UCMJ and its subsequent revisions corrected these faults and put military justice in step with American values, while still maintaining the necessary flexibility to cope with the realities of the military's central function: defense of our nation. For more than 50 years the UCMJ has been a cornerstone of a system of military justice that has proven not only its fairness, but unique adaptability to the requirements of national security, the realities of the battlefield, and the necessities of military operations. Instead of focusing on American values inherent to the UCMJ, the ad hoc, on-the-fly military commission process rules focused on the lack of values of our enemy. That focus has caused the Military Commission to abandon the "rule of law." By running roughshod over the UCMJ, we have lost site of our fundamental values to the point that Mr. Hamdan faces judgment for allegedly violating the law of war in a tribunal that fails to live up to the standards of justice required by that same law. In

recounting my experience in the Military Commissions it is not my intention to lay blame for the present situation; rather I hope to spur a return to the tried and trusted path of the UCMJ.

Chronology

I was nominated to serve as a Defense Counsel in the Military Commissions by the Judge Advocate General of the Navy in early March of 2003. I reported to the Chief Defense Counsel Military in mid-March 2003, on the premise that Commissions were imminent.

When I reported to the Commissions though, I found quite a different mood. No one involved in the Commission process appeared eager to begin the process. In my first meeting with Mr. Haynes, the Department of Defense General Counsel, he thanked me for agreeing to serve and told me that my service would be valuable even if we chose never to do a commission. He also recounted advice he had received from Mr. Lloyd Cutler, who had served as one of the junior prosecutors in the Nazi Saboteur Case, *Ex Parte Quirin,* 317 U.S. 1 (1942). Mr. Cutler cautioned that the *Quirin* case was the only episode of his legal career of which he was not proud. After reading the rules for Military Commissions it was not hard to understand why there was considerable reluctance to begin them.

Despite internal reluctance, on July 3rd of 2003, the President began the Military Commission process by finding that six detainees were subject to trial by Military Commission. The plan was to begin Commissions with guilty pleas. Two weeks after the President's finding, a request to detail Military Counsel to Mosem Begg of Great Britain and for David Hicks of Australia believed to be likely candidates for guilty pleas was made. I was tasked by the then-Acting Chief Defense Counsel Colonel Will Gunn to draft letters detailing Lieutenant Colonel Sharon Shaffer, USAF to represent Mosem Begg and Major Dan Mori, USMC to represent David Hicks. Literally minutes before Colonel Gunn was going to sign these letters, he received word that counsel was not to be detailed to either man.

Subsequently, I watched as diplomatic talks between Great Britain and the United States attempted to reconcile the Commission procedures with what Great Britain considered to be the minimum standards of due process for criminal justice required by the Anglo Saxon tradition and international law for a criminal proceeding.

Ultimately, the Department of Defense released the British detainees rather than accede to Britain's demands concerning the commissions. That the decision to charge an individual was at least in part dependent on nationality and political concerns raises the specter of selective prosecution and undue command

influence, and has further compromised the perception of the Commissions' fairness at their onset.

As talks with Britain were reaching an impasse, it was decided to skip the British defendants and move on in an attempt to demonstrate the legitimacy of Commissions. Still determined to begin the commission with guilty pleas, Mr. Hamdan was substituted for Mr. Begg on the belief that he too would agree to plead guilty. On or about December 12th, 2003, Mr. Hamdan was moved into "pre-commission segregation," and held in solitary confinement in Camp Echo. On December 16th, the Chief Prosecutor requested that Military Counsel be detailed to Mr. Hamdan. I was subsequently detailed to represent Mr. Hamdan on December 17, 2003.

At the onset of my representation of Mr. Hamdan, I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of "negotiating a guilty plea" to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea.

Despite my reservations about representing a client whose only choice was to plead guilty I believed it was prudent to meet with Mr. Hamdan based on the Prosecutions representations that Mr. Hamdan in fact desired to plead guilty. But, at my

first meeting, I knew I had to tell Mr. Hamdan that if he decided not to plea guilty, he may never see me again.

In an effort to offset what I believed to be a clear attempt to coerce Mr. Hamdan into pleading guilty my legal team drafted an authorization for him to sign permitting me to serve as "next friend" in a lawsuit. By so doing, I hoped to offset Mr. Hamdan's fears that if he did not agree to plead guilty he would never be heard from again and rendered incommunicado in a legal black hole.

The lack of a translator prevented me from meeting with Mr. Hamdan until January 30th, 2004. Upon meeting with Mr. Hamdan I was immediately confronted with the fact that the realities of his pretrial confinement did not live up to then-Assistant Attorney General Chertoff's promise of humane conditions of pre-trial detention, including the free exercise of religion. During the initial period of his pretrial confinement, Mr. Hamdan was held in isolation for more than seven months in violation of the Geneva Convention. Mr. Hamdan cell lacked both natural light and ventilation. For approximately the first 60 days of that pretrial detention, Mr. Hamdan was only permitted only a half-hour of exercise and then only at night. For the first 90 days of his confinement in pretrial isolation, Mr. Hamdan was not permitted any reading material beyond the copy of the Koran. Federal courts have found that solitary confinement

for even a handful of days to constitute violations of the Constitution, let alone seven months. Contrary to the promise of free exercise of religion, Mr. Hamdan was not permitted to participate with other detainees in Friday Prayers, nor was he provided basic standard Islamic text found in any American Mosque including the Tafsir (a basic interpretation of the Koran), and Stories of the Prophet continue to be denied him.

My personal observation of the impact of the above conditions caused me serious concern for his well being. To mitigate these concerns, I demanded a speedy trial on Mr. Hamdan's behalf and an independent medical examination. Both of these requests were denied.

