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HABEUS CORPUS AND DETENTIONS AT GUANTANAMO BAY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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HABEUS CORPUS AND DETENTIONS AT GUANTANAMO BAY

TUESDAY, JUNE 26, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:04 p.m., in room 2237, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Wasserman Schultz, Ellison, Conyers, Watt, Cohen, Jackson Lee, Franks, Pence, and Jordan.

Staff present: Robert Reed, Majority Counsel; David Lachmann, Subcommittee Chief of Staff; Susana Gutierrez, Majority Professional Staff Member; Paul Taylor, Minority Counsel; George Slover, Majority Counsel; Crystal Jezierski, Minority Counsel; and Kanya Bennett, Majority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Before I begin, I would remind all those in attendance that the rules of the House of Representatives do not permit demonstrations of any kind by the spectators. The work we are doing today is very important. We have the opportunity to get answers to questions that go to the core of our liberties and the manner in which the current war or wars are being conducted. So I hope everybody will observe the rules of the House.

Today's hearing will examine the current state of the right of habeas corpus as it applies to the policy of detentions at Guantanamo Bay.

The Chair recognizes himself for 5 minutes for an opening statement.

This hearing is the second in our series titled, "The Constitution in Crisis: The State of Civil Liberties in America."

The right to petition for a writ of habeas corpus, the great writ, has been a fundamental pillar of our legal system since the time of Magna Carta in 1215. So fundamental to our system of laws and our liberties did the framers consider it that the great writ was enshrined in article I of our Constitution several years before adoption of the Bill of Rights.

Alexander Hamilton in "Federalist Paper No. 81" explained the need to preserve the writ of habeas corpus by quoting Blackstone: "To bereave a man of life or by violence to confiscate his estate

without accusation or trial would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole Nation. But confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking and therefore a more dangerous engine of arbitrary government."

Hamilton goes on to say that: "As a remedy for this fatal evil, Blackstone is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in place he calls the bulwark of the British constitution." And so it has been a bulwark of our Constitution and our freedoms until now.

This Administration seems to believe that it has greater wisdom and virtue than governments of the last 800 years, that it can be trusted to make correct and just determinations about who should be locked up without any independent review. This President claims the power to point his finger at anybody who is not an American citizen and say, "You are an enemy combatant because I say so. And because I say so, we are going to keep you in jail forever, with no hearing, no writ of habeas corpus, no court proceeding, no confrontation of witnesses, no probable cause, no due process of any kind." No executive in an English-speaking country has claimed such tyrannical power since before Magna Carta 800 years ago.

One of the complaints in the Declaration of Independence—and no one today reads the Declaration of Independence—we just read the first couple paragraphs, "We hold these truths to be self-evident," and so forth. But most of the Declaration of Independence is a list of complaints against tyrannical actions of the British king, tyrannical acts so terrible that they justified violent revolution for independence.

One of the complaints against the king was, "He has combined with others"—Parliament; we didn't want to name Parliament—"He has combined with others to deprive us of the benefits of trial by jury." We now seem to be going George III one better. We now conspire to deprive people of the benefits of trial, period, by jury or otherwise. It is an extraordinary and dubious claim.

What has been the result? A violation of our laws and values and a self-inflicted stain on our national honor. Even the Administration will now concede that it has held and continues to hold individuals who have done nothing against the United States, who are not a threat to the United States. Many of those people have sat in Guantanamo for years, often in solitary confinement. Some have been subjected to torture or creative questioning or whatever euphemism you prefer.

Benjamin Franklin observed that, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." A devil's bargain, to be sure, but if this Administration has asked us to sacrifice liberty, has this lawlessness really made us any safer? Is there really no alternative than to abandon the rule of law?

I continue to believe that we have no alternative but to defend the rule of law. That is why we are here today.

The current policy has created a law-free zone outside our civil law system, outside our system of military law, outside our crimi-

nal justice system, outside the laws of war, outside every domestic and international obligation this Nation has ever undertaken voluntarily or demanded of other countries.

We have faced many threats over the years, and we have prevailed. At times, we have forgotten who we are and acted in ways which, in calmer times, we have deeply regretted, such as, for example, the Alien and Sedition Acts, the Palmer raids, the interment of Americans of Japanese descent during World War II. One day, we will look back on this period with the same sense of shame and regret.

Today's witnesses will address the legal and practical issues of the policy as it now exists.

As many of you know, I have introduced legislation to restore the right of habeas corpus, simply to determine whether someone is being lawfully detained or is being detained under unlawful conditions. This Administration's credibility, however damaged, is beside the point. Blackstone was right, Hamilton was right, Franklin was right. Our Nation has been right for over 200 years. No President, no matter how virtuous, should ever have the power, should ever have the authority to throw people into prison, to make them disappear and not to have to answer to anyone for his actions. No person should ever be subject to disappearance. We used to talk about Argentina under the junta and the desaparecidos. We should have no such thing in the United States.

I look forward to the testimony of our witnesses.

And I can think of no more important issue for the Subcommittee on the Constitution, Civil Rights and Civil Liberties to consider. Without the right of habeas corpus there is no guarantee of our liberty, there is no guarantee of our life.

I yield back the balance of my time.

I would now recognize the distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, habeas corpus is an ancient right that grants those held by the government the right to require the government to justify their confinement. While the Constitution references the habeas right, it does not create that right. It has always been recognized that such a right is granted by statute and enacted by the legislature.

The people have always found it appropriate in America that unlawful enemy combatants, such as terrorists who take up arms against Americans and disguise themselves as civilians in violation of the laws of war, are appropriately not tried in Federal courts but by military courts.

That is because terrorists are not just common criminals. They are blood-thirsty murderers who are plotting in disguise to kill as many innocent Americans as possible. They see themselves at war with all Americans, and should be treated as such.

General George Washington used military courts to try spies. The co-conspirators of John Wilkes Booth, who assassinated President Lincoln, were tried by military commissions, as were members of the KKK.

During World War II, in a 1940 case of ex parte Quirin, the Supreme Court held that enemy combatants who do not wear the uniform of a national army and those who sneak into this country to wage war and destroy innocent human life are subject to the trial and punishment by military tribunals, not ordinary Federal courts.

Indeed, the Supreme Court upheld a trial by a military commission of saboteurs that included a naturalized citizen who was executed within 60 days of his capture.

A few years later, in *Johnson v. Eisentrager,* the Supreme Court held that "not one word can be cited" and "no decision of this court supports the view" that the Constitution extends its protection to foreign enemies.

As a side note, Mr. Chairman, if indeed that were true, engagement in the battlefield would be impossible, because we would have to have probable cause at the moment. We would have to give them their rights to all kinds of insane notions. It would make war absolutely impossible.

The Supreme Court——

Mr. NADLER. Since the gentleman addressed me, would he yield for a second?

Mr. FRANKS. I sure would.

Mr. NADLER. Thank you.

I would simply point out, in terms of what you were just saying—and I think that this whole hearing may turn on that, in effect, and that is why I am glad you mentioned it—the Supreme Court decisions that you talked about dealt with people whose status as combatants, as foreign enemies, were not questioned: the four German saboteurs, et cetera. And whether citizens of this country or not, they were landed here by submarine, and no one questioned that they were, in fact, enemy combatants.

What we are dealing with here with habeas corpus, in many cases, are people who claim they are not enemy combatants, who may be permanent, legal residents of the United States, picked up, alleged by the President or by somebody in the Federal Government to be an enemy combatant but they deny that. So the question isn't, how do you handle enemy combatants? How do you handle people who are alleged to be enemy combatants who claim they aren't? And that is where we need habeas corpus.

Mr. FRANKS. Reclaiming my time, Mr. Chairman, I think if German saboteurs were to land on the shores of America today, they would find that they could probably get away with saying something as ridiculous as, "Well, we didn't mean to do it." And there certainly would be, unfortunately, support among the liberal intelligentsia in this country to back them up on that.

But with that said, the Supreme Court noted that habeas corpus rights afforded to enemy combatants would "hamper the war effort and bring aid and comfort to the enemy. Habeas corpus proceedings would diminish the prestige of our commanders, not only with the enemies, but with wavering neutrals.

"It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him into account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

"Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion, highly comforting to the enemies of the United States."

We were attacked on 9/11 and 3,000 innocent American citizens were murdered by lawless terrorists disguised as civilians. Congress authorized the President to use all necessary force to stop future attacks.

The Supreme Court held that detention is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorize the President to use."

Even so, Congress enacted legislation that provides terrorists with the following rights, far beyond what is required by the Constitution, including the right to a full and fair trial, a presumption of innocence, government-provided defense counsel, an opportunity to obtain witnesses and evidence, an obligation on the part of government to disclose exculpatory evidence to the defense, a right to cross-examination of witnesses, a right not to testify against themselves, and a right at a minimum of two appeals: one through the military justice system and the Federal courts.

Clearly, far from suspending the writ of habeas corpus, Congress has gone far beyond what the Constitution requires. Indeed, the protections in the Military Commissions Act are considerably more generous to those who seek to kill innocent Americans than anything the U.S. or any other nation in the history of the world has previously afforded its adversaries.

The new Habeas Corpus Restoration Act of 2007 would throw out the current system for detaining terrorists and would treat Osama bin Laden as if he were a common thief with citizenship in the United States. Terrorists would have one of the most awesome weapons in the American legal system, and that is the power to shield themselves from anti-terrorism efforts by miring them in years of costly litigation.

If this Congress makes the mistake of granting constitutional protections to the most insidious enemies this Nation has ever faced, the Congress itself, and not the Constitution, will have chosen that tragic course.

Mr. Chairman, I yield back.

Mr. NADLER. Thank you.

Let me simply say that I think the Nazis were more insidious.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask other Members to submit their statements for the record, without objection. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing.

We will now turn to our witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate

a Member who is unavoidably late or only able to be with us for a short time.

Gentlemen, your written statements will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up. We don't give out fines here for traffic violations, but we do ask that you try to observe the red light.

Our first witness is Gregory Katsas. He is the principal deputy associate attorney general of the United States. Mr. Katsas was actively involved in the *Rasul, Hamdi* and *Hamdan* cases in which the Supreme Court addressed the rights of aliens detained as enemy combatants at Guantanamo Bay. He also recently argued *Boumediene v. Bush,* in which the D.C. Circuit held that the Guantanamo detainees have no constitutional right to habeas corpus. He served as a law clerk to the late Judge Edward Becker of the United States Court of Appeals for the 3rd Circuit and to Justice Clarence Thomas of the United States Supreme Court.

Our next witness is Charles Swift. He is a lieutenant commander in the Judge Advocate General's Corps of the United States Navy. He is currently assigned to the Department of Defense Office of Military Commissions, where he serves as lead counsel for Salim Ahmed Hamdan. He graduated from the U.S. Naval Academy in 1984, Seattle University Law School cum laude in 1994, and Temple University School of Law, where he obtained a LMM in trial advocacy with honors.

Our next witness, William Howard Taft IV, is of counsel resident with Fried, Frank, Harris, Schriver & Jacobson, LLP. Mr. Taft originally joined the law firm in 1992. Prior to joining Fried, Frank, Mr. Taft served as U.S. permanent representative to NATO, deputy secretary of defense, acting secretary of defense and as general counsel for the Department of Defense. His most recent government service prior to returning to Fried, Frank was as a legal adviser to the Department of State in the current Bush administration. Mr. Taft received his J.D. in 1969 from Harvard Law School and his B.A. in 1966 from Yale University.

Our next witness, Bradford Berenson, currently is a litigation partner with Sidley and Austin in Washington. Prior to joining Sidley and Austin, Mr. Berenson served as associate counsel to the President of the United States from January 2001 through January 2003. Mr. Berenson holds a B.A. summa cum laude from Yale University and a J.D. magna cum laude from Harvard Law School. Following graduation from Harvard Law School, he clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals of the District of Columbia Circuit and for Justice Anthony M. Kennedy of the United States Supreme Court.

Our final witness, Jonathan Hafetz, is litigation director of the Liberty and National Security Project at the Brennan Center for Justice at New York University Law School, which, I might add, is in my congressional district and of which we are very proud. He is actively involved in post-9/11 litigation involving detainee rights and is lead counsel on several leading detention cases, including *al-*

Marri v. Wright. Mr. Hafetz received his J.D. from Yale Law School and his B.A. from Amherst College, where he graduated Phi Beta Kappa and magna cum laude. Mr. Hafetz also holds a master's degree in history, with high honors from Oxford University, and serves as a Fulbright scholar in Mexico. Mr. Hafetz clerked for Judge Sandra L. Lynch of the U.S. Court of Appeals for the 1st Circuit and for Judge Jed Rakoff of the U.S. District Court for the Southern District of New York.

I am pleased to welcome all of you.

As a reminder, each of your written statements will be made part of the record in its entirety. I told you this already, but here it is again. I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time, I told you about the light already.

Before we begin, it is customary to swear in our witnesses.

[Witnesses sworn.]

Let the record reflect that each of the witnesses answered in the affirmative.

You may be seated.

The first witness is Mr. Katsas. And you are recognized for 5 minutes, sir.

TESTIMONY OF GREGORY KATSAS, PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL, OFFICE OF THE ASSOCIATE ATTORNEY GENERAL, U.S DEPARTMENT OF JUSTICE

Mr. KATSAS. Mr. Chairman, Members of the Subcommittee, I appreciate this opportunity to discuss the writ of habeas corpus and the judicial review procedures that Congress has provided to the aliens captured abroad and detained as enemy combatants at Guantanamo Bay, Cuba.

Since September 11, 2001, the United States has been engaged in an armed conflict unprecedented in our history. Like past enemies we have faced, al-Qaida and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation.

But unlike our past enemies, al-Qaida forces show no respect for the laws of war as they direct their attacks primarily against civilians. In 1 day, they destroyed the World Trade Center, severely damaged the Pentagon and inflicted greater casualties than did the Japanese at Pearl Harbor. They are actively plotting further attacks.

To prevent such attacks, the United States is detaining some members of al-Qaida and the Taliban at a military base leased by the United States at Guantanamo Bay. The majority of the Guantanamo detainees already have been released or transferred to other countries, but the U.S. continues to hold others either because they remain a threat or because no other country will take them.

Each detainee receives a hearing before a combatant status review tribunal, or CSRT. These CSRTs afford detainees more rights than ever before provided for wartime status determinations. They also afford more rights than those deemed by the Supreme Court to be appropriate for United States citizens detained as enemy combatants on American soil, and they afford more rights than

those given for status determinations under the Geneva Convention.

Congress has twice recently provided the detainees with even greater protections than that.

In the Detainee Treatment Act, Congress prohibited the government from subjecting the detainees to degrading treatment, established additional protections for future CSRTs, and guaranteed judicial review for final CSRT decisions and final convictions by military commissions.

At the same time, Congress barred the detainees from seeking judicial review through habeas corpus, consistent with the traditional understanding that habeas is unavailable to aliens held outside the United States, particularly during wartime.

In the Military Commissions Act, Congress codified procedures for war crimes prosecutions before military commissions. The MCA affords defendants more rights than those available in past military commission prosecutions by the United States and more rights than those available in war crimes prosecutions by international tribunals. Like the DTA, the MCA provides for judicial review but forecloses review through habeas.

Extending habeas to aliens abroad is both unnecessary and unwise. Over 50 years ago, the Supreme Court, in *Johnson v. Eisentrager,* held that aliens outside the United States have no constitutional right to habeas. As Justice Jackson explained, "Wartime habeas trials would bring aid and comfort to the enemy." He continued with the compelling language that Mr. Franks has already cited.

The Supreme Court's decision in *Rasul*, which addressed only the scope of the state habeas statute, does not undermine the constitutional holding of Eisentrager.

Habeas restrictions are also important for national security, as explained by Justice Jackson in Eisentrager and as borne out by the recent experience at Guantanamo.

During the last few years, more than 200 habeas actions were filed on behalf of more than 300 of the Guantanamo detainees. The litigation imposed substantial burdens on the operation of a military base abroad in time of war, it preventing military commission trials from even beginning, and it impeded interrogations critical to preventing further attacks.

These burdens would be even greater if habeas were made available to alien enemy combatants in larger conflicts such as World War II, when the United States detained more than 2 million such combatants.

Habeas review is also unnecessary. As I have noted, the CSRT and military commission procedures give the detainees unprecedented protections. Moreover, Congress has afforded the detainees with judicial review encompassing all legal claims, constitutional or statutory. That alone would make the existing scheme an adequate substitute for habeas.

In sum, the existing system represents a careful balance between the interests of detainees and the exigencies of wartime. It is both constitutional and prudent, and it should not be upset.

Thank you very much.

[The prepared statement of Mr. Katsas follows:]

PREPARED STATEMENT OF GREGORY G. KATSAS

STATEMENT OF

GREGORY G. KATSAS
PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

HABEAS CORPUS AND
DETENTIONS AT GUANTANAMO BAY, CUBA

PRESENTED

June 26, 2007

STATEMENT OF GREGORY G. KATSAS
PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

HEARING ON HABEAS CORPUS AND
DETENTIONS AT GUANTANAMO BAY, CUBA

JUNE 26, 2007

Thank you, Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the writ of habeas corpus and the judicial review procedures that Congress has provided to the aliens captured abroad and detained as enemy combatants at Guantanamo Bay, Cuba.

Since the attacks of September 11, 2001, the United States has been engaged in an armed conflict unprecedented in our history. Like past enemies we have faced, Al Qaeda and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation and its citizens. But unlike our past enemies, Al Qaeda forces show no respect for the law of war—they do not wear uniforms; they do not carry arms openly; and, most importantly, they direct their attacks primarily against innocent civilians. They have murdered thousands in attacks against the World Trade Center, the Pentagon, the U.S.S. Cole, and American embassies in Kenya and Tanzania, to name just a few. They have also plotted further attacks against the Empire State Building, the Sears Tower, the Library Tower, Heathrow Airport, Big Ben, NATO headquarters, and the Panama Canal, to name just a few. Faced with such a determined and ruthless opponent, we cannot

expect the ongoing conflict to end through negotiations, much less through unilateral concessions.

To prevent further attacks on our homeland, United States forces have captured members of Al Qaeda, and of the Taliban militia that had harbored and aided Al Qaeda, on battlefields in several countries. As in past armed conflicts, the United States has found it necessary to detain some of these combatants while military operations continue. During the ongoing conflict, we have seized more than 10,000 Al Qaeda or Taliban fighters. About 750 of these combatants—including many of the most dangerous—have been transferred to a detention facility on the United States military base at Guantanamo Bay, Cuba. Of those 750, approximately half have been released or transferred to other countries. The United States continues to hold about 375 detainees at Guantanamo Bay, of whom approximately 75 have been determined eligible for transfer or release. Departure of those detainees is subject to ongoing discussions with other nations. Moreover, the detainee assessment process continues for those not yet determined eligible for transfer or release.

In 2004, after having already released some 200 of the Guantanamo detainees, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review again, in a formalized process akin to other law-of-war tribunals, whether the remaining detainees met the criteria to be designated as enemy combatants. These CSRTs afford detainees greater procedural protections than ever before provided, by the United States or any other country, for wartime status determinations. Indeed, the CSRTs were designed to afford even greater protections than those deemed by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to be appropriate for United States

citizens detained as enemy combatants on American soil and entitled to due process protections. For example, under the CSRT procedures, each detainee receives notice of the unclassified 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 receives assistance from a military officer designated to serve as his personal representative. Another military officer must present to the tribunal any evidence that might suggest the detainee is not an enemy combatant. Each tribunal consists of three military officers sworn to render an impartial decision and in no way involved in the detainee's prior apprehension or interrogation. Each tribunal decision receives at least two levels of administrative review. As Mr. Taft previously has testified, these protections exceed those used to make status determinations under Article 5 of the Geneva Convention. Of the 558 CSRT hearings conducted through the end of 2006, 38 resulted in determinations that the detainee in question was not an enemy combatant.

To ensure that enemy combatants are not held any longer than necessary, the Department of Defense also established separate tribunals known as Administrative Review Boards ("ARBs"). Those tribunals reassess, on an annual basis for each detainee, whether the detainee remains a continuing threat to the United States and its allies. Before each ARB hearing, a designated military officer provides the Board with all reasonably available information bearing on that question. The detainee receives a written unclassified summary of this information, and may present testimony on his own behalf. Another military officer is assigned to assist the detainee. Unless inconsistent with national security, the detainee's home government receives notice of, and may

provide information at, the hearing. As a result of ARB proceedings conducted in 2005 and 2006, 188 detainees have been approved for release or transfer to another country.

In two recent statutes, Congress provided the detainees with even greater rights and protections. In the Detainee Treatment Act of 2005 ("DTA"), Congress prohibited the government from subjecting detainees to cruel, inhuman, or degrading treatment (§ 1003), established additional procedural protections for future CSRTs (§ 1005(a)), and provided for judicial review of final CSRT decisions regarding enemy-combatant status, and final military-commission decisions in war-crimes prosecutions, in the Court of Appeals for the District of Columbia Circuit (§ 1005(e)). At the same time, Congress foreclosed the Guantanamo detainees from pursuing alternative avenues of judicial review, including through habeas corpus. That aspect of the DTA sought to curtail the unprecedented avalanche of wartime litigation following the extension of the habeas statute to aliens at Guantanamo in *Rasul v. Bush*, 542 U.S. 466 (2004). In so doing, Congress merely restored the longstanding understanding that habeas is unavailable to aliens outside the sovereign territory of the United States.