Despite Attorney General Ashcroft's assurances to Senator Edwards that the President's Military Order would not be used to detain a person for an unlimited period of time, General Hemingway rejected Mr. Hamdan's request for a speedy trial, finding that he had no right to a speedy trial and could be held indefinitely.

Mr. Hamdan's request for independent medical evaluation was rejected in favor of a cursory twenty minute psychiatric examination. When an independent exam was finally permitted in March of this year by Dr. Emily Kerham, a noted forensic psychiatrist, the extent of the damage done to Mr. Hamdan by the conditions of his confinement and the methods utilized in his

interrogations was able to be determined. Dr. Keram found after conducting a medical exam in accordance with accepted standards of care that to a medical certainty Mr. Hamdan suffered from Post Traumatic Stress Disorder as a result of the abuse he had suffered during his detention and had experience of major depression during his solitary confinement.

Although I was permitted to continue to meet with Mr. Hamdan subsequent to his refusal to negotiate a guilty plea, the decision to charge two other detainees expected to plead not guilty instead of Mr. Hamdan in combination with the flat refusal to give Mr. Hamdan a speedy trial caused me to fear that the only way Mr. Hamdan would see a Commission was if he agreed to plead guilty. After four month's in solitary confinement Mr. Hamdan was on the verge of being coerced into a guilty plea or deteriorating mentally to the point that he would be unable to assist in his defense if he ever came to trial.

At Mr. Hamdan's request and out of belief that I had no other options left in April 2004, I filed and have maintained since, a petition for Writ of Mandamus and or Habeas Corpus challenging both the lawfulness of procedures and the jurisdiction of the proceeding. The lead counsel in this action is Professor Neal Katyal of Georgetown University Law Center and who has previously testified before this Committee on this

subject.[1] In addition to Professor Katyal, the law firm of Perkins Coie has served as co-counsel. The tireless efforts of Professor Katyal and Perkins Coie have brought the issues of jurisdiction and legality of Military Commissions front and center before the Federal Courts. Their efforts have served not only Mr. Hamdan, but the public's interest as well.

The Department of Justice, contrary to then-White House Counsel Alberto Gonzalez's public assurances and that of Attorney General Ashcroft, Assistant Attorney General Chertoff and Department of Defense General Counsel Haynes to this Committee that detainees could challenge the jurisdiction of military commissions via writs of habeas corpus, has continuously opposed the resolution of the merits of Mr. Hamdan's claim. Initially the Department of Justice argued that court should abstain until the Supreme Court determined whether Secretary of Defense Rumsfeld had by virtue of holding Mr. Hamdan and other detainees in Guantanamo Bay successfully avoided Habeas challenge altogether.

After the Supreme Court determined that detention in Guantanamo Bay was not a bar to Habeas Corpus, the Prosecution hastily referred a single charge of conspiracy against Mr. Hamdan. Based on the decision to charge Mr Hamdan with

[1] Professor Katyal's testimony before this committee is available at http://www.law.yale.edu/outside/html/Public_Affairs/140/katyal.pdf; and further exposition can be found in Neal Katyal & Laurence Tribe, *Waging War: Deciding Guilt:* Trying the Military Tribunals, 111 *Yale L.J.* 1259 (2002).

conspiracy the Department of Justice now argues that the Federal Courts should defer to the Commission. The use of a Military Commission to try Mr. Hamdan on a charge of conspiracy, however, exceeds assurances made to this Committee that only war crimes would be heard by the Commissions.

Colonel Winthrop's definitive treatise on Military Law explicitly states that crimes of intention are not within the jurisdiction of a Military Commission. Conspiracy is not listed as a crime in any of the treaties governing the law of war. The Nuremburg Tribunals rejected conspiracy as a war crime cognizable against minor actors. Finally, just this year the International Committee for the Red Cross published its exhaustive study of the common law of war, and it does not list conspiracy.

The Department of Justice maintains that three military officers, two of which have no legal training or experience, are better suited to determine a Commission's lawful jurisdiction than a federal court. This argument flies not only in the face of the representations to this Committee but also in Attorney General Biddles' observation in *Quirin* that "I cannot conceive that a Military Commission composed of high officers of the Army, under a commission signed by the Commander- In -Chief, would listen to arguments in the question of its power under that authority to try these defendants....[L]et me say that the

question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts."

Apart from the question of whether the Commissions are a lawful exercise of Presidential power, the proceedings against Mr. Hamdan are not going to keep the promise of a full and fair trial. Consider the following:

- The Prosecution is currently seeking to enter more than a thousand pages of investigative reports and interrogations of the accused and other detainees into evidence before the Commission. Yet it has not identified the agents that have compiled the report, the translators if any utilized in the interrogations, and any other individual present.
- Indeed, the prosecution has never disclosed the conditions under which the interrogations have been made. Public statements by General Miller, the former Commander of the Joint Task Force Guantanamo, indicated that the lack of evidence surrounding the interrogations in questions was intentional effort to avoid preserving evidence that may be used by Defense Counsel. These facts in combination with numerous reports in the media, FBI memorandums, internal reports, and internal investigations, of abusive and coercive tactics in the interrogation of detainees cast considerable doubt as to the truth and voluntariness of the

statements principally relied on by the Prosecution to support the charge against Mr. Hamdan.