Congress again addressed the detention, treatment, and prosecution of alien enemy combatants in the Military Commissions Act of 2006 ("MCA"). That statute responded to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which had held that (1) the judicial-review provisions of the DTA were inapplicable to cases that had already been filed on the date of its enactment; (2) aliens tried for war crimes before military commissions must generally receive the same protections afforded to United States servicemembers in courts martial; and (3) Common Article 3 of the Geneva Convention applies to the armed conflict between the United States and Al Qaeda. The MCA

addressed *Hamdan* by (1) providing for D.C. Circuit review of final CSRT and military-commission decisions, foreclosing habeas and other alternative means of review, and making these provisions expressly applicable to pending cases, *see* § 7; (2) authorizing the use of military commissions to try unlawful alien enemy combatants for war crimes under a codified set of procedures, *see* § 2; and (3) elaborating, for the sake of greater clarity, on the treatment standards that Common Article 3 requires, *see* § 6. The military-commission procedures imposed by Congress afford defendants greater protections than did the procedures used in the predecessor Military Commission Order No. 1, which in turn had afforded defendants greater protections than did the procedures used by the United States to conduct war-crimes prosecutions during World War II, and greater protections than do international war-crimes tribunals from Nuremberg to Yugoslavia.

Extending habeas corpus to aliens abroad is both unnecessary and profoundly unwise. Over 50 years ago, the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), held that aliens outside the sovereign territory of the United States have no constitutional right to habeas corpus under the Suspension Clause, particularly during times of armed conflict. In emphatic terms, the Court explained that such habeas trials

> [w]ould bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to the enemies of the United States.

Id. at 779. No less decisively, *Eisentrager* also rejected "extraterritorial application" of the Fifth Amendment to aliens. *See id.* at 784-85 ("No decision of this Court supports

such a view. None of the learned commentators of our Constitution has ever hinted at it. The practice of every modern government is opposed to it."). The Supreme Court has recently and repeatedly reaffirmed that constitutional holding of *Eisentrager*. *See*, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

Rasul does not undermine the constitutional holdings of *Eisentrager*. By its terms, *Rasul* addressed only the scope of the habeas corpus *statute*, and it explicitly distinguished between the statutory and constitutional holdings of *Eisentrager*. *See* 542 U.S. at 476-77. Moreover, *Rasul* acknowledged that the statutory holding of *Eisentrager* (that the habeas statute is inapplicable to aliens outside sovereign United States territory) remained good law until at least 1973. *See id.* at 479. Because the Suspension Clause mandates only traditional habeas standards, *see Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make'" (citation omitted)), it cannot possibly foreclose standards that prevailed in this country for almost two centuries. Moreover, *Rasul* acknowledged that the Guantanamo military base is outside sovereign United States territory. *See* 542 U.S. at 481-82. In that respect, *Rasul* is fully consistent with prior precedents holding that application of United States law to overseas military bases is extraterritorial (and thus presumptively disfavored)—even if (as one would hope) the United States exercises complete control over those bases. *See*, *e.g.*, *United States v. Spelar*, 328 U.S. 217, 221-22 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948).

For all of these reasons, in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), the D.C. Circuit recently upheld the constitutionality of

the habeas restrictions imposed by Congress in the DTA and the MCA. We strongly support *Boumediene* as a straightforward application of settled and sound constitutional precedent.

The habeas restrictions in the DTA and the MCA are not only constitutional, but also necessary for our Nation's security. As Justice Jackson explained in *Eisentrager* (339 U.S. at 779), it would be "difficult to devise a more effective fettering" of military operations than by extending habeas rights to aliens captured and held abroad as enemy combatants during ongoing hostilities. Justice Jackson's pointed warning was amply confirmed during the brief habeas experience between 2004, when *Rasul* was decided, and 2006, when Congress most recently and most definitively restored the statutory holding of *Eisentrager*. During that time, more than 200 habeas actions were filed on behalf of more than 300 of the Guantanamo detainees. The Department of Defense was forced to reconfigure its operations at a foreign military base, in time of war, to accommodate hundreds of visits by private habeas counsel. To facilitate their claims, detainees urged the courts to dictate conditions on the base ranging from the speed of Internet access to the extent of mail deliveries. Through a series of interlocutory habeas actions, military-commission trials were enjoined before they had even begun. Perhaps most disturbing, habeas litigation impeded interrogations critical to preventing further terrorist attacks. One of the detainees' coordinating counsel boasted about this in public: "The litigation is brutal for [the United States]. It's huge. We have over one hundred lawyers now from big and small firms to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation * * * with attorneys. What are they going

to do now that we're getting court orders to get more lawyers down there?" *See* 151 Cong. Rec. S14256, S14260 (Dec. 21, 2005). Finally, whatever burdens were imposed by briefly extending habeas to the few hundred detainees recently held at Guantanamo Bay, these would pale in comparison to the havoc in larger conflicts were the habeas statute generally extended to aliens held abroad as wartime enemy combatants. In World War II, for example, the United States held over two million such enemy combatants. For military operations of that scale, imposing the litigation standards that prevailed at Guantanamo Bay between 2004 and 2006 would be unthinkable.

Such an imposition is also unnecessary. As explained above, both Congress and the Executive recently have extended to detainees protections unprecedented in the history of armed conflict, from the administrative CSRT procedures, which afford far greater protections than do Article 5 tribunals, to the statutory military-commission procedures, which afford far greater protections than did their World War II predecessors or than do counterpart procedures used by international tribunals. Moreover, in both the CSRT and military-commission contexts, Congress has provided for judicial review and allowed detainees not only to challenge the jurisdiction of the relevant tribunals, but also to raise any constitutional or statutory claim of their choosing. *See* DTA § 1005(e)(2)(C)(ii) (challenge to CSRT); *id.* § 1005(e)(3)(D)(ii) (challenge to military commission). Even for detainees held in this country, that alone would make the existing scheme a constitutionally adequate substitute for habeas. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001) (habeas courts traditionally reviewed "pure questions of law," but "generally did not review factual determinations made by the Executive"); *Yamashita v. Styer*, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear,

decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on the facts."); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) (traditional habeas is "appellate in its nature"). But Congress went even further, and allowed detainees to challenge both the sufficiency of evidence underlying their CSRT determination or military-commission conviction and the tribunal's compliance with its own procedures. *See* DTA § 1005(e)(2)(C)(i) (CSRT); *id.* § 1005(e)(3)(D)(i) (military commission). Even where habeas is available (*e.g.*, for detainees tried in the United States or its insular territories), prior habeas law would have barred those claims. *See*, *e.g.*, *Yamashita*, 327 U.S. at 23 ("the commission's rulings on evidence and the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities"); *Ex Parte Quirin*, 317 U.S. 1, 24 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.")

In sum, except for two years under a recent, aberrational, and now twice-superseded decision, habeas corpus has never been available to aliens captured and held outside the United States as enemy combatants during ongoing armed conflict. The Constitution does not require such an extension of habeas, which would severely undermine our ongoing armed conflict against a determined and resourceful terrorist enemy. Nonetheless, despite the magnitude of the Al Qaeda threat, the political branches have provided detainees with unprecedented wartime protections and with judicial review that exceeds that available even under traditional habeas standards. The existing system goes well beyond what we have provided in past armed conflicts, and well beyond what other nations have provided in like circumstances. It represents a careful balance

between the interests of detainees and the exigencies of wartime, and a careful compromise painstakingly worked out between the political branches. The existing system is both constitutional and prudent, and should not be upset.

Thank you, Mr. Chairman. I look forward to answering any questions.

Mr. NADLER. Thank you.

Commander Swift, you are recognized for 5 minutes.

TESTIMONY OF LIEUTENANT COMMANDER CHARLES D. SWIFT, JUDGE ADVOCATE GENERAL CORPS, U.S. NAVY, OFFICE OF MILITARY COMMISSIONS

Commander SWIFT. Thank you, Mr. Chairman and Members of the House Judiciary Subcommittee, for inviting me to speak to you today.

My testimony is given in my capacity as Mr. Hamdan's military defense counsel, and it does not represent the opinions of either the Department of the Navy or the Department of Defense.

I want to thank the Chairman and the Committee for pausing to carefully reconsider the issue of denying habeas rights to an accused designated for trial by military commission.

I believe that any commission that is tried under the MCA will ultimately be determined, once again, to be unlawful because of inherent flaws in it. But whether I am right or not, a challenge to the legislation should happen immediately.

Imagine if the courts had abstained, as Mr. Katsas and others had argued, back when Hamdan was in the D.C. Circuit. There would have been probably 20 trials held by the time the Supreme Court finally came down in striking down what the government at that time said was constitutional.

No one would have benefited from the delay of legislative hearings. And I agree with Mr. Katsas: This really is about timing more than about hearings, at least as far as military commissions go. And so, the right to have pre-trial habeas to challenge the system is inherently important.

Instead of doing that, instead of ensuring that the judiciary took a look at a sweeping act like the MCA, which basically rewrote military justice, the measures within section 7 stripped jurisdiction from the Federal courts until after any hearing was concluded.

The MCA is inconsistent with prior interpretations of the Constitution, including the suspension clause, the exceptions clause, equal protection and prohibitions against bills of attainder. To strip jurisdiction at the same time as these ideas are being put forth was to create an extremely dangerous and unwise act.

And we saw exactly what was going to happen as soon as we got down to the military commissions, because not one, but two, military justices immediately dismissed the actions against my client and against a Canadian citizen because the CSRT that has been lauded here today was found to be inadequate to determine jurisdiction, because it hadn't complied with the Geneva Convention and it hadn't even complied with the requirements set out in the MCA.

Now, normally that would be able to be appealed to a court created under the MCA. The problem is, the Administration didn't create the court. That is right: There is no place to appeal it right now. So we are all going to sit around while the Administration scrambles to put together a court.

Now, I think even the Administration would admit that putting together the court after the issue is sort of closing the gate after

the horse is out of the barn door. It is not going to look good. It hurts our reputation even farther.

I have submitted in my written testimony a proposal to change that expedites the legislation to be heard before the Federal courts. It was drafted by myself and Professor Neal Katyal, my co-counsel, back when the MCA was being written. But I would submit to you here today that current events demonstrate its need even more.

Right now, we are sitting. Had we passed a position for the D.C. Circuit to take on the cases immediately, we wouldn't be sitting around waiting for yet another appeal, we would be arguing it now, which is appropriate.

Now, no less than Colin Powell—and I am in complete agreement—has argued that the entire thing should be closed down and we should return to our normal system of justice, be it military or civilian. And as a counsel, I believe that will work.

But if we are not going to do that, if we continue to want to use the MCA system, then at least we should get an immediate judgement on whether it is constitutional or not, rather than postpone it.

You know, I will often tell people, "What is this all about?" Well, a few years back, I was at my 20th reunion at the Naval Academy. And a classmate of mine cut me off, put me on the corner—he was a Marine colonel, the type that—I best describe Mark's career as, if they have shot at Americans, they have probably shot at Mark.

I thought, "Well, maybe he had some objections to my clients, the so-called terrorists." But that is not what he said. He said to me, "I fight for the rule of law. Men died for this. Don't you dare stop."

Well, I think we owe it to Mark and we owe it to everyone else to ensure that whatever happens in Guantanamo, it represents the best of the rule of law.

Thank you very much.

[The prepared statement of Commander Swift follows:]

PREPARED STATEMENT OF CHARLES D. SWIFT

Testimony of
Lieutenant Commander Charles D. Swift, JAGC, USN
Office of the Chief Defense Counsel, Office of Military Commissions
House Judiciary Committee
June 26, 2007

INTRODUCTION

Thank you, Chairman Conyers and Members of the Judiciary Committee, for inviting me to speak to you today. My testimony is given in my capacity as Mr. Hamdan's military defense counsel and does not represent the opinions of either the Department of the Navy or the Department of Defense. I thank the Chairman and Committee for pausing to carefully reconsider the issue of denying habeas rights to an accused designated for trial by Military Commission in Guantanamo Bay.

On June 15, 2005, I first testified before the Senate Judiciary Committee regarding my decision to file a next friend habeas petition on behalf of Mr. Hamdan. I told that Committee that when the Chief Prosecutor for commissions requested assignment of counsel to Mr. Hamdan, he specified that access to Mr. Hamdan was contingent upon negotiating a guilty plea on Mr. Hamdan's behalf. I said then and I continue to believe today that the only way I could ethically represent Mr. Hamdan under those conditions was to present Hamdan with a second option of filing a habeas petition instead of pleading guilty. After the Appointing Authority refused to charge Mr. Hamdan and chose instead to keep him in the judicial limbo of "pre-trial isolation" that threatened Hamdan's sanity, I filed just such a petition.

During oral argument before the D.C. Court of Appeals, Assistant Attorney General Peter Keisler told the Court that I "had acted consistently with the highest traditions of the legal profession and his military service. He has done his duty." Apparently Mr. Keisler did not check with his client before making this statement because the legislation introduced by the President following the *Hamdan* decision attempted to see to it that no one else, myself included, will have a similar chance to do their duty by challenging the commissions. Section 7 of the Military Commissions Act (MCA) permits the government to do exactly what I was able to prevent – coerce a guilty plea in an unlawful forum.

I again believe, for reasons I detail below, that any commission under the MCA is unlawful and will ultimately be struck down by the courts. Whether I am right or not, a challenge to the legislation should happen immediately. Imagine if the courts had abstained in the *Hamdan* case as the government urged. Fifteen to twenty detainees would have been tried, with presumably some of them convicted, before the Supreme Court ultimately declared the process unlawful. All of the trials would be a nullity. The families of the victims of 9/11 would be forced to undergo a second round of trials – to the extent the Constitution would even sanction such double jeopardy. Justice would be delayed for years more.

Instead of permitting immediate challenge to spare the country such a fate, Section 7 of the MCA sanctions one of the most sweeping jurisdiction-stripping measures in our history and

raises grave constitutional questions.[1] Rather than simplifying the procedures for judicial review of military commissions, the MCA introduced several *new*, complex legal issues that the Supreme Court avoided deciding in *Hamdan v. Rumsfeld*. *See* 126 S. Ct. 2749, 2764, 2769 n.15 (2006). The MCA is inconsistent with prior interpretations of the Constitution, including the Suspension Clause, the Exceptions Clause, the Equal Protection Clause, and the prohibition on Bills of Attainder. To strip jurisdiction at the same time as an entirely newfangled military commission is created was an extremely dangerous and unwise act. It is a profound and dangerous threat to both judicial independence and core rule-of-law values.

I. The MCA Does Not Constitutionally Suspend the Right To Petition For Habeas Corpus.

The MCA seeks to achieve an unconstitutional suspension of habeas corpus. "Habeas corpus is…a writ antecedent to statute,…throwing its root deep into the genius of our common law….The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004) (citations omitted). Our Founders took care to ensure that the availability of habeas was not dependent upon executive or legislative grace. *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001) (noting Suspension Clause protects against loss of right to pursue habeas claim by "either the inaction or the action of Congress"). The Constitution's right to habeas relief exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action and only under limited conditions. *See Johnson v. Eisentrager*, 39 U.S. 763, 767-68 (1950) (assuming that, in the absence of statutory right of habeas, petitioners could bring claim directly under Constitution to the extent their claims fell within the scope of habeas protected by the Suspension Clause); *Rasul*, 542 U.S. at 473-78. Congress has not invoked its suspension power in the MCA, and any attempt to do so under the current circumstances would likely be invalid.

A. Congress May Suspend the Writ Only with Unmistakable Clarity and in Certain Circumstances.

If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. *See St. Cyr*, 533 U.S. at 298-99. The MCA in its current form does not meet that requirement. Congress has only suspended the writ four times. In each of those instances, Congress invoked its Suspension power, each time using the verb "suspend."[2] Simply

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[1] Indeed, "no case has ever countenanced an effort to strip both [the Supreme Court] and the lower federal courts of original and appellate jurisdiction to pass on the constitutionality of Executive action in derogation of personal liberty. To do so would place the very structure of the Constitution at risk by attacking an 'essential function' of the Supreme Court and the Article III judiciary. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953)." Amicus Br. of Norman Dorsen *et al.*, Hamdan v. Rumsfeld, No. 05-184, at 20. This brief was signed, incidentally, by David Shapiro, a Harvard Law School professor who served as Principal Deputy Solicitor General to Ken Starr in the first Bush Administration.

[2] The four suspensions occurred (1) during the Civil War, as authorized in 1863; (2) in 1871, to confront widespread resistance to Reconstruction by armed groups such as the Ku Klux Klan; (3) in 1902, during a rebellion against United States authority in the Philippines; and (4) in December 1941, immediately following the attack on Pearl

withdrawing a statutory basis for habeas is not sufficient to suspend the Great Writ. *Cf. St. Cyr*, 533 U.S. at 298-300.

Even without using the clear term of "suspension," the MCA should not be read as an attempted exercise of the Suspension Clause power. Congress lacks *carte blanche* power to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension only when in "Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Nowhere in the MCA does Congress state that it is exercising its power to suspend habeas corpus. Nor does Congress make any finding that the Nation is currently undergoing a "Rebellion" or "Invasion," or that "the public Safety" was so endangered as to require suspension of the writ. *See* MCA, § 2.

B. Congressional Suspension of the Writ Must be Limited in Scope and Duration.

Even during actual "Rebellion or Invasion," congressional suspension must be limited in scope and duration in ways that the MCA is not. First, Congress must tailor its suspension geographically to jurisdictions in rebellion or facing imminent invasion. In *Ex parte Milligan*, 71 U.S. 2 (1866), the Supreme Court recognized that while some States were in rebellion when the Act of March 3, 1863 suspending habeas was issued, since Milligan was a resident of Indiana, a State not in rebellion, he maintained his right to habeas. *Id.* at 126.[3] The MCA purports to apply to Guantanamo Bay, the primary location where aliens have been held in United States custody since January 2002.[4] Yet like Indiana at the time of *Milligan*, Guantanamo Bay is "far removed from any hostilities." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).[5] The MCA could not, even if intended to do so, constitutionally suspend the right of individuals detained at Guantanamo Bay and elsewhere to a writ of habeas corpus.

Moreover, the Supreme Court has made clear that Congress may suspend the writ only for the limited time during which the suspension can be justified constitutionally. Thus, *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946), invalidated a habeas suspension permitting a military commission "more than eight months after the Pearl Harbor attack." The "courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended." *Id.* at 330 (Murphy, J. concurring). The MCA, however, has no terminal date and indefinitely denies access to habeas corpus.

Harbor (but only for Hawaii). *See* Amicus Br. of Natl. Security Ctr., Hamdan v. Rumsfeld, No. 05-184, at 26-30 (discussing four instances of suspension).

[3] The Court reached this conclusion even though Congress had authorized a broader suspension. *See* Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the President to "suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof").

[4] The MCA states that "the term 'United States', when used in a geographic sense, has the meaning given that term in section 1005(g) of the Detainee Treatment Act of 2005." § 6(a). That provision of the Detainee Treatment Act states that "the term 'United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba."

[5] Nor can *all* the territory "outside the United States" be deemed in Rebellion, subject to Invasion, or a threat to public Safety.

The scope of the right protected from suspension is defined by the historic purposes and applications of the writ. *See St. Cyr*, 533 U.S. at 300-01. "Consistent with the historic purpose of the writ, [the Supreme] Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," including petitions of "admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*...and its insular possessions, *In re Yamashita*." *Rasul*, 542 U.S. at 474 (citations omitted).[6]

Thus, *Yamashita* asked whether there was legal authority for the establishment of a commission and whether the petitioner fell within its jurisdiction. 327 U.S. at 9-18.[7] Although the petitioner was able to rely on the statutory provisions authorizing habeas, the Supreme Court explained that the result would have been no different had there been no statutory habeas, as Congress and the Executive "could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. *See also Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("[N]either the [Presidential Proclamation subjecting enemy aliens to commissions] nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.").

Eisentrager does not support a different result. The *Eisentrager* petitioners were captured, held, and tried by a commission sitting in China. At no stage in their captivity had they been held within the United States' "territorial jurisdiction." *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950). The qualification was essential, for the writ has long been extended to alleged enemy aliens held or tried within English and U.S. territory. *E.g.*, *Rasul*, 542 U.S. at 482 ("As Lord Mansfield wrote in 1759, . . . there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'") (citation omitted); *id.* at 480-82 & nn.11-14 (collecting cases); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1766) (observing that "[t]his is a high prerogative writ, . . . running into all parts of the king's dominions . . . wherever that restraint may be inflicted.").

Thus, *Eisentrager* acknowledged that the judiciary retained the obligation to inquire into

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[6] It makes no constitutional difference whether an individual petitioning for habeas corpus is a non-citizen accused of being an enemy of the United States. Aliens have been able to file habeas petitions to challenge detention at least since the 17th century. *See St. Cyr*, 533 U.S. at 305-06 (from founding, habeas "jurisdiction was regularly invoked on behalf of noncitizens"); *id.* at 301-02 (collecting cases). Both the Habeas Corpus Act of 1641, 16 Car. 1, and the Habeas Corpus Act of 1679, 31 Car. 2, granted "any person" the right to file a petition. *See generally* Amicus Br. of Legal Historians, Rasul v. Bush, No. 03-334 (original conception of habeas permitted challenges by enemy aliens).

Moreover, the Great Writ has long been available to challenge the military's treatment of alleged enemies. *See Rasul*, 542 U.S at 474-75. For example, English courts heard habeas claims from alleged foreign enemy combatants challenging their status in the Eighteenth Century. *See, e.g.*, *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779) (Spanish sailors challenging detention as alleged prisoners of war); *Rex v. Schiever*, 97 Eng. Rep. 51 (K.B. 1759) (Swedish sailor captured aboard enemy ship); *Commonwealth Lawyers Br.* 6-8 & n.9 (collecting cases). Similarly, U.S. courts have heard enemy aliens' habeas petitions from the War of 1812, *Lockington* v. *Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817), through the Second World War, *Quirin* 317 U.S. at 1.

[7] The writ has traditionally been available to challenge the jurisdiction of a committing tribunal, including a military commission. *E.g.*, *Quirin*, 317 U.S. at 19; *Milligan*, 71 U.S. at 118; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963) ("The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military."); *St. Cyr*, 533 U.S. at 302 n.19 ("impressment into the British Navy").

the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory. 339 U.S. at 775. In these and other habeas cases, the Court explained, "it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act," *id.* at 771, for "their presence in the country implied protection," *id.* at 777-78.[8] The Supreme Court has already concluded that individuals detained in Guantanamo Bay are within the "territorial jurisdiction" of the United States. *Rasul*, 542 U.S. at 480. *See also id.* at 487 (Kennedy, J., concurring in judgment) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."). Thus, where there has been no suspension of the Great Writ, those individuals have a right to bring habeas claims directly under the Constitution. The MCA would run squarely up against this hallowed line of constitutional interpretation.

Finally, Congress has provided nothing to resemble an adequate substitute remedy for the writ to detainees. *See St. Cyr*, 533 U.S. at 305 ("[A] serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise."). The limited judicial review in the MCA is wholly inadequate. *See In re Bonner*, 151 U.S. 242, 259 (1894) (holding that when a "prisoner is ordered to be confined in [a facility] where the law does not allow the court to send him for a single hour ...[t]o deny the writ of habeas corpus in such a case is a virtual suspension of it"). Under the MCA, an individual's entitlement to judicial review of the legality of his detention, treatment, or trial is entirely dependent on the government's decision to institute – and render a final decision in – proceedings against him. By permitting review only after a final judgment, the statute precludes entirely any claim that a prisoner is being held unlawfully without trial, a claim at the core of the right to habeas and of no small significance in light of the powers asserted by the President. *See, e.g.*, *Rasul*, 542 U.S. at 556; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). By the same token, the MCA provides no review for a person who is allegedly being held for trial, but never is given one.

Let me further put the habeas-stripping in context. In past wars, the federal courts have always been open – before trial – to test the legality of the military commission. So in the Civil War, when McCardle was indicted in a military commission – he sought to challenge his commission before his trial began. That of course led the Congress to divest part of the jurisdiction over his challenge, but the Supreme Court made clear in its opinion that McCardle had a contemporaneously available avenue to contest the lawfulness of the tribunal. In World War II, in the midst of fighting, eight[I don't understand why this footnote is here] Nazi saboteurs landed on our shores. These were evil men, with plans to blow up critical American infrastructure. The United States Supreme Court heard their challenge *before* the individuals were convicted. That type of process ensures basic fairness.

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[8] The reason the *Eisentrager* petitioners lacked a constitutional right to habeas was because of the lack of any nexus with U.S. territory. Each

> (a) [was] an enemy alien; (b) [had] *never been or resided in* the United States; (c) was captured *outside* of our territory and there held in military custody...; (d) was tried and convicted by a Military Commission sitting *outside* the United States; (e) for offenses against laws of war committed *outside* the United States; (f) and [was] at all times imprisoned *outside* the United States.

Id. at 777 (emphasis added). It was based on this lack of connection to territory within U.S. control that the Court distinguished *Quirin* and *Yamashita*. *Id.* at 779-80. The Court explained that a nexus with a territory under U.S. control, like the Philippines then or Guantanamo now, was sufficient to invoke the right to habeas. *Id.* at 780.

People who face military commissions have two barriers to their freedom – their trial before this newfangled tribunal *and* detention as an enemy combatant. As the government has said several times, even if the tribunal finds someone not guilty, or even if a tribunal's verdict is overthrown by a federal court, that individual can still be detained indefinitely as an enemy combatant. But what is on the line in military commissions goes to the heart of justice – involving the most awesome powers of the government – life imprisonment and the death penalty. In that zone, American courts have always policed the jurisdiction and lawfulness of military tribunals at the outset – to avoid the trauma to the nation that would come from convictions that would later have to be tossed out.

Therefore, Congress should restore the right to challenge, via habeas corpus, the lawfulness and jurisdiction of this novel military commission. Doing so would be in line with American court tradition for 150 years, and will ensure that when trials begin, they are brought in tribunals that are lawful and just.

II. The MCA Violates Equal Protection Guarantees.

If the MCA precludes an individual from pursuing his pending claim for relief, it is only because that individual is an alien (rather than a citizen) in United States custody, yet has been detained outside the United States (rather than in a brig in Norfolk, Virginia or any other place), since September 11, 2001. Legislation that deprives individuals of access to the protections of the Great Writ based on such an arbitrary collage of distinctions—and at the exclusive discretion of the Executive—violates the Fifth Amendment.

The Fifth Amendment protects aliens within U.S. territory as well as U.S. citizens. *See, e.g., Wong Wing v. United States*, 163 U.S. 228 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (all "aliens within the *jurisdiction* of the United States" are protected) (emphasis added); *Galvan v. Press*, 347 U.S. 522, 530 (1954). As the Supreme Court noted, "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." *Rasul*, 542 U.S. at 480. Accordingly, detainees held in U.S. custody there are protected by the Fifth Amendment.

Legislation that enacts substantial discriminatory barriers to the exercise of fundamental rights is subject to strict scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). Access to courts is such a fundamental right. *See Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). The right of access to habeas is particularly fundamental, and is indeed so important to our constitutional tradition that it is singled out for constitutional protection. U.S. Const. art. I, § 9, cl. 2.[9]

No justification for the distinctions drawn by the MCA is apparent. While alienage may be a relevant basis for determining membership in a political community,[10] or for allocating

[9] *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (declaring that the right to habeas corpus is "shaped to guarantee the most fundamental of all rights"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (listing the right to the writ of habeas corpus among rights that are "to be regarded as of the very essence of constitutional liberty") (citation omitted).

[10] *Foley v. Connelie*, 435 U.S. 291 (1978).

scarce entitlements,[11] it is not a permissible basis for determining access to an Article III court in an effort to protect an alien's personal liberty. *See In re Griffiths*, 413 U.S. 717 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982). Furthermore, "where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 92 (1973) (Marshall, J., dissenting). The discrimination here is surely more corrosive than, for example, conditioning access to habeas on a filing fee. *Smith v. Bennett*, 365 U.S. 708 (1961). It offends the very essence of equal justice under law. It is targeted at a population who cannot vote, and concerns not government benefits, but the touchstone issue of who can come into court to protect his liberty.

III. The MCA Violates the Exceptions Clause.

Congress' power to make "Exceptions" to the Supreme Court's appellate jurisdiction is limited. U.S. CONST., art. III, § 2, cl. 2. Indeed, every time the Supreme Court has upheld a congressional limitation under the Exceptions Clause, it has gone out of its way to confirm that an alternative avenue of *contemporaneous* appellate review was available. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996); *id.* at 667 (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues other than certiorari for reviewing [a lower court's denial of habeas] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open"); *Ex parte Yerger*, 75 U.S. 85, 105-06 (1869); *Ex parte McCardle*, 74 U.S. 506, 515 (1869).[12] Yet in many cases, the MCA provides absolutely *no* right to judicial review, much less a right to contemporaneous appellate review in a timely and meaningful manner. *See infra* at 6-7. In addition, the MCA significantly restricts the scope of legal challenges that petitioner may ultimately bring to any final decision of a military commission or a combatant status review tribunal. *See* MCA § 6(a); Detainee Treatment Act of 2005, §1005(e)(2), (3).[13]

IV. The MCA Constitutes a Bill of Attainder.

Finally, the MCA likely runs afoul of the Bill of Attainder Clause. U.S. Const., art. I, sec. 9, cl. 9. A law is an unlawful attainder if (1) it applies to easily ascertainable members of a group, and (2) inflicts punishment. *United States v. Lovett*, 328 U.S. 303, 315 (1946). The MCA satisfies both prongs. The MCA's plain language applies only to "alien[s] detained outside the United States...since September 11, 2001." § 6(b). The MCA undoubtedly constitutes punishment. The extended detention and the denial of a right to challenge treatment or unfair trials, is at least as punitive as the denial of the right to engage in a particular profession. *See Ex Parte Garland*, 4 Wall. 333 (1867) (denial of right to practice law is an attainder).

In general, it will be difficult, if not impossible, to use the new MCA against Khalid Sheik Muhammad or any of the other individuals currently detained. This legislation is punitive,

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[11] *Matthews v. Diaz*, 426 U.S. 67 (1976).

[12] Nor may Congress use its power under the Exceptions Clause "to withhold appellate jurisdiction . . . as a means to an end." *United States v. Klein*, 80 U.S. 128, 145 (1872).

[13] The Supreme Court did indicate that the statutory language conferring "exclusive jurisdiction" upon the Court of Appeals for the D.C. Circuit to review CSRT and military commissions determinations would not deprive the Supreme Court of jurisdiction over an appeal of a decision under the Act.

and ex post facto, and likely to run afoul of both of those prohibitions

V. Expedited Review

Instead of unconstitutionally attempting to suspend the writ, Section 7 of the MCA should provide for a three-judge district court to immediately hear a challenge to this scheme via an anti-abstention provision modeled on the McCain-Feingold Campaign Finance Act. The need for expedited judicial review is highlighted by the recent developments in Guantanamo Bay earlier this month where two different military judges dismissed separate cases due to a lack of jurisdiction. The Administration has publicly criticized these decisions and announced that it intends to appeal the ruling to the intermediate military court created under the MCA. Apart from the chilling effect that public criticism of the military judges represents, the review process is already inexorably tainted by the fact that the court does not yet exist and the Administration is going to select its members while a critical issue is pending without congressional approval allowing or, at the very least, giving the appearance of, court-stacking. After so many missteps this is no way to proceed if we are to regain confidence in the judicial system. To that end I propose that the MCA be amended by inserting the following provision into the Act, after the severability clause:

Sec. 11. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the legality of any provision of, or any amendment made by, this Act, shall be heard by a three-judge panel in the United States District Court for the District of Columbia convened pursuant to the provisions of section 2284 of title 28, United States Code. For purposes of the expedited review provided by this section, the exclusive venue for such an action shall be the United States District Court for the District of Columbia

(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under subsection (a) shall be reviewable as a matter of right by direct appeal to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such order or judgment is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order or judgment is entered.

(c) EXPEDITED CONSIDERATION.—It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

CONFORMING AMENDMENTS

The following MCA provision would also have to be modified:

§ 950i. Finality of proceedings, findings, and sentences

...

(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this chapter, relating to the prosecution, trial, or judgment of military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

Mr. NADLER. Thank you.

I now recognize Mr. Taft for 5 minutes.

TESTIMONY OF WILLIAM H. TAFT, IV, OF COUNSEL, FRIED, FRANK, HARRIS, SHRIVER, JACOBSEN, LLP

Mr. TAFT. Thank you, Mr. Chairman.

Let me address just two issues specifically: first, whether upon the filing of a habeas corpus petition, a court should determine the lawfulness of detaining persons at Guantanamo Bay; and second, how those persons who are lawfully detained should be treated.

Before the enactment of the Military Commissions Act last year, detainees in Guantanamo were entitled to have the lawfulness of their detention reviewed after filing petitions for habeas corpus. The benefits of that procedure were considerable, not so much for the detainees—none of whom was released by a court—as for establishing beyond argument the legitimacy of holding persons who continue to present a threat to the United States as long as the terrorists continue to fight us.

It should be recalled in considering this question that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al-Qaida and the Taliban as long as they pose a threat to the United States. This is black letter law of war.

Currently, whether a person poses a threat to us is determined by the military, with only very limited judicial review of the proceedings of the combatant status review tribunal.

Having the determination made by a court following established habeas procedures would, in my view, greatly enhance its credibility and be consistent with our legal traditions.

Beyond that, providing habeas corpus review of the limited number of cases at Guantanamo will impose only a very modest burden on the courts.

Fewer than 400 people are currently detained at Guantanamo, and I understand that a substantial number of these may soon return to their own countries. By comparison, the courts handle many thousands of habeas petitions each year.

Also, the cases are comparatively straightforward. Many detainees freely state that they would try to harm the United States if they are released. Others are known to be members of al-Qaida, have been captured while attacking our troops or are otherwise known to pose a threat to us.

In short, practically all of the detainees at Guantanamo are there for a good reason and should remain in custody, either there or elsewhere.

Judicial review of such cases should be relatively uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases.

In the event, however, that a court were to be presented with a case that raised serious questions about the lawfulness of detention, surely those questions should be carefully considered, and no institution is better equipped by experience to do that than a court.

In proposing that we return to the system that was in place previously, I want to stress that I do not believe that this issue should be treated as a constitutional one, but simply as a matter of policy.

Whether Congress has the power to bar habeas review to aliens detained in Guantanamo is a question that will be resolved by the courts. My guess is that it probably does have that power.

But Congress should not want to bar the habeas review that the Supreme Court found the aliens in Guantanamo were entitled to under our statutes. It should want, instead, to have the judiciary endorse the detention of the terrorists who threaten us.

For the very reason that the law of war allows us to detain persons without charging them with criminal conduct for extended periods, it is all the more important to be sure that the process for determining who those people are is beyond reproach.

Unlike wars between national armies, where it is easy to tell who the enemy is, identifying those terrorists we are entitled to detain is more difficult.

Regarding the standard of treatment for detainees, I believe we should have followed our practice in previous wars of treating all captured persons in accordance with the Geneva Conventions, whether or not they were entitled to this. Any state, after all, can designate its enemies as unlawful combatants. In fact, North Vietnam and Iran have led the way in this practice in recent years.

But we should not follow them. Our own service men, diplomats and ordinary citizens will pay the penalty of that precedent. They will be abused, tortured and perhaps never even accounted for.

For more than half a century, the United States was a leader in opposing the use of torture and coercive methods of interrogation against those captured in conflict, as well as the deplorable practice of disappearing people. And we need to reclaim our reputation.

It is often said that the war with the terrorists calls for new approaches melding traditional law enforcement procedures with the law of war. How we decide who will be detained and how we treat them in our custody provides a good example of this.

Detainees are held pursuant to the law of war, but the term of their detention is so long and indeterminate that it has many of the characteristics of criminal punishment. The fact that each terrorist has made an individual choice to fight us, rather than being drafted by his government into the army, reinforces this criminal law perspective, which addresses itself to personal responsibility.

Extending habeas review to determine the lawfulness of detaining the terrorist combatants, as has not been done in previous wars, seems to me to be an appropriate acknowledgment of the new situation that the conflict with the terrorists has created for us.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF WILLIAM H. TAFT, IV

Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss legal issues related to the detention of persons captured in our conflict with al Qaeda and other terrorist organizations. My testimony will address two issues specifically—first, whether upon the filing of habeas corpus petitions courts should determine the lawfulness of detaining persons at Guantanamo Bay and, second, how those persons who are lawfully detained should be treated.

Before the enactment of the Military Commissions Act last year, detainees in Guantanamo were entitled under the Supreme Court's interpretation of the relevant authorities to have the lawfulness of their detention reviewed after filing petitions for habeas corpus. The benefits of this procedure were considerable, not so much for

the detainees—none of whom was released by a court—as for establishing beyond argument the legitimacy of holding persons who continued to present a threat to the United States as long as the terrorists continue to fight us.

It should be recalled, in considering this question, that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban as long as they pose a threat to the United States. This is black letter law of war. Currently, whether a person poses a threat to us is determined by the military with only very limited judicial review of the proceedings of the Combatant Status Review Tribunal involved. Having the determination made by a court following established habeas procedures would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of the limited number of cases at Guantanamo will impose only a very modest burden on the courts. Fewer than four hundred people are currently detained at Guantanamo, and I understand that a substantial number of these may soon return to their own countries. By comparison, the courts handle many thousands of habeas petitions each year. Also, the cases are comparatively straightforward. Many detainees freely state that they would try to harm the United States if they are released. Others are known to be members of al Qaeda, have been captured while attacking our troops, or are otherwise known to pose a threat to us. In short, practically all of the detainees at Guantanamo are there for a good reason. Judicial review of such cases should be relatively uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases. In the event, however, that a court were to be presented with a case that raised serious questions about the lawfulness of detention, surely those questions should be carefully considered, and no institution is better equipped by experience to do that than a court.

In proposing that we return to the system that was in place previously, I want to stress that I do not believe this issue should be treated as a constitutional one, but simply as a matter of policy. Whether Congress has the power to bar habeas review to aliens detained in Guantanamo is a question that will be resolved by the courts. My guess is that it probably does. But Congress should not want to bar the habeas review the Supreme Court found the aliens in Guantanamo were entitled to under our statutes. It should want, instead, to have the judiciary endorse the detention of the terrorists who threaten us. For the very reason that the law of war allows us to detain persons without charging them with criminal conduct for extended periods, it is all the more important to be sure that the process for determining who those people are is beyond reproach. Unlike wars between national armies, where it's easy to tell who the enemy is, identifying those terrorists we are entitled to detain is more difficult. We should take advantage of the courts' expertise in performing this task.

Regarding the standard of treatment for detainees, I believe we should have followed our practice in previous wars of treating all captured persons in accordance with the Geneva Conventions and the Army Field Manual applying them, whether or not they were entitled to this. Any state, after all, can designate its enemies as "unlawful combatants". In fact, North Vietnam and Iran have led the way in this practice in recent years, but we should not follow them. Our own servicemen, diplomats and ordinary citizens will pay the penalty. They will be abused, tortured and perhaps never even accounted for. For more than half a century, the United States was a leader in opposing the use of torture and coercive methods of interrogation against those captured in conflict. We need to reclaim our reputation.

It is often said that the war with the terrorists calls for new approaches, melding traditional law enforcement procedures with the law of war. How we decide who will be detained and how we treat them in our custody provides a good example of this. Detainees are held pursuant to the law of war, but the term of their detention is so long and indeterminate that it has many of the characteristics of a criminal punishment. The fact that each terrorist has made an individual choice to fight us, rather than being conscripted by his government, reinforces this criminal law perspective, which addresses itself to personal responsibility. Extending habeas review to determine the lawfulness of detaining the terrorist combatants, as has not been done in previous wars, seems to me an appropriate acknowledgement of the new situation that the conflict with the terrorists has created for us.

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

Mr. NADLER. Thank you.

I now recognize Mr. Berenson for 5 minutes.

TESTIMONY OF BRADFORD BERENSON, PARTNER, SIDLEY AUSTIN, LLP

Mr. BERENSON. Thank you very much, Mr. Chairman, Ranking Member Franks, other Members of the Subcommittee. I appreciate the opportunity to address you this afternoon.

As I listened to the Chairman and the Ranking Member's opening statements, I thought that members of the audience could be forgiven for thinking that they were describing two different universes.

In the Chairman's view, the constitutional right to habeas corpus is absolutely fundamental to what we are talking about this afternoon, whereas in Congressman Franks's view, the constitutional right to habeas corpus was essentially irrelevant to the debate.

And I thought, "Well, how can we reconcile these competing views?" And, in fact, they are fully reconcilable.

I agree with the vast majority of what you said, Mr. Chairman, about the importance of habeas corpus in our constitutional traditions. But I also agree, as Mr. Taft just indicated, that the constitutional right to habeas corpus is essentially irrelevant to the debate we are having today.

How can this be? Well, let me lay out three quick legal principles that I think explain all of this and then describe what I think the implications of them are.

First, alien enemy combatants outside of U.S. territory are not protected by the United States Constitution. As fundamental as habeas corpus rights are for our citizens or those who may be found on our territory, they have never been extended to those fighting against us who are outside our territory and have no meaningful connections to this Nation.

The Constitution and its protections are a privilege afforded to those who have meaningful ties to our Nation, not to foreign enemies who seek to destroy it.

The practical consequences of any other view would be absurd. As Congressman Franks pointed out, there is very little due process on a battlefield. Every time one of our soldiers pulls a trigger, drops a bomb, he takes extraordinary risks with the lives and the property of potentially innocent people, and does so with no advance warning and with no form of process. If the Constitution really applied on the battlefield, we simply could not fight.

In recognition of this, case after case in the Supreme Court has made this crystal clear, most recently the *Boumediene* case in the D.C. Circuit, which Mr. Katsas argued. But that built on a long series of existing Supreme Court cases.