- Unlike every other court with which the United States is familiar, the military commissions do not prohibit testimony obtained by torture. Indeed, the military commission rules permit the introduction of tortured testimony without notice of how it was obtained. As the entire military commission defense team and Professor Katyal wrote, in a letter to this Committee dated June 1, 2004:

> the Department of Defense has sought and attempted to build a legal black hole wherein it can conduct both physically and psychologically abusive interrogations and impose penal and potentially capital sanctions subject only to the will of the Executive and the Department of Defense and not the rule of law. Such a purpose is in no way in keeping with our countries fundamental tenet, enshrined by our nation's great Chief Justice John Marshall in 1803, that we are a "government of laws, and not of

men." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).[2]

- Military prosecutors have no authority to force the disclosure of how statements of purported members of al Qaeda from the intelligence agencies that obtained them and the Military defense counsel have no ability to demand the production of such witness.
- A complete set of rules for the conduct of proceeding has never been promulgated. The failure to publish a trial guide after more than three and half years has created the situation in which counsel were required to prepare for proceedings whose procedures were published literally an hour in advance of the hearing. The Appointing Authority and the Presiding Officer have acknowledged that they are in the process of developing the rules for Military Commissions even as they conduct them. In the best of lights, Mr. Hamdan's Military Commission must be seen as an experiment in justice conducted on a living human being.
- Mr. Hamdan was removed from hearing portions of the Commission Member's voir dire without any effort to mitigate his removal by providing unclassified summaries of

[2] Letter from Lieutenant Colonel Sharon A. Shaffer, Lieutenant Commander Charles Swift, Lieutenant Commander Philip Sundel, Major Mark A. Bridges, Major Michael D. Mori, and Professor Neal Katyal to the Honorable John Warner, Orrin Hatch, Carl Levin, and Patrick Leahy, June 1, 2004, available at http://www.law.georgetown.edu/faculty/nkk/documents/hill.letter.pdf.

the testimony as promised. What is more striking is that the issue could have been easily avoided in advance. The closed testimony centered around one of the member's activities regarding the war in Afghanistan and another member's role in determining classification and transportation of detainees to Guantanamo Bay. The Appointing Authority certainly could have chosen members who did not have a direct involvement in decisions concerning Mr. Hamdan, thereby avoiding the issue altogether.

- The Prosecution indicates that during trial, they intend to seek Mr. Hamdan's exclusion from one to two days of the trial proceedings. As a mitigating measure the Department of Defense has stressed that Military Defense Counsel will be permitted to be present during the presentation of this evidence but will not be able to consult with his client or reveal the content of the evidence or testimony to his client.

As a practicing Military lawyer for eleven years, I can say without reservation, that the presence of Defense Counsel in these hearings does nothing to mitigate the prejudice to the accused. The accused explanation of direct evidence against him is paramount in the preparation of cross examination, proffer of

rebuttal evidence and the accused's determination of whether to testify. For this reason, the accused presence at trial is among the oldest of the traditions of Anglo Saxon jurisprudence.

Military commissions have historically required the presence of the accused during the substantive portions of his trial. Even the *Quirin* Commission, cited repeatedly to this Committee for the lawfulness of Military Commissions, did not exclude the accused at any point of hearing the testimony against them. The *Quirin* saboteurs were present throughout their trial, despite the fact that the evidence then contained critical information regarding the United States' defenses and its vulnerabilities.

Likewise, as NYU Professor Noah Feldman, who drafted the Iraqi Constitution under assignment from the Department of Defense, pointed out in his amicus brief in support of Mr. Hamdan, the rules developed by the United States for the trial of Saddam Hussein and all other war criminals in Iraq required the defendant's presence during every substantiate phase of his trial. To argue that Mr. Hamdan maybe excluded for security purposes from his own trial when the *Quirin* saboteurs were not and Saddam Hussein will not be so excluded does not live up to the promises made to this Committee that Commissions would be reflective of American values.

Even if hearing proceedings are modified to require the presence of the accused in accordance with international law and the Uniform Code of Military Justice, it is highly doubtful that the international community will come to see Commissions as full and fair trials as promised to this Committee by the Assistant Secretary of Defense. The erosion of confidence in interrogations techniques utilized by United States and foreign agents of detainees combined with evidentiary rules that the drafters contend permit the admission of coerced statements and the lack of an independent and unbiased judiciary to review the appropriateness of evidence makes it highly unlikely that the international public will consider the Military Commissions to be full and fair as promised. Indeed, as alluded to the above, Great Britain from whom we draw our tradition of Anglo Saxon jurisprudence refused to continence the trial of its citizens before the Military Commissions as they are currently composed.

We believe that the Supreme Court of the United States will ultimately find these Military Commissions unlawful. But I am here today not to argue a legal case to you, but to underscore the tremendous failure that the Commissions have been. It has been nearly four years since the horrific attacks of September 11, 2001. Not a single person has been prosecuted in the Military Commission. Only four people have been charged. Of those four, none can be said to be a high-ranking member of al

Qaeda or anything close to it. As of the end of July 2005, the Office of the Chief Defense Counsel will be reduced to only one full time defense counsel and incapable of representing the handful of individuals currently before commissions. The Military Commission process, regardless of how the federal courts rule, is an exercise in futility. It tries to reinvent a vibrant system of law, the American court-martial, without considering its fundamental features: balancing of rights of defense and prosecution, and compliance with international law and the United States Constitution.

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTION, DC 20301-1600

December 15, 2003

MEMORANDUM FOR ACTING CHIEF DEFENSE COUNSEL

SUBJECT: Target Letter re Military Commission Investigation of Mr. Salem Ahmed Salem Hamdan

On July 3, 2003, the President determined that Mr. Salem Ahmed Salem Hamdan is subject to the Military Order of November 13, 2001. As a result, pursuant to Section 4(a) of the President's Military Order, Mr. Hamdan "shall, when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

The Office of the Chief Prosecutor is considering whether to prepare charges against Mr. Hamdan and present them to the Appointing Authority for approval and referral in accordance with Section 4(B)(2) of Military Commission Order No. 1, dated March 21, 2002. The charges currently under consideration include, but are not limited to: attacking civilians and civilian objects; terrorism; and conspiracy to commit the above mentioned offenses. Theories of liability in proving these offenses may include conspirator liability for the substantive offense, liability based upon being a member of an enterprise of persons who shared a common criminal purpose, aider and abettor liability, or some combination thereof.