But that does not mean that individuals whom we capture in this or any other war have no rights, or that they are in the often-described legal black hole at Guantanamo Bay. They do have rights. Those rights just don't spring from our Constitution. They spring from the international law of armed conflict.

Now, the second important principle is that the individuals we are talking about here—al-Qaida terrorists, Taliban irregulars and the like—fall into the lowest category of protection under the international laws of armed conflict. They are unlawful enemy combatants, which means that they do not bear arms openly, wear insig-

nia recognizable at a distance, participate in the chain of command that can control them, and themselves obey the law of war.

They are, in short, walking law of war violations themselves. And as a result, the laws of war afford them far less protection than they afford to honorable soldiers and far, far less protection than we ought to afford to our own citizens, even if they transgress our criminal laws.

The people in this category have been described in precedents as hostis humanis generis—that is, enemies of all mankind—precisely because the way they fight is so dangerous to civilians, who are the ultimate object of the law of war's solicitude.

The third important principle: Habeas corpus rights for alien enemy combatants outside the United States are absolutely unknown in human history. No nation at war ever has afforded access to its domestic court system to people fighting against it militarily. No contrary authority has ever been cited in the Supreme Court or elsewhere that I am aware of.

There are cases that extend habeas to enemy combatants, but those are on home soil. There are cases that extend habeas corpus in certain circumstances abroad, but those typically involve U.S. citizens or those under our protection.

It is not the case that the President is exerting some radical new tyrannical power unknown in the history of the United States. In fact, every President prior to President Bush had exactly the same power to capture, detain and hold those who take up arms against this Nation.

So what does that mean for today's debate? Well, to summarize very briefly, the Military Commissions Act is the most generous set of procedural rights ever afforded in the history of warfare to individuals against whom we are fighting. We get no credit for it, but it is absolutely true.

There are sound reasons for this, and I think Mr. Hafetz has accurately identified many of them in his testimony. But the Military Commissions Act represents a balance——

Mr. NADLER. Mr. Hafetz hasn't testified yet.

Mr. BERENSON. I have read his written testimony. [Laughter.]

There are things about this conflict that justify some innovations and more generous procedures to those whom we capture. But the Military Commissions Act represents a sensible compromise balancing the rights and interests of those who we capture against the military exigencies that Greg Katsas described at the very beginning.

At a bare minimum, I would urge the Committee to give the Military Commissions Act the opportunity to prove itself in practice, to show how it functions, to build a better legislative record before reconsidering any aspect of it.

Thank you.

[The prepared statement of Mr. Berenson follows:]

PREPARED STATEMENT OF BRADFORD A. BERENSON

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

TESTIMONY OF BRADFORD A. BERENSON

Former Associate Counsel to the President
Partner, Sidley Austin LLP

June 26, 2007

Chairman Nadler, Congressman Franks, and Members of the Committee, I appreciate the opportunity to testify before you today. My comments this afternoon address certain legal and policy issues associated with judicial review of military detentions in our ongoing war on militant Islamists. In particular, I will address some recent developments relating to enemy combatant detentions and the proposal to amend the Military Commissions Act of 2006 ("the MCA") to grant plenary habeas corpus rights to suspected aliens terrorists detained abroad by the United States.

My perspective on these issues is informed by my experience as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I was one of the lawyers initially began to grapple with these complex questions, which seemed new at the time but which we quickly discovered are in fact very old. I assisted in the legal and policy research and analysis that resulted in the President's Military Order of November 13, 2001, which initially authorized the Secretary of Defense to establish a system of military commissions to try suspected terrorists. Since leaving the White House, I have returned to my private practice in Washington, D.C., but I continue to follow closely the developments in this area of law and to contribute in whatever way I can to the ongoing public debate.

My testimony this afternoon will consist of two basic parts. First, I will bring the Committee up to date on certain developments that have occurred since Congress resolved these issues in the MCA. Then, I will discuss recent proposals to amend the MCA to provide foreign terrorists greater rights of access to our domestic court system. My basic view on these issues is that it would inadvisable to enact any such amendment until we have collectively had an opportunity to see how the system so recently adopted in the MCA works in practice. And in

substance, the advantages of granting further legal rights to militant Islamic terrorists whom we capture would likely be outweighed by the significant costs and disadvantages of doing so.

History of the habeas corpus provisions in the Military Commissions Act

In September, 2006, when Congress was considering passage of the Military Commissions Act, I had the privilege of testifying before the Senate Judiciary Committee on the legal issues surrounding the habeas corpus rights of alien enemy combatants held abroad by the United States military. At that time, Congress was considering passing a provision that would channel judicial review of the status determinations by the Combatant Status Review Tribunals and the verdicts of military commissions to a unified appellate process in the District of Columbia Circuit. That provision eventually became law.

Critics suggested that this provision would amount to an unconstitutional suspension of the writ of habeas corpus. I advised the Senate that, in my opinion, such a provision was likely constitutional and did not amount to a suspension of the writ. Among other reasons I cited was that alien enemies held abroad by our military have never been regarded as entitled to the protections of our Constitution, including the Suspension Clause. After all, if our Constitution protected our enemies in arms, we could not shoot or bomb them without first affording them due process, and we could not destroy their property, including their weapons, without providing them just compensation. Instead, alien enemy combatants, including unlawful combatants such as organized transnational terrorist groups, have always derived their legal rights primarily from international law: specifically, international humanitarian law, otherwise known as the law of armed conflict. In this framework, lawful soldiers who fight according to the rules for protecting civilians accepted by civilized nations are protected by, among other things, the Geneva Conventions, while saboteurs, terrorists, guerrillas, and other irregulars whose

conduct poses special danger to innocents receive a lower level of protection derived primarily from peremptory norms of customary international law.

I advised the Senate that the international law of armed conflict has never been interpreted to require that alien enemies held outside the territory of the detaining power be given access to its domestic court system to challenge their detentions while the war is ongoing. No country in history has ever done such a thing, by habeas corpus or otherwise. Thus, from a legal perspective, empowering our enemies to sue our commanders and inviting civilian courts to override military and intelligence decisions regarding the danger posed by particular detainees was unprecedented. I acknowledged that there might be good policy reasons to extend some sort of judicial review to the military detentions occurring in our struggle with al Qaeda and affiliated entities, especially in light of some of the unusual aspects of this conflict. But I told the Senate that the Suspension Clause did not, in my judgment, significantly constrain the policy choices available to Congress. Congress appeared to accept that view and enacted the Military Commissions Act with the limitations on judicial review included. The judgment that this was not an unconstitutional suspension of the writ has since been endorsed by a decision of the United States Court of Appeals, which I will describe shortly.

My testimony before the Senate outlined some of the history of this issue in the current conflict. Since that history constitutes useful background to the issues before the Committee today, I will briefly repeat some of it.

Rasul v. Bush: the Supreme Court recognizes statutory habeas corpus rights for Guantanamo detainees. From the beginning of the war, the Bush Administration consistently took the position, relying on decisions of the Supreme Court such as *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that suspected al Qaeda terrorists or Taliban fighters captured on the global

battlefield and held at the Naval Base in Guantanamo Bay, Cuba had no right of access to U.S. courts. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court rejected this position, holding that suspected terrorists detained at Guantanamo had a statutory right to pursue habeas corpus relief in the federal courts.

The Supreme Court's decision in *Rasul* was, to my knowledge, the first time in recorded history that any court of a nation at war had held that those whom its military had determined to be enemies had a right of access to its domestic courts and could sue the Commander-in-Chief to challenge their detentions. During World War II, for example, the United States detained hundreds of thousands of German and Japanese enemy combatants. Many of those detainees were held here in the United States. Many also had plausible claims to having been captured or held in error or to having no enmity against the United States. Yet those prisoners were not outfitted with lawyers and invited to sue our commanders during the conflict. The federal courts were not swamped with requests to order the release of prisoners held in military custody while our troops were in the field.

Rasul changed all that. It allowed a floodtide of litigation in federal district court against U.S. commanders by the militant Islamists being held at Guantanamo. Virtually all detainees then at Guantanamo – which, no matter what you believe about the error rate in Guantanamo detentions, included hundreds of our nation's most vicious enemies – sued the President, the Secretary of Defense, and other military commanders seeking to force the military to release them back into the world.

Congress's first attempted solution: the Detainee Treatment Act. Because the Supreme Court's decision in *Rasul* was based only on an interpretation of section 2241 and not the Constitution, Congress was free to address the serious problems caused by the *Rasul* decision

with a legislative solution. The Congress immediately sought to overrule the *Rasul* decision, at least partially. While unwilling to subscribe to the traditional rule relied on by the Administration that no habeas corpus review at all would be available to enemy combatants held outside our shores, Congress sought to strike a sensible compromise and to circumscribe detainee litigation within some reasonable limits.

In the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("the DTA"), Congress established a process of formal administrative review of enemy combatant status for those detained at Guantanamo. The Combatant Status Review Tribunals (CSRTs) were charged with conducting reviews of each detainee's status and making an on-the-record determination of the basis for continued detention. Congress then provided for judicial review, akin to judicial review of administrative action, in the United States Court of Appeals for the District of Columbia Circuit. In each case, the DTA permitted the D.C. Circuit to consider whether continued detention was consistent with the Constitution and laws of the United States. This standard was meant to permit judicial review of the lawfulness of the fact of detention but to eliminate judicial review of some of the more tenuous conditions-of-confinement type claims the detainees had begun to assert.

It is fairly clear to me that these formal procedural rights were not meant to be in addition to the existing habeas litigation but rather were intended to be a substitute for it. Indeed, a review of the congressional debate suggests that a desire to eliminate the unwieldy flood of detainee litigation and to channel it into a more orderly and manageable process was a principal reason the DTA was passed in the wake of *Rasul*. Thus, in section 1005(h) of the DTA, the Congress enacted a provision that I believe most Members understood to mean that the new standards and procedures of the DTA would apply to all suspected terrorists in U.S. custody at

Guantanamo, present or future, and would provide the exclusive judicial remedies for those individuals, whether or not they had already brought habeas corpus proceedings in federal district court. The problem of detainee litigation was thus brought under congressional supervision and control and the interests of the detainees had been balanced, as a matter of policy, against the interests of the United States to produce a fair and moderate mechanism.

The problem returns: Hamdan v. Rumsfeld. Unfortunately, the Supreme Court proved resistant to the policy choice made by Congress. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), seizing on an arguable ambiguity in the language of section 1005 of the DTA, the Supreme Court strained to preserve its own jurisdiction to hear Hamdan's challenge to the military commission structure by concluding that the DTA did not apply to any of the actions pending on the date of its enactment, notwithstanding the fact that those actions had been a major reason for its passage. Instead, the Supreme Court held that the DTA would apply only prospectively, so that all of the existing litigation in the federal district courts could continue apace. And it did.

Congress's second attempted solution: the Military Commissions Act of 2006. The *Hamdan* decision was the major impetus for the enactment of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) ("the MCA"). As it relates to judicial review of military detentions, the MCA essentially amounts to a statement by Congress that "We mean it." In essence, the MCA reaffirmed Congress's original policy choice in the DTA and ensured that the DTA procedural mechanism for orderly and fair judicial review would be consistently applied to all alien detainees, regardless of the date on which they originally filed legal actions.

In the MCA, Congress eliminated the ambiguity seized on by the Supreme Court in *Hamdan* to hold that the DTA's judicial review procedures applied only prospectively. *See* MCA § 7(b) (providing that the MCA's judicial review provisions "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act"). It then substituted new language that made clear that the D.C. Circuit review of the legality of detentions provided for in DTA sections 1005(e)(2) and (3) would be the only such review afforded in courts. *See id.* § 7(a). It did this first by stating clearly that the courts would have no jurisdiction to entertain traditional habeas corpus applications by "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." *Id.* Then, as to those same individuals, the MCA stated that appeals to the D.C. Circuit pursuant to DTA sections 1005(e)(2) and (3) were the only legal actions by such individuals over which U.S. courts would have jurisdiction.

The new MCA judicial review provision preserves the basic policy choice originally adopted by Congress in the DTA, providing orderly review by a single, well-respected federal court of appeals to assess the constitutionality and legality of all enemy combatant status determinations and military commission verdicts.[1] In addition, the substitute language made

[1] Section 7(a) of the MCA provides that judicial review of any and all matters "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of any alien enemy combatant are governed by section 1005(e)(2) of the DTA, which relates to review of the decisions of CSRTs regarding combatant status, and section 1005(e)(3) of the DTA, which relates to review of the decisions of military commissions in war crimes trials. Detainees who have not been charged with war crimes and tried before a military commission but who are instead merely being detained for the duration of the conflict to keep them *hors de combat* have rights of administrative review within the military system of the factual basis for their detention – *i.e.*, the conclusion that they are enemy combatants fighting against the United States on behalf of militant Islamist terrorist elements. These rights include review of their detentions by the Combatant Status Review Tribunals (CSRTs) and then periodic review and revisitation of the enemy combatant determination by Administrative Review Boards (ARBs). Section 1005(e)(2) of the DTA provides that the D.C. Circuit has exclusive jurisdiction over detainee appeals from "the final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The scope of review embraces claims that the CSRT's status determination was inconsistent with the standards and procedures for CSRT proceedings promulgated by the Secretary of Defense or that such standards and procedures are inconsistent with the U.S. Constitution or laws. This portion of the DTA specifically provides that the D.C. Circuit may review the sufficiency of the evidence to ensure that a preponderance of the evidence supports detention. With respect to

certain technical changes, some of which limited the scope of these provisions and others of which broadened them. In particular, the MCA narrows the scope of these provisions by eliminating previous language that would have applied them to any alien at Guantanamo "currently in military custody," regardless of status determination. Under the MCA, only those who have had or are awaiting CSRT determinations and who have been found by the military to be enemy combatants are be subject to the unified judicial review process. The MCA expands the DTA's limited coverage beyond Guantanamo and also makes clear that those "awaiting" status determinations are similarly constrained to abide by the MCA's judicial review mechanism. These changes ensure that the courts will not be flooded with lawsuits brought on behalf of detainees in military or CIA custody in parts of the world other than Cuba and also closed a loophole in the DTA that would have allowed suspected alien terrorists brought to Guantanamo to sue in federal district court in the 90 days or so before a CSRT had been convened to consider their status.

Though rarely acknowledged by the press or critics, the Military Commissions Act provides literally unprecedented access to our courts for the suspected terrorist fighters we are holding around the world. I am of course aware of the constant barrage of criticism directed at the MCA by the army of lawyers and human rights activists who now act on behalf of the militant Islamists we have captured. But although the MCA does not provide the traditional

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military commissions, section 1005(e)(3) of the DTA also empowers the United States Court of Appeals for the District of Columbia Circuit to determine "the final validity of any judgment of a military commission." There is an appeal as of right for any detainee in a capital case or who has received a sentence of 10 years or greater; the Court of Appeals has discretionary jurisdiction over the remainder of the cases. Presumably that discretion will be guided by an assessment of how substantial the legal issues are that the detainee raises in his petition for review. When reviewing a final decision of a military commission, section 1005(e)(3) of the DTA authorizes the D.C. Circuit to consider "whether the final decision was consistent with the standards and procedures" governing the commission trials and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States," which likely also includes some deferential sufficiency-of-the-evidence review. For both ordinary detainees and those tried for war crimes before military commissions, following a decision by the D.C. Circuit, discretionary review by certiorari is thereafter available in the Supreme Court of the United States.

habeas corpus remedy available to U.S. citizens, the MCA provides an adequate substitute. And even though military commission trials do not afford the full panoply of rights given to an American accused of a crime, they provide so many of those familiar protections to our enemies that, to most ordinary Americans, the differences would be difficult to distinguish.

In so doing, the MCA provides our enemies in the current conflict far more legal process than has ever been afforded by any country to its adversaries in armed conflict. The CSRTs convened for each suspected terrorist fighter are demonstrably more robust than even the Article V hearings to which *lawful* combatants – honorable soldiers in the organized military of a foreign nation – would be entitled under the Geneva Conventions. And full judicial review of CSRT determinations and military commission verdicts for compliance with the Constitution and laws of the United States by what is commonly regarded as the second most powerful court in the country, with the possibility of later review by the Supreme Court itself, is unprecedented.

The situation of a captured enemy fighter, in this or any war, is rarely an enviable one. That is one of the many hazards to life, limb, and liberty that an individual risks when he takes up arms against a foreign country, whether ours or any other. I have no illusions that detention at Guantanamo or elsewhere is anything but unpleasant, stressful, and demoralizing to the enemies we hold there. On a human level, it is possible to sympathize with their plight, much as we might sympathize with the pain they suffer when we wound them on the battlefield. But from the perspective of legal process, it is vital to recognize that, despite past errors in detainee treatment, Congress has now established a system that is not only humane but generous by the historical standards of wartime detention. The likely duration of this conflict and the difficulty of accurately distinguishing friend from foe when our adversaries deliberately disguise themselves as civilians as a tactic of asymmetric warfare probably justify this extra measure of

process and protection. But do not be fooled: when measured against the proper baseline of warfare, rather than criminal justice, the current regime embodied in the MCA provides more, not less, process than either international law or our Constitution requires.

The issue of judicial review for alien enemy combatants in the current conflict was fully debated and resolved by the Congress just last fall when it passed the MCA. Although the MCA passed the House and the Senate by large margins – votes of 250-170 and 65-34, respectively – an amendment was offered at the time in the Senate to strip the bill of the provisions regulating judicial review of the claims of enemy combatant detainees. *See* 152 Cong. Rec. S10263 (daily ed. Sept. 27, 2006) (Amendment No. 5087) (amendment "to strike the provision regarding habeas review"). After extended debate concerning the constitutional requirements of Article I, Section 9 as applied to noncitizens, the meaning of several relevant Supreme Court precedents, and various policy considerations relating to extension of habeas review, this amendment was rejected by a vote of 51-48. *See id.* at S10263-75.

***Boumediene v. Bush:* the courts affirm the constitutionality of the MCA**

Since passage of the MCA, the most significant legal development has been the D.C. Circuit's consideration of the very question that consumed so much of Congress's attention when it debated the MCA: whether section 7 of the MCA constitutes a suspension of the writ of habeas corpus. In *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), the court of appeals was asked to determine whether the Military Commissions Act applied to the habeas petitions of two aliens captured outside the United States and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba. The court unanimously held that the MCA stripped federal courts of the statutory habeas jurisdiction that the Supreme Court had recognized in *Rasul v. Bush*. *Id.* at

986-88. Congress had made clear that provisions in the MCA repealing habeas jurisdiction applied "to all cases, without exception" relating to any aspect of such detention. *Id.* at 987.

The court of appeals then confronted the question that was the subject of so much Senate debate: whether withdrawal of jurisdiction over habeas petitions by aliens detained abroad as enemy combatants eliminated a constitutionally protected aspect of the writ. As I had predicted at the time of my Senate testimony, the court held that the MCA's deprivation of jurisdiction over the detainees' habeas petitions did not violate the Suspension Clause. This constitutional holding was based on three related determinations. First, the court of appeals held that the Constitution only protects the habeas right recognized at common law as it existed immediately following ratification, "when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus." *Id.* at 988 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). Second, the D.C. Circuit held that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States," including aliens held by the government outside the sovereign's territory. *Id.* at 990. Finally, the court concluded that because Guantanamo is merely leased from Cuba and is not formally subject to U.S. sovereignty, it is outside the territorial scope of the common law writ circa 1789 and lies beyond the confines of the United States for constitutional purposes. *Id.* at 992 (citing *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948)). The heart of the majority's reasoning was the proposition that aliens held outside the United States with no other connection to this country than their determination to destroy it are not entitled to the protections of the Constitution, including the Suspension Clause. Relying on *Eisentrager* and other precedents, the court stated plainly "that the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* at 991.

Following the D.C. Circuit decision, the detainees' lawyers attempted to convince the Supreme Court to review the decision. The Supreme Court denied certiorari. In denying certiorari and allowing the D.C. Circuit's decision to stand, Justices Kennedy and Stevens pointed to the Supreme Court's "practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) (Kennedy and Stevens, J.J. concurring). Implicit in the Kennedy and Stevens concurrence in the denial of certiorari is the notion that legislation has now established a functioning system of judicial procedures for dealing with enemy combatants, and that this system should be allowed to run its course before further review.[2] This will enable later decisions to be informed by a developed record of how this system works in practice, which should greatly clarify the legal issues and equities at stake. The concurring Justices held open the possibility of later Supreme Court review, especially if it could be shown that "the Government has unreasonably delayed proceedings under the Detainee Treatment Act." *Id.* at 1479.

Thus, the legal issue at the heart of the debate over the habeas provisions of the MCA is no longer the exclusive domain of academic debate among outside experts. It has been resolved by the inside experts who possess the constitutional authority to decide these questions. At present, the highest court to consider the issue has held clearly that the habeas provisions of the Military Commissions Act and the Detainee Treatment Act fully comport with constitutional requirements. To be sure, there remains the possibility – and indeed the probability – of later Supreme Court review, but at the present time, the legal system has come to rest on the notion that the legislation's habeas corpus and judicial review provisions are constitutional, that no legal

[2] As of the date of this testimony, there remain pending before the Supreme Court a petition for rehearing of the denial of certiorari, as well as a motion to delay issuance of the D.C. Circuit mandate. It would be exceedingly unusual, however, for the Supreme Court to grant any such petition or motion.

injury is being inflicted on the detainees by virtue of their operation, and that the system should be allowed to function and demonstrate its virtues (or flaws) in practice before these questions are revisited.

The present path: allowing MCA review procedures to function

At this moment in time, the extensive system of detainee review carefully crafted by Congress, signed by the President, and affirmed by the courts, is finally starting to function as designed. The procedural mechanisms that Members of this Committee helped establish for judicial review of enemy combatant detentions were set in motion just months ago and are only now beginning to operate as Congress intended. We will soon see how the system will function in practice to afford detainees the avenues of appeal that Congress determined would best serve our national interest and the competing policy goals of procedural fairness to detainees and effective warfighting efforts.

The early results have already been interesting. Just weeks ago, in two separate cases, military commissions dismissed charges against detainees who had been designated as "enemy combatants" but not, to the tribunals' satisfaction, as "*unlawful* enemy combatants." In the first case, Omar Khadr, a Canadian accused of throwing a grenade during a firefight in Afghanistan in 2002, was designated as an "enemy combatant" in 2004. Colonel Peter Brownback dismissed without prejudice all charges against Khadr for want of jurisdiction, essentially concluding that a CSRT must first officially declare Khadr an "alien unlawful enemy combatant" before the commission may exercise jurisdiction. Later the same day another judge, Captain Keith J. Allred, reached a similar conclusion with regard to Salim Ahmed Hamdan, Osama bin Laden's personal driver and bodyguard who was captured during the invasion of Afghanistan.

These dismissals do not indicate any fundamental flaw with the MCA, but they do identify a technical problem. This problem can be fixed in one of several ways, and the Department of Defense is currently pursuing remedies. For example, some commentators have criticized the conclusion that the "alien unlawful enemy combatant" determination must be made by a CSRT. The MCA envisions two potential paths to establishing the jurisdictional predicate of "unlawful enemy combatant" status – either a formal CSRT finding to that effect or a factual showing that the defendant is "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i) (2006). In short, the MCA seems to contemplate that the "unlawful enemy combatant" determination can be made not only by a CSRT, but also by the military commission itself. Alternatively, individuals whom the government wishes to charge with war crimes could have their cases resubmitted to the CSRTs for a formal finding regarding the lawfulness of their combatancy. In the case of al Qaeda terrorists and Taliban irregulars, this will be short and easy work: there is no respectable argument that individuals such as Khadr or Hamdan are privileged or lawful belligerents. Thus, regardless of the precise procedure employed, Khadr and Hamdan will soon be tried before military commissions, as, in all probability, will the 9/11 conspirators, led by Khalid Sheikh Mohammed.

Likewise, the MCA is in the process of being applied in the D.C. district court to dismiss pending habeas corpus provisions and channel review to the D.C. Circuit. Although decisions have not yet been rendered by the lower courts that will definitively determine the path this will take, it is reasonable to expect that within the next year, a variety of legal challenges to the CSRTs, their processes, and their determinations will be brought before the D.C. Circuit. In

the course of deciding those appeals, the D.C. Circuit will clarify a great deal about the nature and scope of judicial review afforded under the MCA to enemy combatants and will render opinions on the blizzard of legal claims being developed by the detainees' advocates.

Thus, we now stand at the threshold of a process that will show us how both the military commissions and the MCA's judicial review provisions operate in practice. And we stand here at this moment with the courts having already ruled that the constitutional privilege of the writ of habeas corpus does not extend to enemy fighters our military detains abroad. Detainees such as Khadr and Hamdan are already availing themselves of the legal rights afforded to them under the MCA – with some success. And large numbers of detainees will shortly have the opportunity to present their legal and factual arguments to the D.C. Circuit. As these cases make their way through the commissions and the courts, we will all learn a great deal, and the Administration and the courts will supply answers to numerous open questions.

H.R. 1416

After years of discussion, debate, political activism, and constructive compromise, we are finally in a position to see how the procedural system agreed to by the two political branches of government actually works in practice. Yet I understand the Committee is now considering H.R. 1416, The Habeas Corpus Restoration Act of 2007. This bill would fundamentally alter and undermine the existing procedural scheme before it has even had a chance to prove itself. It thus strikes me as precipitous and premature. Moreover, in substance, I believe it proceeds from faulty legal premises and represents bad national policy. I urge the Committee not to adopt it, or, at a minimum, to delay consideration of the bill for a period of time, so that a more informed legislative exercise can be undertaken after we have had some experience with the MCA regime.

Effect of H.R. 1416. In substance, H.R. 1416 does two things. First, it repeals section 7 of the MCA, plus the related provision in Title 10 relating to military commissions, that channels all judicial review of CSRT and military commission decisions to the D.C. Circuit. At first blush, the bill would thus appear to abandon the careful compromise arrived at in the MCA by both political parties and the President and restore the chaotic situation that prevailed in our courts prior to its passage. But the bill is actually worse than that. It leaves the DTA judicial review mechanisms in place and does not repeal them. Thus, the bill would expand our terrorist enemies' litigation options beyond even those they enjoyed *before* Congress acted to bring some order to the chaotic and damaging situation produced by the *Rasul* decision. If this bill became law, not only would the al Qaeda terrorists and Taliban fighters at Guantanamo have access to our federal district courts to file habeas corpus petitions, but they would *also* have the special statutory review provisions enacted in the MCA available to them to challenge the legality of the CSRT and military commission proceedings. Not only will we again see vexatious habeas corpus litigation challenging every aspect of their detention, confinement, treatment, and transfer, but we will also see the D.C. Circuit burdened with overlapping and duplicative direct appeals from the CSRTs and military commissions, with no statutory means for resolving or regulating these jurisdictional conflicts.

This would represent a 180 degree turn in policy toward judicial review of enemy combatants' claims. These individuals, whom our military has determined to be violent enemies of the United States, will be among the most privileged litigants in the very court system they would like to replace wholesale with shari'a religious courts. They will have greater and more robust litigation options than even loyal American citizens convicted of federal crimes, who are typically confined to at most a single round of habeas corpus review.

But the bill does not stop at multiplying the judicial fora available to the militant Islamists our military and intelligence services have captured and are holding abroad. It also multiplies the legal claims they can bring in those fora. The second change proposed by H.R. 1416 is to repeal section 5 of the MCA, which had made clear that our enemies could not bring claims under the Geneva Conventions against our country, its officers, or employees. Prior to the wave of post-9/11 detainee litigation, it had always been understood that the Geneva Conventions were non-self-executing, and thus did not confer private rights of action that could be asserted by individual litigants in the domestic courts of a signatory nation. *See, e.g., Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978). Instead, the Conventions imposed duties and created rights between sovereigns, and their enforcement was left to state-to-state negotiation informed by the International Committee of the Red Cross. But as with so many other traditional understandings that have been caught in the legal crossfire following 9/11, this one was attacked by the detainees and their advocates, and Congress had to act to restore it. If H.R. 1416 were to pass, some courts may regard it as evidence that Congress wishes to create private rights of action in favor of our enemies under the Geneva Conventions. After all, if that were not the case, what would be the reason for repealing section 5 of the MCA at all? In that event, not only will the suspected terrorists we have detained have unprecedented access to our courts, they will have unprecedented claims to bring in their court actions.

Flawed legal assumptions underlying H.R. 1416. I do not believe that the proponents of H.R. 1416 are motivated by a desire to help a deadly enemy or to create chaos in our courts. Rather, I believe the proponents of the bill are well-intentioned and feel that enactment of the bill is somehow necessary for us to live up to our ideals, principles, and legal traditions as Americans. In particular, proponents appear to assume that the constitutional core

of the habeas corpus right includes alien enemy fighters captured and held abroad, and that failure to repeal the judicial review provisions of the MCA will result in a violation of basic principles of procedural fairness embodied in our Constitution. In my view, this is a central and deeply flawed assumption.

The clearest and most important reason is that, to the extent the Suspension Clause itself requires any habeas corpus remedy for those in federal custody,[3] the scope of the writ does not cover alien enemies of the United States, captured during an armed conflict, and held abroad. Nothing in the Constitution confers rights of access to our courts for alien enemy combatants being detained in the ordinary course of an armed conflict. The Supreme Court, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), held specifically that the Suspension Clause does not give aliens held abroad any constitutional right to habeas corpus relief. The Court recognized an essential distinction between our country's defenders and her foes, declining "to invest these enemy aliens, resident, captured, and imprisoned abroad, with standing to demand access to our courts," and refusing to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." *Eisentrager*, 339 U.S. at 777, 781. In recent cases such as *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Court has reaffirmed that constitutional rights simply do not attach to aliens outside our country. And most recently, in the context of the present dispute, the D.C. Circuit in

[3] There is a respectable argument, based on the original understanding of the Suspension Clause, that the Constitution itself creates no habeas corpus right *at all* for prisoners of *any* type in federal custody and that all such rights are entirely a creature of the Congress. No less a critic of the Administration than Professor Erwin Chemerinsky has explained that, "[a]lthough the Constitution prohibits Congress from suspending the writ of habeas corpus except during times of rebellion or invasion, this provision was probably meant to keep Congress from suspending the writ and preventing *state* courts from releasing individuals who were wrongfully imprisoned. The constitutional provision does not create a right to habeas corpus; rather, federal statutes [do so]." E. Chemerinsky, *Federal Jurisdiction* 679 (1989) (emphasis in original); *see also id.* at 683 ("the Constitutional Convention prevented Congress from obstructing the state courts' ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus"); W. Duker, *A Constitutional History of Habeas Corpus* 135-136 (1980). After all, if the Suspension Clause itself were an affirmative grant of procedural rights to those held in federal custody, there would have been little need for the first Congress to enact, as it did, habeas corpus protections in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Boumediene confirmed that the MCA did not suspend the constitutional habeas corpus rights of the Guantanamo detainees because they never had any to begin with. Thus, the premise built into the very title and description of H.R. 1416 – that it is a bill to "*restore*" constitutional habeas corpus rights previously enjoyed by our enemies – is incorrect.

There is a second and independent reason why the MCA's judicial review provisions do not violate the Suspension Clause: even if the scope of the writ did cover alien enemy combatants, the MCA procedures are a sufficient substitute for the traditional habeas corpus remedy available to those in military custody to satisfy any constitutional requirement. Put simply, the MCA/DTA regime respects whatever constitutional habeas rights a foreign fighter could be thought to have. The Supreme Court has indicated that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). And the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 & n.38 (2001).[4] The MCA provides for meaningful judicial review of the legality of the Guantanamo detentions in a federal court of appeals. Habeas corpus is not suspended by these provisions; if anything, it is extended. As noted previously, the rights of judicial review afforded by the MCA to those whom we have captured are in fact considerably

[4] To be sure, the DTA review in the D.C. Circuit does not entail de novo evidentiary hearings or judicial fact finding. But neither do many habeas corpus proceedings in federal district court. In the ordinary habeas context, even as applied to U.S. citizens convicted of crime in a state court, review of factual sufficiency is highly deferential. *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979). Indeed, the traditional rule on habeas corpus review of non-criminal executive detentions was that "the courts did generally did not review the factual determinations made by the executive." *St. Cyr*, 533 U.S. at 27. Most petitions for collateral relief by federal prisoners under 28 U.S.C. § 2255 are resolved without any form of evidentiary hearing. And in the context of military detentions and trials, the established rules currently recognized by the Supreme Court are even more limited, providing for judicial review of legal issues and commission jurisdiction but no review at all of factual questions of guilt or innocence. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942); *Yamashita v. Styer*, 327 U.S. 1 (1946). The kind of quasi-administrative record review provided for by the DTA has ample precedent in contexts as diverse as habeas corpus review of selective service and immigration decisions. *See, e.g., St. Cyr*, 533 U.S. at 305-06; *Cox v. United States*, 332 U.S. 442, 448-49 (1947); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312 (1946).

more generous than anything we or any other nation in the history of the world has previously afforded to our military adversaries.

Thus, I believe H.R. 1416 proceeds from the erroneous legal premise that Anglo-American legal traditions require more access to domestic courts for alien enemy combatants than are afforded by the MCA. This erroneous premise partakes of an even deeper and more serious misunderstanding that led the Fourth Circuit astray recently in *Ali Saleh Kahlah Al-Marri v. Wright*, 2007 U.S. App. LEXIS 13642 (4th Cir. 2007). Both the bill and the *Al-Marri* decision assume that foreign terrorists, because they masquerade as civilians, must be treated as such by the legal system. This is not so. As a legal matter, we are free to treat them as what they are and have declared themselves to be: enemy soldiers waging a holy war against the United States with aims that include our complete destruction.

Al-Marri is a member of al Qaeda who trained at a terrorist camp in Afghanistan, met personally with Khalid Sheik Mohammed and Osama Bin Laden, and volunteered for a "martyr mission" to the U.S. during which he would serve as a "sleeper agent" facilitating terrorist attacks. *Id.* at *11. After arriving in the United States on September 10, 2001, Al-Mari received funding from al Qaeda sources to gather technical information about poisonous chemicals and to develop methods for disrupting the country's financial system as part of what the government believes was an intended second round of terror attacks. *Id.* Following his arrest, officials found information about jihad, the 9/11 attacks, and Bin Laden on his laptop computer, together with information about poisonous chemicals. *Id.* at *12. Without disputing any of these facts, the Fourth Circuit panel held that, notwithstanding President Bush's written order determining that Al-Marri is an enemy combatant waging war against America, he is in reality a "civilian" who must be treated as an ordinary criminal. *Id.* at *8-9, 34, 57.

Failing to recognize the realities of the global terrorist threat we now face, the court took upon itself the responsibility to apply what it described as "law of war principles" to determine who fits within the legal category of enemy combatant. *Id.* at 60. The court distinguished the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (U.S. 2004), by noting that unlike Yaser Hamdi, Al-Mari was not found "fighting against the United States on the battlefield," and he "bore no arms with the army of an enemy nation." *Id.* at *51, 60. The court likewise avoided an obvious analogy with *Ex parte Quirin*, 317 U.S. 1 (U.S. 1942), where the Supreme Court upheld the treatment as enemy combatants of Nazi terrorists who snuck ashore during World War II for the purpose of committing terrorist acts inside the United States and destroying American war industries. *Id.* at *55. It instead adopted a rule that "enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government,'" categorically excluding members of transnational terrorist groups unaffiliated with a nation-state, such as al Qaeda, from the reach of American military power, at least once they reach our soil. *Id.* at *56 (quoting *Quirin*, 317 U.S. at 37-38). The court ruled that in such circumstances individual terrorists can only be treated as civilians and that "our Constitution does not permit the Government to subject civilians within the United States to military jurisdiction." *Id.* at *57.

A comprehensive critique of this decision and its pernicious practical and legal consequences is beyond the scope of my testimony today.[5] For present purposes, it will suffice to note that the heart of its holding – that terrorists unaffiliated with a state and not caught in a

[5] Among other things, the court usurped the President's power as Commander-in-Chief to determine who poses a military threat to the United States, seriously misapplied international law and domestic law concerning the scope of the law of war, gave applicable Supreme Court precedents far too narrow a reading, created a zone of relative legal safety for our adversaries on U.S. soil – precisely the place where they pose the greatest danger to us, and hamstrung our ability to use vital powers not available to civilian law enforcement to detect, detain, and interrogate terrorists who might have information vital to preventing further attacks. For these and other reasons, it seems difficult to believe that the decision will stand.

zone of active combat bearing arms can only be treated as civilians for legal purposes – is directly contrary to traditional understandings under the laws of armed conflict. Both domestic law and international law clearly recognize that such forces may pose a military threat and may be dealt with as such. Thus, the baseline against which to measure the rights afforded to them under the MCA is not our ordinary criminal justice system but rather the law of armed conflict. As we have seen, when measured against those standards, the MCA is generous and humane.

Under precedents and standards in both U.S. law and the international law, non-state actors perpetrating intense and organized violence with political aims – such as the attacks on our centers of military, political, and financial power on 9/11 – may trigger the President's war powers and the legal regime associated with the use of those powers. The President in fact expressly so found in the immediate aftermath of 9/11. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001) (9/11 attacks "ha[ve] created a state of armed conflict that requires the use of the United States Armed Forces"). Traditionally, his determinations on such matters have received near-total deference from the courts. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 666, 670 (1862) (determining whether a state of war exists and whom to treat as belligerents are presidential prerogatives). And in this case, Congress expressly agreed with the President's determination: the congressional Authorization for the Use of Military Force plainly recognized that we were involved in an armed conflict with al Qaeda, as it was naturally and specifically directed at individuals such as those who had flown the planes and mounted the attacks on 9/11 itself – individuals functionally indistinguishable from Al-Marri and who would have failed the Fourth Circuit's test for combatancy. *See* Pub. L. No. 107-40, § 2(a), 115 Stat. at

224 (authorizing the use of military force against organizations and individuals that "planned, authorized, committed, [and] aided" the September 11 attacks).

These presidential and congressional determinations were fully consistent with the applicable norms of law concerning armed conflict. A state of war does not depend on formalities such as a declaration by Congress. *See* U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 1, ¶ 9 (1956) ("[A] declaration of war is not an essential condition of the application of this body of law"). Nor is war limited to a conflict between two nation-states. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862) (holding, in the context of a naval blockade of the Southern states claimed as an exercise of President Lincoln's war powers, that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states"). For example, the irregular warfare carried on against bands of Indians on the western frontier during the nineteenth century was recognized as having the legal status of war, notwithstanding the fact that the Indians were not independent, sovereign nations under classical international law. *See, e.g., Montoya v. United States,* 180 U.S. 261 (1901); The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873); Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470 (1871). American presidents have also used their war powers and employed the legal regime applicable to armed conflict, rather than civilian law enforcement, in the case of such irregulars as Pancho Villa's band on the southern border, the Barbary pirates, and the conspirators responsible for the Lincoln assassination, who were Maryland citizens living in the Union where civilian courts were open and functioning.[6]

International law likewise recognizes the general principle that non-state actors may engage in war and must therefore be bound by the laws of war. *See, e.g.*, Respect for

[6] *See, e.g., Military Commissions*, 11 Op. Att'y Gen. 297 (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868); *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001).

Human Rights in Armed Conflict, G.A. Res. 2444, U.N. GAOR, 23d Sess., U.N. Doc. A/7433 (1968) (minimal standards of conduct set forth in common article 3 of the Geneva Conventions apply not only to governmental actors but also to "other authorities" responsible for "action in armed conflict"); *Prosecutor v. Tadic*, 35 I.L.M. at 54 (laws of war apply to "protracted armed violence between governmental authorities and organized armed groups"). And with specific reference to 9/11, important international law sources, too, recognized that the attacks were of a military character and had brought about a state of armed conflict between the United States and those who had planned and carried out those attacks. For the first time in its history, NATO invoked the mutual defense provision of Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243, 246.

If further proof were needed that the rights of individuals such as those at Guantanamo are to be measured against the baseline of the law of war, rather than domestic criminal law, the history of Protocol I to the Geneva Conventions provides it. In 1977, an additional protocol to the Geneva Conventions was drafted, which became quite controversial. Known as Protocol I, this measure was specifically intended to address the legal rights of non-state actors such as transnational terrorist groups and guerrillas. It was controversial precisely because it would have afforded such groups greater legal rights than were previously afforded to people in this category under the laws of war, where they occupied the lowest rung of the rights ladder and were entitled to only minimal protections.[7] This protocol was never ratified by the

[7] Traditionally, such unlawful combatants – *i.e.*, those who do not fight according to the laws of war, which are designed in large measure to minimize the inevitable risks and injuries to civilians that war occasions – have been regarded as *hostes humani generis*, or "enemies of all mankind," because their failure to follow the customs and usages of war renders their violence particularly dangerous to non-combatants. Unlawful combatants have traditionally been afforded fewer substantive or procedural rights than lawful combatants, in part to create incentives to fight according to civilized norms and thereby protect civilians. *See generally Ex parte Quirin*, 317 U.S. at 31-32 & n. 10; *United States v. The Cargo of Brig Malek Adhel*, 43 U.S. 210, 232 (1844); *Colepaugh v. Looney*, 235 F.2d

United States, under either Republican or Democratic administrations, because our leaders objected on a bipartisan basis to affording any greater legal protections to individuals and groups whose unlawful means of waging war, such as hiding in civilian populations and refusing to bear arms openly, deliberately magnified the risks and dangers of war to civilian populations.[8] The history of the 1977 protocols and the debates over whether to ratify them makes clear that there was (and is) a universal understanding that fighters in these disfavored categories are not, as the Fourth Circuit would have it, civilians who must be treated as mere criminals but rather are the most dangerous kind of enemy combatants who are properly subject to the law of war. After all, Protocol I was proposed, and was controversial, precisely because it would have afforded transnational terrorist groups and guerrillas *more*, not fewer, legal rights. The opposite would have been true if the Fourth Circuit were correct.