Under my interpretation of Section 3(B)(8) of Military Commission Instruction No. 4, you are authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pretrial discussions with a view toward resolving the allegations against him. My office will make the arrangements with the Commander, Joint Task Force Guantanamo, for such detailed military defense counsel to have access to Mr. Hamdan. Such access shall continue so long as we are engaged in pretrial negotiations. Please advise me as soon as possible what arrangements, if any, you desire to facilitate this representation.

Attachment 1 to this memorandum is provided: 1) to assist Mr. Hamdan's detailed defense counsel in evaluating the potential charges against him; and 2) to advise Mr. Hamdan regarding his options. Additional discovery will be provided to detailed defense counsel when identified.

The final decisions regarding charges against Mr. Hamdan and the terms of any plea agreement that might be entered are within the sole discretion of the Appointing Authority. Nothing in this memorandum, or in any subsequent discussions between the

Office of the Chief Prosecutor and the defense counsel detailed to represent Mr. Hamdan pursuant to this memorandum, should be considered as binding on the Appointing Authority.

Please advise the Office of the Chief Prosecutor no later than January 9, 2004 whether or not Mr. Hamdan is interested in discussing a plea agreement.

Commander [redacted] is my point of contact for matters related to this memorandum.

Disclosure or other public release of the contents of this memorandum is prohibited by Military Commission Instruction No. 4, Section 3(B)(4) and Military Commission Instruction No. 5, Annex B, Section II(E)(1).

Frederic L. Borch
Colonel, U.S. Army
Chief Prosecutor (Acting)
Office of Military Commissions

Attachment:
1. Salem Ahmed Salem Hamdan FBI 302, dated July 10, 2002

STATEMENT OF
J. MICHAEL WIGGINS
DEPUTY ASSOCIATE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON
DETAINEES

JUNE 15, 2005

Mr. Chairman and Members of the Committee: My name is Michael Wiggins. I am a Deputy Associate Attorney General at the Department of Justice. I am pleased to discuss the work of the Department of Justice and the current status of litigation involving the United States Government's detention of enemy combatants at Guantanamo Bay, Cuba, as part of the ongoing global war on terrorism.

Background on Detention and Trial of Enemy Combatants in the War on Terrorism

In response to the terrorist attacks of September 11, 2001, the President dispatched the United States Armed Forces to seek out and subdue the al Qaida terrorist network and the Taliban regime and others that had supported it. In the course of those hostilities, the United States captured or took custody of a number of enemy combatants. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention is not for criminal justice purposes and is not part of our Nation's criminal justice system. Rather, detention of enemy combatants serves the vital military objectives of preventing captured combatants from

rejoining the conflict and gathering intelligence to further the overall war effort and to prevent additional attacks. The military's authority to capture and detain such combatants is both well-established and time-honored. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 26 (1942); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946).

A small fraction of those combatants captured in connection with the current conflict, whom the U.S. military has determined through a screening process have significant potential intelligence value or pose a particular threat to the security of the United States, have been designated for detention by the Department of Defense at Guantanamo Bay, Cuba. Currently, the Department of Defense holds approximately 520 detainees at Guantanamo Bay.

Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal ("CSRT"). Those tribunals, established pursuant to written orders by the Deputy Secretary of Defense and the Secretary of the Navy, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained . . . at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation."

During the CSRT proceedings, each detainee received substantial procedural protections modeled upon an Army regulation that governs hearings under Article 5 of the Third Geneva Convention. Among other things, each detainee received notice of the unclassified factual basis

for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Each detainee also received assistance from one military officer designated as his "personal representative for the purpose of assisting the detainee in connection with the CSRT review process." Another military officer, the recorder of each tribunal, is also required to present any evidence which might "suggest that the detainee should not be designated as an enemy combatant." Each tribunal comprised three military officers sworn to render an impartial decision and in no way "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." Each tribunal decision was subject to mandatory review first by the CSRTs Legal Advisor and then the Director. Out of 558 tribunals, 38 have resulted in determinations that detainees are not enemy combatants. *See* CSRT Summary, http://www.defenselink.mil/news/Mar2005 /d20050329csrt.pdf.

In addition, a small subset of non-citizen combatants have been designated for trial by military commission. Since the founding of our Nation, the U.S. military has used military commissions during wartime to try offenses against the laws of war. Congress has recognized this historic practice and approved its continuing use in both the Articles of War, enacted in 1916, and their successor, the Uniform Code of Military Justice. And the Supreme Court repeatedly upheld the use of military commissions in the 20th century against a series of legal challenges, including cases involving a presumed American citizen captured in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, *Yamashita v. Styer*, 327 U.S. 1 (1942); German nationals who alleged that they worked for

civilian agencies of the German government in China, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, *Madsen v. Kinsella*, 343 U.S. 341 (1952).

Against this backdrop of legal authority and historic practice, on November 13, 2001, the President ordered the establishment of military commissions to try a subset of detainees for violations of the laws of war and other applicable laws. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 ("Military Order"). In doing so, the President expressly relied on his constitutional authority as Commander in Chief of the Armed Forces of the United States and the authority recognized by Congress in the Authorization for Use ofMilitary Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and in articles 21 and 36 of the Uniform Code of Military Justice, which recognize his authority to convene military commissions and to establish procedures that will govern them.

The President explained in the Order that the creation of military commissions was necessary to "protect the United States and its citizens" and that the commissions would not be governed by the principles of law and rules of evidence applicable to criminal cases in the U.S. district courts because of the threat international terrorism poses to the safety of the United States. *See* Military Order §§ 1(e), 1(f).

Under the Military Order, a military commission may not exercise jurisdiction over a detainee unless certain preconditions have been met. First, the detainee must be a non-citizen

and the President must determine that (1) there is reason to believe that the detainee (i) is or was a member of al Qaida, (ii) has engaged or conspired to engage in acts of international terrorism against United States interests; or (iii) has knowingly harbored a member of al Qaida or someone otherwise involved in international terrorism against United States interests; and (2) it is in the interest of the United States to subject the detainee to the President's Military Order. *See* Military Order § 2a. Second, the detainee must be charged with a violation of the laws of war or another offense triable by military commission. *See* 32 C.F.R. § 9.3.

The President directed the Secretary of Defense to issue regulations governing the military commissions that would provide at a minimum for "a full and fair trial"; admission of evidence that would "have probative value to a reasonable person"; and "conviction only upon the concurrence of two-thirds of the members of the commission." *See* Military Order § 4.

The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for military commissions. The Appointing Authority has many responsibilities, including to appoint military commissions to try individuals subject to the Military Order, to designate a judge advocate of any United States Armed Force to serve as Presiding Officer over each commission, to approve and refer charges, to ensure commission proceedings are open to the maximum extent possible, and to order that investigative or other resources be made available to defense counsel and the accused to the extent necessary for a full and fair trial. *See* DOD Directive No. 5105.70, 2/10/04.

An individual charged before a military commission is assigned defense counsel (one or more military officers who are judge advocates of any United States armed force) to conduct his defense. The accused may choose to replace the detailed defense counsel with another military officer who is a judge advocate, provided that such officer is available. The accused may also retain a civilian attorney of choice at no expense to the U.S. government, provided the attorney meets certain criteria. *See* 32 C.F.R. § 9.4(c).

Under the procedures the Secretary established for the commissions, the accused must, among other things, (1) receive a copy of the charges in English and, if appropriate, in another language that the accused understands "sufficiently in advance of trial to prepare a defense"; (2) be presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved beyond a reasonable doubt. *See* 32 C.F.R. §§ 9.5(a)-(c). The prosecution must provide the defense with access to evidence it intends to introduce at trial and to evidence known to the prosecution that tends to exculpate the accused. The Commission may not draw an adverse inference if the accused chooses not to testify. The accused may also obtain witnesses and documents for his defense, to the extent necessary and reasonably available, and may present evidence and cross-examine witnesses. Once a Commission's finding on a charge becomes final, the accused cannot be tried again on that charge. *See* 32 C.F.R. §§ 9.5(e), (f), (h), (i) and (p).

The Secretary has directed that the Commissions "hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." Proceedings may be closed in order to protect classified information, intelligence and law enforcement sources and

methods, other national security interests, and the physical safety of participants, including witnesses. *See* 32 C.F.R. § 9.6(b). In no circumstance, however, may the detailed defense counsel be excluded from the proceeding (32 C.F.R. 9.6(b)(3)), and in no circumstance may the commission admit into evidence information not presented to detailed defense counsel. *See* 32 C.F.R. 9.6(d)(5)(ii)(C).

Once a trial is completed, a Review Panel comprised of three military officers, at least one of whom has experience as a judge, will review the record for the purpose of identifying whether a material error of law occurred. The Review Panel will either return the case for further proceedings in the event a material error is found, or it will forward the case to the Secretary of Defense with a written opinion recommending a disposition. The Secretary of Defense, in turn, will review the record and the Review Panel's recommendation and either return the case for further proceedings or forward it to the President (if the President has not designated him the final decisionmaker) for final decision. The President may approve or disapprove the commission's findings and may change a finding of guilty to a finding of guilty on a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed. Neither the President nor the Secretary may change a finding of not guilty to a finding of guilty. *See* 32 C.F.R. § 9.6(h).

After the first detainees arrived at Guantanamo Bay in January 2002, relatives of those detainees and others began to file habeas corpus lawsuits in United States courts challenging their detention. These lawsuits were generally dismissed by the lower courts on the grounds that,

among other things, the habeas corpus statute, 28 U.S.C. § 2241, does not apply extraterritorially, and aliens detained by the military abroad in connection with hostilities do not enjoy rights under the United States Constitution. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

The Trio of Supreme Court Decisions in June, 2004

On June 28, 2004, the Supreme Court issued a trio of decisions that defined the landscape for future litigation involving military detention of enemy combatants. In the first of these cases, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), a six-Justice majority of the Court interpreted the habeas corpus statute to apply extraterritorially to Guantanamo Bay. As a result, the United States federal courts have statutory jurisdiction over habeas corpus petitions filed by aliens held at Guantanamo Bay challenging their detention. The Court did not, however, reach the question of whether such enemy alien detainees enjoy constitutional rights, stating instead that "[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction . . . ." The Supreme Court remanded the case for the lower courts to consider those matters in the first instance.

The second decision, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), concerned a United States citizen captured on the battlefield in Afghanistan and then detained at a Navy brig in South Carolina. In that case, the Government did not contest that the individual, as a result of his U.S. citizenship, enjoyed constitutional rights. The issues before the Court were whether the military has the power to detain enemy combatants, and what degree of process is constitutionally

required in order for a United States citizen to be so detained. As to the first question, a majority of the Justices concluded that the Military has the power to detain enemy combatants for the duration of the conflict, as authorized by Congress in the Authorization for Use of Military Force, as a necessary incident of war, and that even United States citizens may be detained pursuant to the Authorization for Use of Military Force. As to the second question, the Court plurality stated that the Due Process Clause requires that a United States citizen detainee seeking to challenge his classification as an enemy combatant be given notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker. The plurality also stated that the specific procedures used to afford due process could be tailored in light of military exigencies.

The third decision, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), involved a United States citizen apprehended in the United States, designated an enemy combatant based on his affiliation with al Qaida and his preparations for acts of terrorism within the United States, and detained at the Navy brig in South Carolina. The Court's holding in *Padilla* addressed only the questions of what government official is the appropriate respondent in a habeas corpus proceeding, and what is the appropriate venue for such litigation. The Court held that a habeas petitioner seeking to challenge his detention must generally name his immediate custodian as respondent and must file his case in the district of his confinement.