H.R. 1416 appears to share this fundamental conceptual misunderstanding with the majority in *Al-Marri*. The baseline for fair, appropriate, and lawful treatment of al Qaeda terrorists is not the treatment we afford to criminal defendants in the civilian justice system. It is not even the treatment we afford to honorable soldiers of an enemy nation, who wear uniforms, bear arms openly, and obey the laws of war. It is instead the relatively low level of protection afforded to especially dangerous and pernicious unlawful combatants – the kind of people who wage war by flying airplanes loaded with jet fuel into civilian office buildings. Forbidding military detention, as the Fourth Circuit majority did, or granting the full complement of habeas corpus rights, as H.R. 1416 would do, confuses the categories horribly. It reduces the incentives

429, 432 (10th Cir. 1959); William Winthrop, *Military Law and Precedents* 783 (2000); *Military Commissions*, 11 Op. Att'y Gen. 297 (1865); Ingrid Detter, *The Law of War* 144 (2d ed. 2000).

[8] As President Reagan explained in transmitting a later Protocol to the Senate for ratification, the United States could not support Protocol I because "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law." S. Treaty Doc. No. 100-2, at iv (Jan. 29, 1987). The nation's leading newspapers, including the Washington Post and the New York Times, editorialized in favor of this position. *See generally* John Cornyn, *In Defense of Alberto R. Gonzales and the 1949 Geneva Conventions*, 9 TEX. REV. L. & POL. 213, 220-21 (2005).

that exist in the laws of armed conflict to fight honorably and the penalties for failing to do so. And it fails to recognize that treating terrorists like civilians essentially dignifies and validates the very disguises that make them so dangerous to society.

Policy implications of H.R. 1416. Once the legal misconceptions are dispelled, H.R. 1416 appears as it should: as a straightforward policy decision. Are we as a nation better off affording our captured enemies more access to our domestic courts than the MCA now provides? Should Congress, as a matter of choice, allow foreign terrorists and enemy fighters to sue our military commanders on an almost unlimited array of claims in federal district court, trigger evidentiary hearings and trial-type proceedings, and invite the courts to engage in de novo second-guessing of the judgments of our military commanders concerning who presents a danger to our population?

I believe the answer is no. Enactment of H.R. 1416 would place the United States in much the same position we found ourselves immediately after *Rasul*, with hundreds of our nation's most vicious enemies suing our military and civilian commanders in federal district court seeking writs of habeas corpus. Now that Khalid Sheikh Mohammed, the al Qaeda mastermind of 9/11, has been transferred to Guantanamo, along with approximately a dozen other high-value detainees previously held by the CIA, enactment of H.R. 1416 would directly benefit the 9/11 conspirators themselves, and not merely those with some claim, however implausible, to being mere shepherds or religious students caught by mistake in Afghanistan. The resulting litigation would distract military commanders from their primary duties, cause innumerable difficulties in running the detention facility at Guantanamo, and soak up enormous resources at the Department of Justice. It would also allow al Qaeda leaders such as Khalid

Sheikh Mohammed and Ramzi Binalshibh an extraordinary propaganda platform in the midst of the conflict. The potency of such a platform is already a matter of record.

The potential harm that could result from such litigation has already been recognized by the Supreme Court. As Justice Robert Jackson observed in *Eisentrager*, furnishing habeas corpus rights to enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy. [Habeas proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U.S. at 779. The wisdom of the Supreme Court's pronouncement in 1950 has been amply borne out by our experience with the Guantanamo litigation. Unfortunately, the old common sense and practical appreciation for the imperatives of wartime that informed the Supreme Court's views in 1950 seem increasingly difficult to come by.

Litigation and warfare do not mix well. A nation that wishes to preserve itself will strive to ensure that the latter remains largely unencumbered by the former. Oversight and accountability in wartime should generally be provided by means other than lawsuits. As the Supreme Court recently observed, accepting the claim that aliens abroad enjoy federal constitutional protections "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273. The values of civilization and human rights are not served by affording court access and rights under

the U.S. Constitution to our enemies; those values are served by vigorously and effectively defending our society and our liberties against those who would destroy both.

What, then, are the advantages of H.R. 1416? I can think of only two. First, it is possible that providing more robust court access to detainees would dampen the criticism directed at us by foreign governments, NGOs, and opinion leaders across the globe. Mollifying our critics abroad does have value. Retaining the moral high ground in the eyes of the rest of world not only makes Americans feel better about themselves and helps our citizenry remain supportive of the war effort but also pays concrete security dividends in the form of intelligence cooperation from foreign countries. It can also help deprive our enemies of popular support in the communities where they operate.

However, I doubt that these advantages would meaningfully accrue to us from enacting H.R. 1416. The impact of enacting H.R. 1416 on world opinion will be marginal at best. It may even be negative in the long run, as the propaganda platform provided by the litigation provides greater and fuller opportunities for accusations of misconduct or malfeasance, no matter how unfounded, to be broadcast across the globe. It is simply not realistic to believe that the world's disapproval of our current efforts stems from the absence of full habeas corpus rights in federal district court. After all, such rights are absolutely unknown in most of the world, and especially in many parts of the world where criticism of us is most severe. This is only one item (and not a very prominent one at that) in a long list of grievances about which our critics profess to be upset. I believe H.R. 1416 would do little, if anything, to placate global elites or the Arab street, who are more focused on the fact of the Guantanamo detentions themselves, the war in Iraq, historical wrongs such as the detainee abuse at Abu Ghraib, and the perception that defending ourselves against militant Islamists entails disapproval of Islam.

In evaluating measures like H.R. 1416, we need to be clear-eyed and realistic: our critics across the globe have their own agendas, and they are largely implacable. However wrongheaded these attitudes may be, many of our critics genuinely fear American power more than they fear militant Islam. They are more determined to constrain our ability to act in defense of liberal values across the globe than they are to defeat the forces of fanatical, religiously-inspired totalitarianism that wish to shed innocent blood in their streets. In my opinion, almost nothing short of wholly abandoning the effort to defend ourselves militarily will satisfy the critics. At bottom, they want a return to pre-9/11 sleepwalking, where military threats were dealt with as law enforcement matters.

Even in the context of the debates over the legal rights of detainees, it is apparent that there is no simple way to mollify our critics. At first they claimed that all they wanted were Article V status hearings under the Geneva Conventions. When they got CSRTs, which are vastly superior to Article V hearings, they then complained that it was unfair for the Administration to unilaterally set the rules of detention: what they really wanted, they said, was congressional review of the issues and the enactment of legislation. When they got that, they immediately began claiming that the resulting statute, the MCA, was unconstitutional in a variety of respects. And now many of the critics are even seeking to impose criminal justice-style adversary procedures on the CSRTs themselves, contrary to every known principle of combatant status review. Thus, I believe expectations about the public relations or world opinion advantages of H.R. 1416 are largely or wholly illusory.

Moreover, even if enacting the bill would meaningfully satisfy our harshest critics, we would have to weigh very carefully whether that advantage would be sufficient to outweigh the very real disadvantages we would suffer in our ongoing effort to incapacitate

extremely dangerous individuals. The record is already clear that the existing level of process afforded at Guantanamo has resulted in several dozen erroneous releases. Employing procedures the critics contend are wholly inadequate, we have released significant numbers of detainees based upon a conclusion that they were not, or did not remain, enemy combatants. Yet we know now that in many instances we were duped: there are now numerous documented instances where individuals we had in custody have returned to the battlefield and continued to attack our soldiers and others. Where the effect of an erroneous release could be to unleash future Mohammed Attas and increase the risk of another 9/11, we should think long and hard before adopting policies that will undoubtedly increase the instances of such errors.

This leads to the second possible advantage of enacting H.R. 1416: allowing full judicial process might reduce the error rate in our detentions. Any fair-minded person must acknowledge that our military does not successfully distinguish friend from foe 100% of the time. Just as we have released some bona fide terrorists and enemy fighters, we also undoubtedly have detained some people who genuinely represented no threat to us. More robust judicial review should have a tendency to reduce such errors and to result in the release of more individuals who do not belong in military custody. This is a genuine advantage. Every erroneous detention is deeply regrettable. Our commanders do everything within their power to prevent them, and our government plainly has no interest in holding innocents.

However, fair-minded people must also acknowledge that the balance of risks is radically different in wartime than when we are at peace. When the lives of thousands of American civilians could be destroyed, and the lives of their families shattered, by a single additional terrorist attack enabled by missteps on the global battlefield, and when the safety and security of our nation and our system of laws are themselves at stake, we take risks with the lives

and liberties of innocents that would be wholly unacceptable under other circumstances. Every time a shot is fired or a bomb is dropped, we risk making catastrophic mistakes and harming individuals who deserve no harm and to whom we intend none. Yet we fire shots and drop bombs anyway, without any due process or court hearings beforehand. We do it because we have to in order to ensure that we prevail in a conflict where we represent the values of humanity and classical liberalism against adversaries who wish to impose a medieval, religious tyranny. As much as more robust judicial review may reduce the rate of erroneous detentions, and thus help some individual innocents caught up in our military system, it will also increase the rate of erroneous releases, and thus increase the danger to our soldiers and civilians.

It is extremely difficult to conclude that the benefit to innocents of the first effect will outweigh the risks to innocents of the second. After all, our civilian justice system is built on the notion that it is better to release ten guilty people than to see one innocent person wrongfully imprisoned. But in wartime, where the risks to civilians and the larger society are so much greater from an erroneous release, neither we nor any other nation in history has adopted a similar philosophy. All military operations present at least some risk of error that might be reduced by judicial review. Yet in war, decisionmaking with potentially dramatic consequences for innocents caught in the crossfire is traditionally and almost totally unreviewable by the courts.

At a minimum, consideration of a step as momentous as granting unprecedented habeas corpus rights to those our military has captured on the global battlefield should await further factual and legal developments as the MCA is allowed to work. Whatever one believes about the policy merits of H.R. 1416, it would be premature to pass it now.

At present, the law represents a sensible compromise between competing policy considerations, arrived at after full and careful debate by the last Congress. By historical law of war standards, the MCA affords generous procedural rights to detainees. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the extent of the due process to which an *American citizen* detained militarily in the current war was entitled, the Supreme Court noted that "the exigencies of the circumstances may demand that," aside from core rights to notice and a meaningful opportunity to contest the factual basis for detentions before a neutral decisionmaker, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533. In the context of global terrorist networks threatening our homeland, the MCA provides robust procedures for a federal court of appeals to review executive branch determinations that the suspected terrorists at Guantanamo are enemy combatants subject to detention under the laws of armed conflict. The court is specifically empowered to ensure that the applicable administrative procedures and standards for combatant status review have been followed and that those procedures and standards comport with federal constitutional and statutory norms. The court is also directed to ensure that the executive determinations are supported by a preponderance of the evidence. This is meaningful review of the legality of detention. It would be prudent to let the system work for a while – to allow the careful compromises of the MCA to take their course. If untoward practical consequences emerge, or unexpected or problematic legal developments arise, there will be plenty of opportunity for informed adjustments in due course.

As noted before, this seems to be the current view of the Supreme Court. The D.C. Circuit has already held that MCA does not violate any constitutional habeas corpus rights of the detainees. The Supreme Court decided to let that decision stand and to wait and see how

the judicial review mechanisms function in practice before reviewing the MCA. Further legislative action at this moment in time is equally inadvisable. It would throw a system that is just now approaching a tentative equilibrium into chaos. None of us has yet had a meaningful opportunity to see how MCA review really works in practice. And we will all undoubtedly learn many things as it does. Indeed, the jurisdictional loophole identified by the military judges presiding over the Khadr and Hamdan military commission trials may be but the first of several unexpected issues that emerge from the MCA's operation. If Congress is going to legislate on this subject again, it would be far better to do so after the system has had an opportunity to function, so that such issues can be identified and clarified. Allowing the system to function will also produce a more complete legislative record on which to base important policy judgments about what rights of access to our domestic courts foreign enemy jihadists should enjoy.

* * * *

In closing, I wish to thank the Committee for the opportunity to address this important issue. I would be glad to answer any questions you may have.

Mr. NADLER. Thank you.

Now recognize Mr. Hafetz for 5 minutes.

TESTIMONY OF JONATHAN HAFETZ, LITIGATION DIRECTOR OF THE LIBERTY AND NATIONAL SECURITY PROJECT, BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. HAFETZ. Thank you, Chairman, thank you, Ranking Member Franks, and thank you to Members of the Subcommittee for inviting me to share my views at today's hearing.

The subject of today's hearing cuts to the heart of America's values and commitment to the rule of law. Since pre-Revolutionary American history, habeas corpus has been a cornerstone of our system, protecting individuals against unlawful exercises of state power.

Habeas guarantees individuals seized and detained by the government the right to question the legal and factual basis for their detention. It has traditionally been available to citizens, noncitizens, slaves, alleged spies and alleged enemies alike. Our founders all regarded the writ as a bulwark of individual liberty and safeguarded its protections in the Constitution.

I want to briefly address the question of the constitutional implications, because I do not agree that the Supreme Court's decision in *Rasul* was only won regarding the habeas statute. The Supreme Court in its 6–3 decision made two important points: first, that executive imprisonment has been lawless since the Magna Carta; and second, that the common law writ of habeas corpus enshrined in the suspension clause of the Constitution would have extended to detainees at Guantanamo Bay.

Now, habeas corpus provides two important—well, it provides several important protections, two of which I will highlight here. The others I have highlighted in my written testimony.

First, it provides a guarantee that the government provide a legal basis for an individual's detention. That serves a very important function: It ensures, as the Supreme Court said, that the detention of enemy combatants remains within the permissible bounds of the law. That is very important, because the Administration has asserted sweeping powers to detain individuals as enemy combatants, powers that would extend to people who, according to the Administration, donate money or services to an organization that, unbeknownst to them, is affiliated with a terrorist organization. It would allow people to be held for life based on innocent association.

Second, habeas corpus provides meaningful review of the factual basis for a prisoner's detention; in other words, to determine whether or not the individual is who the government claims the person to be. That serves a very important function at Guantanamo for several reasons, including because individuals were picked up at Guantanamo and not provided the underlying process that the military ordinarily provides during armed conflicts. Instead, many were handed over for bounty, for rewards, by individuals seeking rewards. In addition, the detentions are based on evidence gained by torture and other coercion.

Now, the other witnesses have talked a little bit about the military commissions procedures, but I want to focus on the other procedure, the procedure that really dominates Guantanamo, the combatant status review tribunal.

Of the 750 individuals who have been detained at Guantanamo since September 11th, and of the approximately 375 who remain, only a handful have been charged and only a few will ever be charged. The rest are being held indefinitely, potentially for life, based upon executive say-so.

The only process they have been given is that of a CSRT, the combatant status review tribunal, which was created deliberately to avoid habeas review. The CSRT is a summary proceeding that lacks all the hallmarks of due process: denying detainees attorneys, relying on secret evidence, preventing detainees from calling witnesses or presenting evidence, using evidence gained by torture and other abuse, and rubber-stamping detentions based on what higher-ups have said and political influence.

In fact, a striking recent affidavit from Lieutenant Colonel Stephen Abraham, a 26-year veteran of military intelligence, details that CSRT decisions were based on generic information and that lacked the fundamental earmarks of objectively credible evidence. Every Federal judge that has examined the CSRT against the requirements of due process has found it lacking. According to District Judge Joyce Hens Green, the CSRT denies detainees a fair opportunity to challenge their incarcerations.

Now, supporters of the MCA say affording Guantanamo detainees habeas rights would give America's enemies unprecedented access to the courts, but that is inaccurate and misleading. Courts have reviewed the habeas petitions of foreign nationals detained by the United States during wartime, including Nazi saboteurs and a Japanese general accused of war crimes.

But even more significantly, what the Administration calls a global war on terror is very different than prior wars. It has no identifiable enemies, no recognizable battlefields and no foreseeable end. It is precisely the indeterminate, open-ended nature of the fight against terrorism that increases the risk that government officials will inadvertently detain the wrong people based upon suspicion, innuendo or mistake.

In other words, the very nature of what the Administration calls a global war on terror makes habeas corpus more, not less, important.

But the issue is not merely about the detainees. It is also about America and what America stands for. As former Secretary of State Colin Powell explained, Guantanamo has become a major problem for how the world sees our country. It has shaken the belief that the world had in America's justice system, and it has undermined the faith that is necessary to fight terrorism.

The first step in regaining that faith is to restore habeas corpus. As Mr. Powell said, isn't that what our system is all about?

[The prepared statement of Mr. Hafetz follows:]

PREPARED STATEMENT OF JONATHAN HAFETZ

TESTIMONY OF JONATHAN HAFETZ, LITIGATION DIRECTOR, LIBERTY AND NATIONAL SECURITY PROJECT OF THE BRENNAN CENTER FOR JUSTICE, NYU SCHOOL OF LAW

OVERSIGHT HEARING ON HABEAS CORPUS AND DETENTIONS AT GUANTANAMO BAY

BEFORE THE

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JUNE 26, 2007

Introduction

Thank you Chairman Conyers, Chairman Nadler, Ranking Member Smith, Ranking Member Franks, and all Members of the Subcommittee for inviting me to share my views at today's Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay. We are grateful for your leadership, and we have appreciated the opportunity to work with your offices on the effort to restore habeas corpus for detainees at Guantanamo. We also appreciate the Subcommittee's careful and deliberate approach to this issue, which is among the most important of our time.

My name is Jonathan Hafetz, and I am Litigation Director of the Liberty and National Security Project of the Brennan Center for Justice at New York University School of Law ("the Center"). The Center was founded in 1995 as a living tribute to U.S. Supreme Court Associate Justice William J. Brennan, Jr. Combining elements of a think tank, a public interest law firm, a technical assistance provider, and an advocacy organization, the Center works to strengthen our democracy, make our governmental processes transparent and accountable, and to bring human values to the economic and justice systems. The Center's attorneys, scholars, and communications experts engage in ground-breaking impact litigation to challenge anti-democratic policies; produce legal and policy research to measure the economic and social impact of current and proposed policies; and, through strategic public education, reframe the debate on issues of profound importance.

The Center's Liberty and National Security Project ("LNS") seeks to develop the intellectual infrastructure and framework for a national security policy that respects rights and follows constitutional norms. Developing this framework entails a mix of advocacy strategies, innovative policy development, and legal work. It means challenging stale presumptions. It means developing new coalitions of allies among advocacy groups. And, it means deepening, via broad-gauge advocacy, public consensus on the primacy of liberty in security policy.

LNS has focused extensively on preserving habeas corpus in the aftermath of September 11. LNS' recent report, *Ten Things You Should Know About Habeas Corpus*, describes the importance of habeas corpus for Guantanamo detainees and others. LNS is counsel of record in *Al-Marri v. Wright*, the case involving the only individual presently detained in the

mainland United States as an "enemy combatant." LNS has been actively engaged in the Guantanamo detainee litigation, where it has filed several friend of the court briefs on the history and importance of habeas. I have visited Guantanamo several times in connection with my representation of a detainee there.

The subject of today's hearing cuts to the heart of America's values and commitment to the rule of law. Since pre-revolutionary American history, habeas corpus has been a cornerstone of our system, protecting individuals against unlawful exercises of state power. Habeas guarantees individuals seized and detained by the government the right to question the grounds for their detention. It has traditionally been available to citizens, non-citizens, slaves, alleged spies, and alleged enemies alike.

Twice, however, in the past two years, Congress has passed statutes curtailing habeas rights. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 limit federal court jurisdiction to hear petitions filed by or on behalf of foreign nationals detained as "enemy combatants" at Guantanamo and elsewhere. The Administration has argued that these acts deprive even legal immigrants in the United States of their right to habeas corpus. These restrictions, moreover, are not limited to a time-bound, immediate emergency but are permanent, forever stripping access to the writ for a singled-out class of people.

Most immediately, these acts deprive the approximately 375 prisoners who remain at Guantanamo of their right to file habeas petitions in district court to determine whether or not they are lawfully held. Most of these detainees have been imprisoned at Guantanamo for more than five years without a meaningful opportunity to challenge the factual and legal basis for their confinement. But much more is at stake than the fate of these individuals. America's reputation and commitment to the rule of law hangs in the balance.

As former Secretary of State Colin Powell recently explained, denying habeas corpus to detainees at Guantanamo has "shaken the belief that the world had in America's justice system." The consequences could not be graver, undermining faith not only in America's moral credibility but also in its counter-terrorism efforts as a whole. The first and most important step in regaining that faith is restoring habeas corpus. As Mr. Powell said, "Isn't that what our system is all about?"[1]

My testimony will be divided into five parts. First, it will describe the historical importance of habeas corpus and its centrality to the Constitution. Second, it will provide an overview of the efforts to deny habeas corpus to Guantanamo detainees, despite two Supreme Court decisions highlighting the vital importance of habeas review. Third, it will explain how Guantanamo demonstrates the importance of habeas corpus in providing meaningful review to ensure that the United States is detaining the right people and holding them in accordance with its legal obligations. Fourth, it describes why restoring habeas is essential to regaining the legitimacy and moral credibility necessary to build an effective counter-terrorism policy. Finally, it will detail the flaws in arguments against providing habeas corpus to Guantanamo detainees. In particular, it will explain why what the Administration describes as a "Global War on Terrorism" makes habeas *more*, not less, important.