Habeas Corpus Litigation Involving Guantanamo Bay
Detainees Since the June 2004 Supreme Court Decisions

In the aftermath of the Supreme Court's decision in *Rasul*, a large number of habeas petitions have been filed on behalf of Guantanamo Bay detainees in the United States District Court for the District of Columbia. As of today, approximately 95 cases have been filed on behalf of approximately 200 detainees. These cases are now progressing through the lower courts.

The Government has taken many steps to facilitate this unprecedented litigation by private civilian lawyers representing alien enemy combatants detained offshore by the Military. The private lawyers were permitted to apply for, and many have received, security clearances enabling them (1) to see certain classified national security information relevant to their clients' cases, and (2) to travel to the Guantanamo Bay Naval Base to meet with their clients. Various court orders have been entered to govern the use and handling of certain classified and protected information in the litigation and to establish procedures for counsel to meet with their clients and to correspond via mail with their clients on a privileged basis. A secure facility was established, at Government expense, where habeas counsel possessing security clearances could review and work on classified materials. To date, over 100 lawyers and their support staff have received security clearances. The first counsel visit to Guantanamo Bay in connection with the habeas litigation occurred in August 2004, and numerous visits have occurred since then.

In October 2004, the Government moved to dismiss the then-pending Guantanamo Bay detainee habeas cases on two principal grounds. First, the Government argued that under longstanding precedents of the Supreme Court and the D.C. Circuit, alien enemy combatants detained abroad lack rights under the United States Constitution. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 484 U.S. 249, 266 (1990); *32 County Sovereignty Comm. v. Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). The Government has argued that *Rasul* did not implicitly overrule that longstanding precedent.

Second, the Government has argued that even if Guantanamo Bay detainees do enjoy some rights under the Due Process Clause of the Constitution, the CSRTs – which were created to review whether detainees continued to be properly classified as enemy combatants – provide all the process that is required under the circumstances. In fact, the Government has argued that the CSRTs provide more process than the Supreme Court plurality in *Hamdi* said would be necessary for a United States citizen detained in this country. In the CSRTs, each detainee is provided an unclassified summary of the factual basis for his classification as an enemy combatant; is permitted to testify and present information to a three-member panel of neutral, independent military officers; and is permitted to call witnesses and/or introduce documentary evidence to the extent reasonably available. These features satisfy any applicable constitutional standards and exceed those contained in other types of military tribunals that the *Hamdi* plurality cited with approval.

In these cases, the Government also filed factual returns including the record of each CSRT proceeding. The Court, and counsel who had obtained appropriate security clearances, were given access to classified information in the factual returns; an unclassified version suitable for public release was filed on the public record.

In response to the Government's motions to dismiss, two United States District Court Judges issued opposite decisions. On January 19, 2005, Judge Richard J. Leon granted the Government's motion in full in two cases. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Relying on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), among other cases, Judge Leon held that aliens detained by the Military outside the United States do not have constitutional rights. Judge Leon also rejected other claims made by some detainees under various statutes and international treaties, and held that separation-of-powers principles highly circumscribe any role for the Judicial Branch in reviewing the Military's capture and detention of enemy combatants.

In contrast, on January 31, 2005, Senior Judge Joyce Hens Green granted the Government's motion in part and denied it in part in other cases. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). In holding that detainees do have certain rights under the Fifth Amendment's Due Process Clause, Judge Green reasoned that the Naval Base at Guantanamo Bay, Cuba was analogous to past or present United States territories such as the Philipines, Puerto Rico, or Micronesia. Judge Green then ruled that the CSRTs failed to satisfy applicable constitutional standards because they did not provide enemy combatant detainees with either access to classified information or an attorney permitted to review such information;

because it was possible, she believed, that information could be considered in the tribunals that would not be admissible in a United States criminal case; and because she viewed the Military's definition of "enemy combatant" as potentially overbroad. Judge Green recognized that because al Qaida is not a party to the Geneva Conventions, individuals detained as members of al Qaida are not entitled to the protection of the treaties. However, she allowed Taliban detainees to maintain claims under the Geneva Conventions. Finally, Judge Green dismissed all other claims raised by the detainees.

The Government has appealed Judge Green's decision, and the petitioners on whose claims Judge Leon ruled have appealed that decision. The cases are now before the United States Court of Appeals for the District of Columbia Circuit, with briefing set to close at the end of this month.

There is also ongoing litigation involving challenges to the military commissions. As of today, four detainees have been referred to military commissions for trial on charges that they violated the laws of war or other offenses triable by military commission. Three of these detainees have challenged the military commissions in federal court. In the first such challenge, brought by Salim Ahmed Hamdan, the self-acknowledged driver for Osama bin Laden, Judge James Robertson of the United States District Court in the District of Columbia issued an injunction on November 8, 2004 barring his trial by military commission. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The United States appealed the injunction to the United States Court of Appeals for the District of Columbia Circuit. Argument was heard on April 7,

2005, and the parties are awaiting a decision. The other two habeas challenges to military commissions have been stayed pending the D.C. Circuit's decision in *Hamdan*, as have those military commission proceedings themselves.

The CSRT litigation presents a number of important issues. The first is whether the Due Process Clause of the Fifth Amendment is applicable to aliens captured abroad and detained at Guantanamo Bay. The Government believes that a long line of Supreme Court and D.C. Circuit precedents foreclose such application. For example, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court stated emphatically that conferring constitutional rights on World War II detainees held at Landsberg Air Base in Germany would have been "so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." 339 U.S. at 784-85 (citation omitted). More recent cases have reaffirmed these principles. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("our rejection of extraterritorial application of the Fifth Amendment [in *Eisentrager*] was emphatic"). While petitioners in the habeas cases have contended that the Supreme Court's decision in *Rasul* implicitly overruled or narrowed *Eisentrager*'s constitutional holding, the Government does not believe that a reasonable reading of *Rasul*, which expressly limited its scope to the threshold issue of jurisdiction, supports that interpretation.

The second major issue is, assuming that aliens detained by the Military at Guantanamo Bay enjoy some constitutional rights, what is the scope of those rights and how are they to be implemented in a judicial proceeding in United States courts? In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court stated that even for a United States citizen detained as an enemy combatant, all that was required was notice and an opportunity to be heard before a neutral decision-maker, a standard that the CSRTs clearly satisfy. Indeed, *Hamdi* specifically rejected the contention that more elaborate processes, such as those afforded in domestic criminal trials, would be required. For example, *Hamdi* noted that the Military may rely on hearsay evidence to support the classification of someone, even a citizen, as an enemy combatant, and that any reviewing authority may create a presumption in favor of the Government's evidence. *See* 124 S. Ct. at 2649. *Hamdi*'s approach is consistent with a long line of Supreme Court cases that emphasize the flexibility inherent in the Due Process Clause and the need to balance the value of additional procedures against the governmental interests and burdens at stake – which include, here, the need to protect the security of classified information and to avoid unduly burdening military personnel engaged in ongoing combat operations. Again, *Hamdi*, which involved a citizen, does not mandate *any* process at all for *non-citizens*. However, it surely cannot be the case that non-citizen enemy combatants are entitled to more process than that which the Constitution requires for citizens.

Nevertheless, many of the detainees have argued, in effect, that they are entitled to the equivalent of a full-blown criminal trial in their habeas cases, where they would seek to have the federal courts adjudicate their enemy combatant status on a *de novo* basis after an evidentiary-

type hearing. Again, however, detention of enemy combatants is not and has never been a matter committed to the criminal justice system of civilian courts. It is the Government's position that to require such proceedings as a prerequisite for the detention of enemy combatants would be unprecedented and would seriously hamstring the ongoing military campaign against al Qaida and its supporters. *Hamdi* does not require the equivalent of a criminal trial. Moreover, courts have never engaged in substantive fact-finding to second-guess the judgment of the Military about who is an enemy combatant, even when some degree of habeas review has been allowed. For example, in *Yamashita v. Styer*, 327 U.S. 1 (1946), the Supreme Court stressed that "The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."

As mentioned previously, the military commissions too have been challenged under the Geneva Conventions, the Uniform Code of Military Justice, and the Constitution. These challenges raise additional important issues. To begin with, the Government believes that Judge Robertson in *Hamdan* erred in the very decision to reach the merits of this case before the military proceedings had run their course. The Supreme Court instructed in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), that federal courts should not entertain legal challenges to ongoing military proceedings, but rather should abstain until the military proceedings have been completed. The Court explained that military exigencies, judicial economy, and deference to the

judgment of a coordinate branch of government require the federal courts to exercise restraint. Judge Robertson in *Hamdan* refused to abstain on the theory that Hamdan had raised a substantial jurisdictional challenge to the military proceedings. The exception on which Judge Robertson relied, however, applies only to U.S. citizen civilians subjected to military proceedings. It does not apply to aliens who the U.S. military has determined are enemy combatants. The refusal to abstain in these circumstances constitutes an improper intrusion on the Executive's conduct of the war. We have accordingly asked the Court of Appeals to vacate the District Court's injunction on this basis.

As for the merits, Hamdan claims that the military commission in his case does not have jurisdiction until and unless a tribunal convened pursuant to Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) determines that he is not entitled to be treated as a Prisoner-of-War. Judge Robertson agreed. Here too, Judge Robertson committed error — in several respects. First, the Geneva Convention does not provide detainees with rights enforceable in the courts of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court held that the 1929 Geneva Convention, the predecessor to the 1949 Convention, did not confer on detainees rights enforceable in our domestic, civilian courts. There is nothing in the 1949 Convention's text or ratification history to suggest that the United States or other ratifying nations intended to revolutionize the Convention by granting detainees judicially enforceable rights. To the contrary, the Convention sets out an elaborate dispute-resolution procedure making no mention of private litigation in the domestic courts of signatory nations.

Second, even if there were some doubt about whether the Convention could be enforced by enemy fighters in our courts, it is clearly not enforceable by al Qaida operatives such as Mr. Hamdan, an acknowledged aide to Osama bin Laden, whose status as an al Qaida member or affiliate was confirmed by a CSRT. The President has made an authoritative determination in his capacity as Commander in Chief that al Qaida is not a party to the Geneva Convention; thus, its fighters are not entitled to the Convention's protections. The President has also determined that Taliban fighters do not qualify as prisoners of war under the Convention because they are unlawful combatants who do not satisfy the requirements for prisoner of war status set forth in Article 4 of the Third Geneva Convention. *See* 2/7/02 Memorandum For The Vice President Re: Humane Treatment of al Qaida and Taliban Detainees. Those decisions lie at the core of the President's Commander-in-Chief and foreign-affairs powers and thus are not subject to countermand by the courts. They are also clearly correct in any event.

Moreover, as mentioned above, the detainees at Guantanamo Bay, including Mr. Hamdan, have been provided the opportunity in CSRTs to challenge the determination that they are enemy combatants. Thus, even assuming Mr. Hamdan is entitled to an Article 5-type proceeding, he has received it. Judge Robertson discounted the CSRT on the ground that it was directed to determine whether Mr. Hamdan was an enemy combatant, not whether he was a POW. But the CSRT's finding that Mr. Hamdan is affiliated with al Qaida necessarily resolved his POW status, because the President has determined that the Convention does not apply to al Qaida, and even if he had not made that determination, there is no doubt that members of al

Qaida, which, among other things, does not comply with the laws of war, does not qualify for POW status under the Convention.