I. The Paramount Importance Of Habeas Corpus

Habeas corpus traces its roots to 1215 and the signing of the Magna Carta. For centuries, it has provided the most fundamental safeguard against unlawful executive detention in the Anglo-American legal system. Habeas corpus was available in all thirteen British colonies from the time they were established until the American Revolution.[2] Alexander Hamilton declared habeas corpus a "bulwark" of individual liberty, calling secret imprisonment the most "dangerous engine of arbitrary government."[3] At its historical core, the writ provides a check against executive detention without trial, and it is in this context that its protections have traditionally been strongest.[4]

No one at the Constitutional Convention in Philadelphia debated whether to include habeas corpus in the Constitution. The delegates instead discussed only what conditions, *if any*, could ever justify suspension of the writ.[5] With unmistakably clarity, Article 1, Section 9 of the Constitution states:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.[6]

The First Congress codified this constitutional command in the Judiciary Act of 1789,[7] making the writ available to any individual held by the United States who challenges the lawfulness of his detention.

Habeas corpus has been suspended on only the rarest of occasions in American history and amid active and ongoing rebellion or invasion. It was suspended twice during the Civil War, a time when Washington, D.C., was surrounded by Confederate Virginia to the west and mobs in Maryland threatened to cut off supplies and troops to the capitol. It was also suspended after the Civil War when armed insurrectionists made it impossible for courts to function in the South; decades later, in the early 1900s, during an armed rebellion in the Philippines; and one final time in 1941 in Hawaii, immediately after Pearl Harbor.[8] Each time, Congress responded to an ongoing, immediate emergency. Each time, Congress specifically limited suspension to the duration of the emergency that necessitated it. And, each time, Congress made a determination that the public safety required suspension of this most fundamental right.

Repealing habeas, therefore, is not a casual act. The permanent elimination of habeas corpus departs radically from the course of American history and the intentions of those who wrote the Constitution and established this Nation's laws.

II. The Effort To Deprive Guantanamo Detainees Of Habeas Corpus

A. Establishing A Prison Beyond The Law At Guantanamo

In the months after the September 11 attacks, the Administration charted a course away from a rights-respecting approach to national security policy and towards creating a prison beyond the law at Guantanamo. First, the President unilaterally declared individuals in U.S. custody "enemy combatants" (or "unlawful enemy combatants") in a "Global War on Terror" to deny them any legal protections under the Geneva Conventions while allowing their indefinite detention without charge. Second, the Administration deliberately brought prisoners to Guantanamo to prevent courts from reviewing the lawfulness of their detention. A December 2001 Memorandum by Justice Department attorneys Patrick Philbin and John Yoo, leaked to the press in 2004, reveals this strategy, arguing why federal courts should find that Guantanamo was outside their habeas jurisdiction.

The Memorandum, notably, acknowledged that if federal courts did exercise habeas review, they might invalidate the detentions.[9]

In June 2004, the Supreme Court rebuked the Administration's attempt to deprive Guantanamo detainees of habeas corpus. In *Rasul v. Bush*, the Court ruled that the federal courts had jurisdiction over habeas corpus petitions filed by or on behalf of detainees at Guantanamo.[10] The Court emphasized that "[e]xecutive imprisonment has been considered oppressive and lawless since [Magna Carta]," and that the writ of habeas corpus was developed precisely to protect individuals from such arbitrary exercises of executive power.[11] The Supreme Court also explained that extending habeas rights to non-citizen detainees at Guantanamo – territory under the exclusive and permanent control of the United States – was consistent with the historical purpose and scope of the common law writ.[12] *Rasul* thus established that detainees at Guantanamo had the right to challenge the factual and legal basis for their confinement before a federal judge by way of habeas corpus.

The Administration, however, immediately sought to block the Supreme Court's ruling. Nine days after *Rasul* was decided, the Defense Department created a summary military proceeding known as a Combatant Status Review Tribunal ("CSRT") to avoid habeas review. The order establishing the CSRT pre-judged the detainees, declaring that they had already been found to be "enemy combatants" based upon multiple levels of internal review. Rather than affording the detainees a meaningful opportunity to prove their innocence, the CSRT denied them the most basic protections against erroneous decisions.

The CSRT, for example, denies detainees the assistance of counsel, prohibits them from seeing the government's allegations, and fails to supply a neutral decisionmaker to rule on their cases. Instead of attorneys, detainees are given "Personal Representatives" with whom they typically meet only briefly before their hearing. Personal Representatives, moreover, do not represent the detainees and often advocate against them.[13] The government, moreover, has not produced a single witness in any CSRT hearing, and has routinely denied detainees' requests to call witnesses or to obtain documentary evidence that would conclusively prove their innocence.[14] For example, the CSRT has denied such reasonable requests as contacting a close family member by telephone to verify a detainee's story; locating a detainee's passport to demonstrate his whereabouts; locating

medical records from a specified hospital; and obtaining documents from court proceedings that could have exonerated the detainee.[15] Further, the CSRT permits the use of evidence gained by torture and other coercion[16] – evidence that the Supreme Court has said is not only inherently unreliable, but repugnant to the values of a civilized society.[17] As District Judge Joyce Hens Green found, the CSRT's numerous flaws deny the core protections of due process that habeas provides: a meaningful factual inquiry to determine whether a prisoner is lawfully held.[18]

In addition, the CSRT employs a sweeping and elastic definition of "enemy combatant" that effectively sanctions indefinite detention based upon rumor, innuendo, and mere association. Specifically, the CSRT defines an "enemy combatant" as an "individual who was part of or supporting Taliban or al Qaeda forces or associated forces that engaged in hostilities against the United States or its coalition partners."[19] According to the Administration, this definition encompasses individuals who gave money or support to charities or other organizations that, unbeknownst to them, were engaged in terrorist activity.[20] The concerns raised by this overbroad definition are not hypothetical. Publicly available records indicate that the United States has detained individuals at Guantanamo without any proof that they intended to engage, let alone actually engaged, in any actions harmful to the United States or its allies.[21] According to the Defense Department's own data, only 8% of the Guantanamo detainees are characterized as al Qaeda fighters; 40% have no definitive connection with al Qaeda; and 55% never have committed any hostile act against the United States or its allies.[22] Moreover, many detainees are being held at Guantanamo based upon their alleged affiliation with organizations that neither Congress nor the State Department has identified as terrorist organizations and whose members are permitted to enter the United States under federal immigration law.[23]

A recent affidavit by a military official closely involved in the CSRT process highlights why these hearings are a sham, a deliberate effort to shield executive detention from the meaningful scrutiny habeas affords. Lt. Col. Stephen Abraham, a 26-year-veteran of military intelligence, said officials responsible for compiling the CSRT record were provided only with "generic" material about detainees, and that "[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence." Lt. Col. Abraham also noted that various agencies withheld exculpatory evidence about detainees from the CSRT. Further, Lt. Col. Abraham detailed how problems of command influence

pervaded the CSRT, whose three-member panels were pressured from above to find detainees "enemy combatants."[24]

The CSRT's manifest flaws underscore the importance of habeas corpus in determining whether prisoners at Guantanamo are lawfully detained and in giving the detentions at Guantanamo legitimacy. Yet, Congress has now twice enacted statutes repealing habeas rights for Guantanamo detainees.

B. Congressional Statutes Stripping The Courts Of Habeas Jurisdiction

In December 2005, Congress enacted the Detainee Treatment Act of 2005 ("DTA"), which purported to eliminate jurisdiction over petitions filed by or on behalf of Guantanamo detainees.[25] In place of habeas, the DTA created an alternative mechanism where detainees could seek review of final CSRT decisions directly in the United States Court of Appeals for the District of Columbia Circuit. But, as described below, that mechanism is inherently flawed, serving to shield CSRT findings from meaningful scrutiny.

In June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA's repeal did not apply to pending habeas petitions.[26] At the same time, the Court reinforced the importance of habeas corpus as a check on arbitrary executive power by invalidating the jerry-rigged military commissions established by the President to try the handful of Guantanamo detainees who have been charged with crimes[27] and by affirming that all detainees are protected, at a minimum, by Common Article 3 of the Geneva Conventions which requires basic protections for military trials and prohibits torture, cruel treatment, and other abuse.[28]

Congress responded by enacting the Military Commissions Act of 2006 ("MCA")[29] which not only sought to resurrect the flawed system of military commissions but also stripped all Guantanamo detainees of habeas rights. Moreover, this time the court-stripping legislation was not limited to Guantanamo but extended to other foreign nationals detained as "enemy combatants." The Administration has argued that the MCA repeals habeas corpus even for lawful resident aliens in the United States.[30] Under the government's interpretation of the MCA, the President could effectively disappear immigrants in the United States and imprison them indefinitely without judicial review simply by labeling them "enemy combatants."

In February 2007, the United States Court of Appeals for the District of Columbia Circuit upheld the MCA's repeal of habeas jurisdiction for Guantanamo detainees. In a divided decision, the court ruled in *Boumediene v. Bush* that Guantanamo detainees had no constitutional right to habeas corpus because they were foreign nationals captured and detained outside the United States.[31] The Supreme Court denied certiorari.[32] In doing so, however, the Supreme Court did not indicate agreement with the lower court opinion that the Guantanamo detainees lacked a constitutionally protected right to habeas corpus. On the contrary, three Justices dissented from the denial,[33] and two other Justices issued a separate statement indicating that Guantanamo detainees should first exhaust available remedies under the DTA.[34]

Litigation under the DTA is now pending in the District of Columbia Circuit, and will initially address threshold questions of counsel access and discovery under this review mechanism. It is possible that litigation will again reach the Supreme Court. But Congress should not wait for what will no doubt be more protracted court battles. Several bills reestablishing habeas corpus for Guantanamo detainees have been introduced into Congress. Lawmakers should act now to return habeas to its rightful, historic, and fundamental place in American law by restoring the writ to its post-2004 statutory *status quo*.

III. The Importance Of Habeas Corpus For Guantanamo Detentions

The importance of habeas corpus for Guantanamo detainees cannot be gainsaid. As described below, habeas affords detainees meaningful review of the legal and factual basis for their detentions. This review is particularly important for Guantanamo detainees because of the Administration's failure to distinguish between innocent civilians and combatants; the United States' reliance on non-U.S. forces in the capture of nearly all Guantanamo detainees, many of whom were turned over to the United States on the say-so of bounty hunters eager for a promised reward; the United States' decision to seize people far from any recognizable battlefield; the use of torture and other abuse to manufacture evidence to justify detentions; and the pervasive political pressure from above to rubber-stamp detainees "enemy combatants." Habeas also provides other protections, including access to counsel, release for those improperly held, and review of prisoner

transfers to prevent a detainee's illegal rendition to a country where he will face torture.

A. Review Of The Legal And Factual Basis For A Prisoner's Detention

The essence of habeas corpus is meaningful judicial review of the legal and factual basis for a prisoner's confinement. This protection is essential for Guantanamo detainees who have been detained by the executive for years without charge and without lawful process.

In *Hamdi v. Rumsfeld*, the Supreme Court held that the President could detain as an "enemy combatant" an individual who was captured in Afghanistan where he had directly engaged in armed conflict against the United States or allied forces.[35] The Court explained that Hamdi's detention was consistent with longstanding law-of-war principles and Congress' Authorization for Use of Military Force passed after September 11.[36] As described above, the Administration has since defined "enemy combatant" in sweeping terms far exceeding the definition upheld in *Hamdi* and what the Constitution and laws of war allow. The United States Court of Appeals for the Fourth Circuit recently rejected the President's sweeping definition of "enemy combatant" as applied to a lawful resident alien arrested in the United States, demonstrating the vital check habeas provides against illegal executive action.[37] Habeas review, in short, is critical in helping ensure that the definition of "enemy combatant" remains, as the Supreme Court said, within "the permissible bounds" of the law.[38]

Habeas also guarantees review of the factual basis for a prisoner's confinement in cases of executive detention.[39] That is, even where the legal limits of the "enemy combatant" category have been properly defined, habeas helps ensure that a particular detainee actually falls within that category. Thus, in *Hamdi*, the Supreme Court instructed the district court to determine whether there was a sufficient factual basis for concluding that the petitioner had actually participated in hostilities against the United States in Afghanistan. By providing a detainee with notice of the allegations against him and a meaningful opportunity to be heard before a neutral decisionmaker (including a fair chance to rebut the government's evidence), habeas helps prevent errant tourists, embedded journalists, local aid workers, and others from being imprisoned by mistake.[40]

Habeas review is crucial for detainees at Guantanamo who have never been afforded a meaningful process to assess whether the government's allegations are accurate. During the conflict in Afghanistan, the United States failed to conduct the battlefield hearings that are required by the Third Geneva Convention[41] and pre-existing U.S. army regulations[42] to separate innocent civilians from actual combatants. These hearings (known as "190-8 hearings") are conducted close in time and place to a prisoner's capture to ensure accuracy, and are important in preventing mistaken detention. During the Gulf War, for example, the military held 1,196 Article 190-8 hearings and in 886 of those cases, the detainees were found to be innocent civilians, not combatants, and were released.[43] The circumstances in Afghanistan after September 11 made these hearings especially important. According to Defense Department documents, only 5% of the detainees at Guantanamo were captured by U.S. forces; 86% were taken into custody by Pakistani or Afghan forces at a time when the U.S. was offering large financial bounties for the capture of any terrorist.[44] While military officers urged that these hearings be conducted, they were overruled by civilian officials in Washington.[45]

It became apparent early on that most Guantanamo detainees were not the hard-core terrorists the Administration insisted they were.[46] A confidential report sent by the CIA to Washington in October 2002 – and ignored by the Administration – stated that most of the Guantanamo detainees "didn't belong there."[47] A former Guantanamo commander went further: "Sometimes we just didn't get the right folks." But, the Commander explained, people remained in detention because: "Nobody wants to be the one to sign the release papers. There is no muscle in the system."[48]

Habeas corpus provides that muscle. It does not, by itself, require any prisoner's release. What it does do, however, is afford the meaningful factual review that Guantanamo detainees have been denied now for more than five years. This review is essential to determining whether the Administration is detaining the right people and is holding them in accordance with the law.

At the same time, habeas hearings are not full-blown criminal trials where the government must prove guilt beyond a reasonable doubt. Rather, they are expedited proceedings where the government must show only that there is a sufficient legal and factual basis for a prisoner's detention. If the government can demonstrate such a basis, a court will uphold the prisoner's

detention. Habeas cases will neither clog the courts nor coddle terrorists. They will simply give individuals who are wrongfully imprisoned a meaningful chance to prove their innocence and to show their detention is illegal.

B. Access To Counsel

Federal courts have uniformly concluded that habeas petitioners have a right to counsel in connection with their legal challenges. As one district judge explained, counsel access is necessary to ensure the "careful consideration and plenary processing" of detainees' claims that habeas corpus requires.[49]

Counsel access has increased openness and accountability at Guantanamo. Before the Supreme Court's decision in *Rasul*, no detainee had met with or spoken to an attorney even though they had been imprisoned for more than two years. Information about Guantanamo was based on official government descriptions. However, when attorneys started meeting with detainees after *Rasul*, an alternative account emerged about who was detained at Guantanamo and how they were being treated. It became apparent that the Guantanamo detainees were not "the worst of the worst" and that they were being held in often brutal conditions and subjected to torture and other coercive interrogation techniques. Counsel access helped focus attention on problems at Guantanamo and provided an important check on the abuse of government power.

Not surprisingly, the government has seized on the repeal of habeas corpus jurisdiction to significantly curtail attorney access. While the government has abandoned its initial proposal to limit the number of visits by attorneys, it is still trying to impose draconian restrictions on attorney access. For example, the government has sought to restrict and censor attorney-client mail, to limit attorneys' access to classified information (even though attorneys have the required security clearances), and to eliminate attorney access altogether on its say-so. Notably, the government did not seek to curtail counsel access in any of these ways while the courts exercised habeas jurisdiction under *Rasul*. If adopted, the government's proposed restrictions would eviscerate meaningful access to counsel for Guantanamo detainees, chilling communications between lawyers and their clients, suppressing information about detentions, and inhibiting detainees from meaningfully contesting the allegations against them.

C. *Review Of Transfers To Prevent Illegal Detention And Torture*

Another important function of habeas corpus is to review the lawfulness of a prisoner's transfer from custody. This review serves an important function at Guantanamo, where the President claims unfettered authority to hand detainees to foreign governments despite a significant risk that some detainees may be illegally detained or tortured upon their arrival.

Since the Supreme Court's decision in *Rasul*, many district courts have entered orders preventing a detainee's transfer from Guantanamo without advance notice to his counsel and to the court.[50] A number of these orders were entered against the backdrop of news accounts of a possible mass transfer of Guantanamo detainees to foreign prisons and revelations about the Administration's "extraordinary rendition" program in which individuals are handed over to foreign governments for torture.[51] These advance notice orders do not block any transfer. Instead, they merely provide some protection against renditions in the dead of the night to jails in Egypt, Syria, and other countries that routinely abuse prisoners by giving judges the opportunity to review a transfer to ensure that it complies with the law. A judge, for example, can assess whether a prisoner's proposed transfer violates the United States obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which categorically prohibits transfers where there is a substantial risk of torture.[52]

Congress' repeal of habeas corpus jurisdiction for Guantanamo detainees has jeopardized these protections. The government is currently seeking to vacate advance notice orders entered in existing habeas cases. The courts, meanwhile, have ruled that they lack jurisdiction under the DTA to review the lawfulness of prisoner transfers. Unless habeas is restored, this important safeguard against illegal renditions will be eliminated. The dangers would be exacerbated if Guantanamo were closed and prisoners outsourced to foreign prisons, such as the new prison in Afghanistan that the United States is helping to construct, without any opportunity to contest the lawfulness of their transfer or whether they were properly detained in the first place.

D. *Habeas And The Right To Release*

Habeas corpus jurisdiction provides an additional check on illegal detentions at Guantanamo by guaranteeing an effective remedy: release. Long ago, William Blackstone described the writ as "the great and efficacious writ in all manner of illegal confinement."[53] The Supreme Court has similarly explained that the writ's importance as a safeguard against unlawful and arbitrary executive action lies in a judge's power and ability to grant an effective remedy.[54] The federal habeas statute thus gives judges broad power to do as "law and justice require," including to order a prisoner's release where his detention is illegal.[55]

Repealing habeas corpus undermines this core protection and allows the Administration to continue holding prisoners even when there is no longer any basis to do so. Notably, the Administration has detained prisoners at Guantanamo for months even *after* concluding they are not properly detained as enemy combatants. Eliminating habeas deprives such prisoners of an effective remedy and makes their release a matter of executive discretion and grace.

IV. Habeas Is Essential To America's Legitimacy And Moral Credibility.

Habeas corpus is about more than providing a lawful process to those whom America detains. It is also central to America's effort to give legitimacy to its counter-terrorism policy. It is precisely the absence of this legitimacy that has made Guantanamo a lightening rod for criticism and tarnished America's moral credibility.

In a leaked 2003 memo, then Secretary of Defense Donald Rumsfeld asked a pointed question that should guide anti-terrorism policy:

> Are we capturing, killing or deterring and dissuading more terrorists every day than the madras's and the radical clerics are recruiting, training and deploying against us?[56]

The sense that the United States is a country that honors the rule of law and basic human rights has long been our core foreign-policy asset. But in the global struggle against al Qaeda and its affiliates, the idea that the United States no longer plays by its own rules is a huge recruiting boon to

our enemies. Allegations of torture and images from Abu Ghraib have led to a state in which, as former Secretary of State Colin Powell said, "The world is beginning to doubt the moral basis of our fight against terrorism."[57] Donald Rumsfeld's successor, Robert Gates, warned that the treatment of those detained at Guantanamo "taints" the fight against terrorism and deprives this country of international credibility.[58] (Gates has urged that the Guantanamo facility simply be closed.) Disregarding longstanding constitutional protections simply offers new ammunition to those who assert that the United States is a lawless hyper power.

The creation of whole classes of people who can be held without review or any guarantee of fundamental rights undermines the United States' moral authority as well as its credibility as a defender of liberty. People around the world judge us by our deeds, not our words. By subjecting detention decisions to habeas review, the United States demonstrates that the fight against terrorism is legitimate and that we are detaining the right people, an obvious predicate step to gaining the broad support necessary for success.

V. The False Arguments Against Habeas

Supporters of DTA and MCA make several arguments why Congress should not guarantee habeas corpus for Guantanamo detainees. They argue, for example, that foreign nationals have traditionally not had habeas rights during wartime, that Guantanamo detainee habeas petitions are largely frivolous, and that, in any event, Congress has created an adequate and effective substitute for habeas under the DTA. Those arguments are misguided. They misunderstand both the nature of habeas and the vital role it plays at Guantanamo.

A. Foreign Nationals Have Habeas Rights Even During Wartime

The Supreme Court has previously reviewed the habeas petitions of foreign nationals detained by the United States during armed conflict. In two separate World War II cases, for example, the Court reviewed habeas petitions filed by foreign nationals including a group of Nazi saboteurs and a Japanese general accused of war crimes. Though the Court in those cases, *In re Yamashita*[59] and *Ex parte Quirin*,[60] ultimately rejected the petitioners' claims, habeas review was nonetheless used to review the lawfulness of the detainees' situation.