The rules governing military commissions have also been challenged under the Uniform Code of Military Justice, a body of law that predominantly regulates courts martial and has only a handful of provisions that apply to military commissions. Judge Robertson in *Hamdan* held that, because Article 36 of the UCMJ provides that the rules the President prescribes for military commissions "may not be contrary to or inconsistent with" the UCMJ, the military commission rules may not materially diverge from UCMJ rules that, by their plain terms, are applicable to courts-martial only. Here too, the District Court's legal analysis was deeply flawed.

Congress has never sought to regulate military commissions comprehensively; to the contrary, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenses against the laws of war. Indeed, Article 21 of the UCMJ provides that the UCMJ's conferral of jurisdiction on courts-martial "do[es] not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court expressly held that the identically-worded predecessor to Article 21 (Article 15 of the Articles of War) "authorized trial of offenses against the laws of war before such commissions." 317 U.S. 1, 29 (1941). Article 21 — which recognizes the jurisdiction of military commissions without purporting to regulate them — reflects a considered congressional judgment to leave the conduct of military commissions to the President as

Commander-in-Chief, as does the fact that only eight other articles of the UCMJ even mention military commissions. The broad latitude the President enjoys in establishing rules for military commissions is also reflected in the Manual for Courts-Martial, which contains the Rules for Courts-Martial and the Military Rules of Evidence and makes clear that the President may by regulation establish different rules for military commissions. As a logical matter, if military commissions have to follow all of the UCMJ rules for courts-martial, then the UCMJ provisions that do expressly apply to military commissions are all superfluous. And as a practical matter, if military commissions must follow the same procedures as courts-martial, there is no point in having them. Congress has recognized the jurisdiction of military commissions precisely because of the President's historic and constitutionally-grounded authority to convene them to prosecute enemy fighters during wartime.

The military commissions have also been challenged on constitutional grounds. Mr. Hamdan, for example, has claimed that the President's Military Order violates separation of powers and the Equal Protection Clause. As explained above in connection with the non-commission challenges, these constitutional claims are foreclosed by Supreme Court precedent. *See Eisentrager*, 339 U.S. at 783 (rejecting Fifth Amendment challenge to military commission proceedings brought by German prisoners detained and prosecuted outside the United States on the ground that the Fifth Amendment does not "confer[] rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); *Verdugo-Urquidez*, 494 U.S. at 271 (rejecting claims by "alien who has had no previous significant voluntary connection with

the United States" under both the Fourth Amendment and equal protection component of the Fifth Amendment).

The United States hopes that Mr. Hamdan's trial before a military commission and those of the other detainees will be permitted to proceed. The President's Military Order is fully consistent with the Constitution, treaties, and laws of the United States, and the regulations established to govern the commissions reflect a proper balancing of the twin objectives of protecting the security of the United States, and providing captured fighters a full and fair trial.

Other Recent Developments in Guantanamo Bay Detainee Habeas Corpus Litigation

A number of new habeas cases were filed in the wake of Judge Green's January 31, 2005 decision, bringing the current number to approximately 95 cases on behalf of over 200 of the 520 detainees remaining at Guantanamo Bay. In the cases in which she ruled, Judge Green stayed all proceedings in the District Court pending resolution of appeals. Many Judges presiding over other Guantanamo Bay detainee cases have entered similar stays. Despite these stays, significant recent activity has occurred in these cases. These issues include:

1. The United States seeks to release detainees from United States custody when, for example, it is determined that they no longer present a threat to the United States and its allies, and over 230 Guantanamo Bay detainees have been transferred or repatriated in this manner over the past three years. However, beginning in March 2005, a large number of detainees sought, and in many cases received, court orders either requiring advance notice of a repatriation or

transfer from Guantanamo Bay, or, in some cases, actually barring the United States from repatriating or transferring them out of Guantanamo Bay absent further court order. These motions have alleged that the United States intends to transfer detainees out of Guantanamo Bay to deprive the Court of its jurisdiction or to have them mistreated and abused in other countries. The Government disputes these allegations and has opposed these motions on several grounds, including that they present an unlawful encroachment on Executive Branch prerogatives. The Government has appealed adverse orders of this nature that have been entered in a number of cases.

2. Several detainees have filed motions seeking court intervention into their conditions of confinement. These motions have sought injunctions that would prescribe the conditions in which they should be detained and/or prohibit treatment that, it is argued, violates their putative constitutional rights. One such motion even seeks an injunction against further interrogation. The Government has opposed these motions on the ground that the detainees are treated humanely and there is no legal or factual basis for such judicial intervention. To date, no Judge has granted one of these conditions-of-confinement motions.

3. Some detainee lawyers have complained to the Court that the conditions in which they are permitted to meet and correspond with their clients at Guantanamo Bay are overly restrictive. For example, lawyers in one case filed an emergency motion seeking an order requiring the Government to allow them to show detainees family videos on DVD. Others have

filed motions objecting to the speed of mail transmission to and from the Naval Base and to the quality of the internet connection they are provided when visiting.

4. Some detainees have alleged that the medical care provided to them is inadequate and have therefore sought court orders requiring access to independent physicians or release of medical records. The Government has opposed these motions on the basis that Guantanamo Bay detainees are provided first-rate medical care and that even in prisons in the United States, inmates do not have a right to outside health care providers of their choice. To date, no Judge has granted such a motion. One Judge has denied such a motion. *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

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In sum, the unprecedented situation created by *Rasul*, in which alien enemy combatants detained at Guantanamo Bay by the military have been permitted to pursue habeas claims against their custodians in United States courts, has posed a number of challenges, and a number of substantial legal issues await resolution by the courts.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Committee may have.