The Administration principally and mistakenly rests its claim that habeas rights do not apply to Guantanamo detainees on a World War II case, *Johnson v. Eisentrager*.[61] This case was brought by a group of German soldiers who had been captured and convicted in China and who were imprisoned in Germany. In denying their habeas petitions, the Supreme Court noted that all of the prisoners were admitted enemies of the United States and that all had been tried and convicted by a military court. The current detention of "enemy combatants" at Guantanamo is very different. An overwhelming majority of prisoners there deny that they are enemies of this country; all but a handful have never been charged with any crime, let alone been tried by any court. Most will never be charged.[62] In addition, the prisoners in *Eisentrager* were held in Germany; the Guantanamo detainees, by contrast, are imprisoned in territory over which the United States government exercises complete and exclusive control and jurisdiction – a territory that, in the words of Supreme Court Justice Anthony M. Kennedy, "is in every practical respect a United States territory."[63] For those detainees who seek to contest their designation as "enemy combatants," the United States is the only sovereign that can hear their cases and order them freed if they are wrongly detained.

Further, Guantanamo detainees are being held in what the Administration describes as a "Global War on Terrorism," which distinguishes them in important ways from prisoners in prior conflicts.[64] Previously, the United States fought wars against enemy nations where soldiers and battlefields were easily recognizable. But in the so-called "Global War on Terrorism," there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. The nature of the conflict, therefore, increases the risk that we will inadvertently detain innocent civilians based upon suspicion, innuendo, or mistake. Moreover, because this "war" could last for generations, the consequences of such wrongful detentions are particularly severe. Habeas corpus thus plays a different and more important role now than in prior conflicts to ensure that innocent people are not wrongfully imprisoned and that the President does not exceed legal limits on his detention power.

B. Habeas Petitions Are Not Frivolous Prisoner Conditions Suits

As Congress debated the DTA and MCA, many legislators appeared to believe that Guantanamo detainees were routinely using habeas petitions

to file frivolous complaints about prison food or insufficient Internet access. "Crazy lawsuits out there." That is what Senator Lindsey Graham said about lawsuits in which Guantanamo detainees complained about slow mail service and the quality of medical services.[65]

In fact, the Guantanamo detainee habeas petitions are categorically different from prison lawsuits.

Prisoners often raise quality-of-life issues through lawsuits. They sometimes seek money damages. Congress previously curbed such suits. The Prison Litigation Reform Act, passed in 1995, limited prisoners' access to the courts. But a habeas petitions is different. In essence, it asks, "Can this person be detained?" It does not ask "how" that detention should proceed. Habeas thus goes to the far more elementary question of whether there is a basis in fact and in law to hold a person in the first place. To be sure, in the habeas petitions filed by Guantanamo detainees, some of the detainees' lawyers have raised disturbing questions about forced feedings and other improper practices.[66] In so doing, they are simply ensuring that they can zealously represent a client whose wishes they can discern. And this small number of cases may be indicative more of abusive interrogation and other problematic practices rather than of any danger that the habeas right will be abused for frivolous purposes.

C. Congress Has Not Created An Adequate Substitute for Habeas

The Military Commissions and Detainee Treatment Acts do not provide adequate substitutes for habeas corpus. Quite the reverse: these laws sanction indefinite imprisonment without due process and eviscerate the core protections that habeas provides.

Under these new statutes, Guantanamo detainees can seek review of final CSRT decisions in the United States Court of Appeals for the District of Columbia Circuit. But both statutes limit the scope of that review in crucial ways. These laws confine judicial review to the record of the facts created by the CSRT. As described above, the CRST lacks key protections against erroneous decisions and is subject to pervasive command influence. It simply does not – and cannot – serve as a fair fact-finding instrument. Any detention review scheme that is grounded on acceptance of CSRT findings will necessarily be flawed.

As written, the MCA and DTA also do not allow CSRT records to be supplemented even if available evidence conclusively proves the detainee's innocence or shows that he confessed after prolonged abuse and/or torture. Court review limited in these fundamental ways undermines the integrity of the Judiciary by denying appeals courts the basic tools necessary to actually review questionable practices and findings. Today, only the scrutiny of an *independent* federal judge on habeas corpus will be sufficiently credible to warrant further detention.

The new statutes also slow the judicial process. For many detainees, this means prolonging their wrongful imprisonment. As noted above, the District of Columbia Circuit recently ruled that the MCA eliminates jurisdiction over the Guantanamo detainee habeas cases.[67] The Supreme Court decided not to review this decision. In so doing, the Court indicated that prisoners at Guantanamo should first go back to the District of Columbia Circuit.[68] But that court has already ruled that the detainees have no constitutional rights, so the exhaustion of the DTA and MCA's limited remedies will almost certainly be futile. The Supreme Court may review the District of Columbia Circuit's decision, but Congress does not need to – and should not – wait for the courts to act. It should instead restore habeas corpus now and provide the lawful process that should have been provided at the outset.

In addition, the DTA and MCA enable other questionable government conduct, including the unchecked and unreviewable transfer of Guantanamo detainees to face torture by foreign governments. Unlike habeas, the MCA and DTA do not provide for, and in fact expressly bar, judicial review of a detainee's transfer to a foreign government. They thus gut the important role habeas plays in helping enforce the United States' domestic and international legal obligations against rendering prisoners for torture.

Further, unlike habeas, the MCA and DTA do not affirmatively empower a court to release a detainee if wrongfully held. The government, moreover, has taken the position that the District of Columbia Circuit lacks that power under the DTA. Absent habeas, detainees with meritorious claims will likely confront a potentially endless cycle of remands to the CSRT rather than the promise of release from illegal detention that habeas provides.

Conclusion

For centuries, habeas corpus has provided the greatest protection against illegal and arbitrary executive detention in our system. The failure to ensure this protection at Guantanamo has led to the prolonged imprisonment of innocent people, facilitated abuses of executive power, and tarnished America's moral credibility.

Several legislators have proposed closing Guantanamo as a solution. Certainly, that is a step in the right direction, a recognition that off-shore penal colonies do not make America safer or more free. But closing Guantanamo should not be a substitute for restoring habeas corpus. Simply moving Guantanamo detainees to Fort Leavenworth or other prisons in the United States would not address the root of the problem – the absence of a lawful and legitimate process to determine whether a prisoner is being illegally detained in the first place. In addition, closure without habeas restoration would do nothing to prevent the United States from establishing more Guantanamos in the future. The underlying problem is the attempt to create a prison beyond the law, not the location of that prison. If Congress is serious about addressing that problem, it must restore habeas corpus as a necessary first step in creating a rights-respecting national security policy.

Thank you.

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[1] Meet the Press, NBC television broadcast, June 10, 2007, *available at* http://www.msnbc.msn.com/id/19092206/.

[2] William F. Duker, *A Constitutional History of Habeas Corpus* 98, 115 (1980).

[3] *The Federalist* No. 84 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[4] *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Swain v. Pressley*, 430 U.S. 372, 385-86 (1977) (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S. 443, 533 (Jackson, J., concurring in result).

[5] *Compare* 2 *The Records of the Federal Convention of 1787*, at 438 (M. Farrand ed. 1966) (no suspension except "on the most urgent occasions, and then only for a limited time not exceeding twelve months") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus "inviolable" and should never be suspended) (proposal of John Rutledge).

[6] U.S. Const. art. I, § 9, cl. 2.

[7] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified at 28 U.S.C. § 2241(c)(1)).

[8] William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980).

[9] Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Patrick F. Philbin and John C. Yoo, in *The Torture Papers: The Road to Abu Ghraib* 29 (Karen J. Greenberg & Joshua L. Dratel eds. 2005).

[10] 542 U.S. 466 (2004).

[11] *Id.* at 474.
[12] *Id.* at 481-82.
[13] Mark Denbeaux et al., *No Hearing Hearings: CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo* 16 (2007), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.
[14] *Id.* at 22, 36.
[15] *Id.* at 32-33.
[16] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472 (D.D.C. 2005); Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL) (D.D.C.); *Boumediene v. Bush*, 04-CV-1166 (RJL) (D.D.C.), at 84:7-84:22.
[17] *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 173 (1952); *Spano v. New York*, 360 U.S. 315, 320 (1959).
[18] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005).
[19] *See* Combatant Status Review Tribunals Order of the Deputy Secretary of Defense of July 7, 2004, para. a, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. This category includes, but is not limited to, "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*
[20] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).
[21] *See* Mark Denbeaux et al., *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, *available at* http://law.shu.edu/aaafinal.pdf.
[22] *Id.*
[23] Mark Denbeaux et al, *Second Report on Guantanamo Detainees: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy* (2006), *available at* http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf.
[24] Declaration of Stephen Abraham, Lt. Col., U.S. Army Reserve, June 15, 2007.
[25] Pub. L. No. 109-148, 119 Stat. 2680 (2005).
[26] __ U.S.__, 126 S. Ct. 2749, 2764-65 (2006).
[27] *Id.* at 2797-98
[28] *Id.* at 2795.
[29] Pub. L. No. 109-366, 120 Stat. 2600 (2006).
[30] Although United States Court of Appeals for the Fourth Circuit recently rejected that argument, the government has announced it will appeal that decision. *See Al-Marri v. Wright*, __ F.3d __, 2007 WL 1663712, at *10 (4th Cir. June 11, 2007).
[31] 476 F.3d 981 (D.C. Cir. 2007). Judge Judith Rogers dissented, finding that the Guantanamo detainees had a constitutional right to habeas corpus. *Boumediene*, 476 F.3d at 994-95 (Rogers J., dissenting).
[32] __ U.S. __, 127 S. Ct. 1478 (2007).
[33] *Id.* at 1479 (Breyer, J., joined by Ginsburg & Souter, JJ., dissenting).
[34] *Id.* at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).
[35] 542 U.S. 507, 516 (2004) (plurality opinion).
[36] *Id.* at 521; *id.* at 549 (opinion of Souter, J.).
[37] *Al-Marri v. Wright*, __ F.3d __, 2007 WL 1663712, at *10 (4th Cir. June 11, 2007).
[38] *Hamdi*, 542 U.S. at 522 n.22 (plurality opinion).

[39] *Boumediene*, 476 F.3d at 1005(Rogers, J., dissenting); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 Cardozo Public Law, Policy, and Ethics Journal 127, 152-58 (2006).

[40] *Hamdi*, 542 U.S. at 534.

[41] Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287.

[42] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, Army Regulation 190-8, (1997), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf.

[43] Report on the Conduct of the Persian Gulf War, Final Report to Congress by the Department of Defense (April 1992).

[44] Denbeaux et al., *Report on the Guantánamo Detainees*, *supra*, at 2-4; Carol D. Leonnig & Julie Tate, *Guantánamo: Five Years Later*, Wash. Post, Jan. 17, 2007. Indeed, Defense Secretary Rumsfeld proclaimed that leaflets advertising this money-for-capture program fell over Afghanistan "like snowflakes in December in Chicago." *See U.S. Hopes $25 million reward will lead to bin Laden*, Associated Press, Nov. 20, 2001.

[45] *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, The New Yorker, July 3, 2006.

[46] Defense Secretary Rumsfeld and other Administration officials also repeatedly referred to the Guantánamo detainees as "the worst of the worst," and claimed that they included many senior al Qaeda operatives who had been involved in active plots against Americans. *See* Neil A. Lewis & Eric Schmitt, *Guantánamo Prisoners Could Be Held For Years, U.S. Officials Say*, N.Y. Times, Feb. 13, 2004.

[47] Mayer, *The Hidden Power*, *supra*.

[48] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, Wall St. J, Jan. 26, 2005, at A1.

[49] *See, e.g.*, *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004).

[50] *See* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 (2004) (summarizing decisions).

[51] Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, Wash. Post, Mar. 11, 2002.

[52] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[53] William Blackstone, 3 *Commentaries* *131.

[54] *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 319 (1995); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

[55] 28 U.S.C. § 2243.

[56] Walter Shapiro, *Rumsfeld Memo Offers Honest Display of Doubts About War*, USA Today, Oct. 24, 2003, at 5A.

[57] David Jackson & Kathy Kiely, *Strategy on Terror Suspects Splits GOP; Key Senators Say No to Bush Plan*, USA Today, Sep. 15, 2006, at 1A.

[58] Thom Shanker & David Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007, at A1.

[59] *In re Yamashita*, 327 U.S. 1 (1946).
[60] *Ex parte Quirin*, 317 U.S. 1 (1942).
[61] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
[62] In more than five years, only ten of the more than seven hundred individuals who have been detained at Guantanamo have been charged with a crime. Those ten detainees were charged before military commissions. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). After the Supreme Court invalidated the commissions in *Hamdan*, Congress enacted the MCA, providing the statutory authorization for military commissions that the Court found was previously lacking. Three detainees have since been charged before military commissions and one, David Hicks, has pled guilty.
[63] *Rasul v. Bush*, 542 U.S. 466, 487 (2004).
[64] The Brennan Center rejects the proposition that there is such a thing as a "Global War on Terror" or that United States can be at war with an international terrorist organization like al Qaeda under principles of international humanitarian law or the U.S. Constitution. However, even accepting *arguendo* the Administration's terms, habeas corpus must exist to ensure that this "war" is conducted within legal limits and that individuals are not wrongfully detained.
[65] National Defense Authorization Act for Fiscal Year 2006 - Conference Report, 151 Cong. Rec. S14256, 14262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham).
[66] *See, e.g.*, Tim Golden, *Guantanamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. Times, Apr. 9, 2007, at A12.
[67] *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).
[68] *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).

Mr. NADLER. I thank you.

I will begin the questioning by recognizing myself for 5 minutes.

Mr. Berenson, you said that there is no habeas for enemy combatants abroad, obviously; that there is no new tyrannical power assumed by the President.

The President claims the power, for example, in the Padilla case, to seize someone in the United States, someone who we don't know to be an enemy combatant—there may be information to that effect, but someone, anyone basically, anyone who isn't a citizen—my grandmother before she became a citizen—and throw them in a military brig forever.

How is that not a new tyrannical power?

Mr. BERENSON. I think that is a misunderstanding of the power that the President claimed with respect to Mr. Padilla.

I was working in the White House at the time that Padilla was first captured, and the United States never took the position that Mr. Padilla did not have right of access to U.S. courts and did not have the ability to file a writ of habeas corpus.

He in fact did those things, and the Administration never took the view that the courts were without jurisdiction to entertain his claims.

Mr. NADLER. I thought that was exactly the position of the Administration.

Mr. BERENSON. No, the dispute was really over what that habeas court could do. The Administration took a very restrictive view of the right mode of judicial review for the habeas court; that is, it was extremely deferential review, which essentially amounted to a review of the record on which the Administration had based its conclusion that Padilla was a combatant. The Administration did not want trial-type adversary proceedings, with lawyers on both sides duking it out——

Mr. NADLER. But on what basis—if I am accused of murder and I am picked up on the streets of New York—or genocide or anything else—I get full normal rights to contest that. But if I am accused of being an enemy combatant, I don't get full rights.

How can the characterization of the accusation deprive me of the rights?

Mr. BERENSON. Because it is a fundamentally different thing to take up arms against this Nation——

Mr. NADLER. Excuse me. No one knows I took up arms. Someone has accused me of taking up arms. How can the characterization of the accusation, not the facts, which haven't yet been determined, but the characterization that I took up arms against the United States, allegedly, as opposed to murdering people, the first 10 people who walk down the street, why is that a difference?

Mr. BERENSON. During World War II, we detained, on our soil, hundreds of thousands of people who were suspected of being Japanese or German soldiers.

Mr. NADLER. And no one today thinks that was good law.

Mr. BERENSON. Many of them—— [Laughter.]

No, I am not talking about the internment of Japanese citizens.

Mr. NADLER. Then what are you talking about?

Mr. BERENSON. I am talking about prisoner of war camps.

Mr. NADLER. Oh, okay.

Mr. BERENSON. We held prisoners of war, here, from the Axis powers. And many of them claimed that they were not in fact enemies of the United States. They claimed that they were in forced labor battalions, that they had essentially been enslaved by the Nazis, that they bore us no enmity——

Mr. NADLER. But in those cases, they had been captured. I am not arguing with someone who was captured on a battlefield in Afghanistan, which would be the analogous case. They were in fact captured in circumstances that gave weight to the belief that, in fact, they were not simply criminal defendants charged with waging war against the United States. They were captured in combat abroad and they may have said, "I was here under duress," or whatever.

Mr. Padilla or anybody else in the United States is not in that situation. He is analogous. Other people are analogous to someone who is simply—they are captured the way any criminal defendant would be captured.

And the position you are taking is that, because they are accused of being an enemy combatant, they should have fewer rights than someone accused of different crimes but even more serious crimes.

Mr. BERENSON. Well, the evidence on which the President certified that Mr. Padilla was an enemy combatant included very good intelligence about his meetings with Osama bin Laden——

Mr. NADLER. It may or may not be wonderful intelligence. It may or may not be true. That is not the question.

Mr. BERENSON. And a court was going to review that and determine its adequacy.

I accept your point that the risk of error in the detentions in this war is higher than in a conventional——

Mr. NADLER. That was not my point. That was a different point. Mr. Hafetz made that point. I agree with it, but that is not the point.

My point is that the procedure of someone picked up in the United States cannot differ simply because he is accused of being an enemy combatant, as opposed—once he is determined to be an enemy combatant, what you do may differ; what rights he has then may differ.

But I don't know how you can pick up someone in New York and say that his rights are different or less because he is accused of being an enemy combatant, based on whatever information, as opposed to he is accused of being a murderer.

Let me go on to a different question now.

Mr. BERENSON. With your indulgence, may I make one point?

Mr. NADLER. Okay.

Mr. BERENSON. On that view, we need to be clear about what that means. It means that, if we had captured Mohammed Atta on September 10th, we would have had no choice but to treat him as a criminal defendant, which would have meant——

Mr. NADLER. Exactly right.

Mr. BERENSON [continuing]. No interrogation, no intelligence, and the World Trade Center coming down.

Mr. NADLER. That is exactly right. And when we captured mass murderers in the United States, we did the same, when we captured Charles Manson or other mass murderers.

But let me go on to another point, which I also don't understand. If someone is in Guantanamo, or for that matter someone is accused of being an enemy combatant, he gets a CSRT as a matter of policy, but the law does not require that.

Mr. BERENSON. Well, the Military Commissions Act specifically refers to the CSRTs. So, although the statute doesn't direct that they——

Mr. NADLER. But there is no legal compulsion, because the Speedy Trial Act is specifically waived in the Commission Act. He could be held forever, without any—and since there is no habeas corpus and there is no ability to go into court, under any reason except to appeal from a final determination of a CSRT or military tribunal, we can in fact hold people there forever without any kind of review, can we not?

Mr. BERENSON. I don't agree with that. The CSRTs perform a status review, which is much more robust——

Mr. NADLER. Excuse me. No, no. But there is no legal requirement that there be a CSRT.

Mr. BERENSON. But the Administration has made clear that in every single case there will be a CSRT, and there has been.

Mr. NADLER. But the Administration saying that, as a matter of policy, it will do so is not the same as saying, as a matter of law, it must do so.

Mr. BERENSON. I would be surprised if the Administration objected to having it written into the law that there have to be CSRTs. I mean, they are committed to providing——

Mr. NADLER. The gentleman will suspend.

There will be no demonstrations from the audience, please.

Mr. BERENSON. The Administration has committed that every person held and detained at Guantanamo is going to receive a CSRT, followed by judicial review in the D.C. Circuit.

Mr. NADLER. Thank you.

The time of the Chairman has expired. I now recognize the Ranking minority Member, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

I missed the excitement a moment ago. I thought he was upset at Mr. Berenson. [Laughter.]

You have done an outstanding job, Mr. Berenson. I have not heard more compelling testimony before this Committee.

Mr. Chairman, in sincere respect toward you, one of the comments I made in my opening statement was that the jihadist ideology is one of the most dangerous ideologies that this country has ever faced. And you said that you thought that the Nazi ideology was.

I would say to you that there is great agreement that the Nazi ideology and the jihadist ideology, both of which have no respect for innocent human life and have damaged humanity with scars that will never heal—I believe they belong in the same category.

I mean, a Nazi ideology that did what they did is impossible to really relate to. It is also true that the jihadist ideology that beheads little girls because they want to attend a faith-based school is a pretty hellish ideology, given their statements to wipe out humanity.

With that said, what if we had granted habeas corpus to Nazi war criminals in Nazi jails? I am afraid that all of us on this Committee, if it existed—and it wouldn't—would be speaking German. It certainly would have prevented us, in my judgment, from prevailing in that hellish conflict.

With that said, I think there is a lot of distortion about how we treat the detainees in Guantanamo Bay. Just to suggest to you some of the things that we do there, first of all, we fly in special meals to the detainees in Guantanamo Bay to meet their faith-based dietary requirements. That food is better than what we feed our own soldiers on the battlefield.

We give five times a day a time for prayer so that they can do this, which is called over a taxpayer-funded address system. We have arrows pointed toward Mecca painted on the floors so that they can pray toward Mecca. We have a taxpayer-funded Koran so that they can follow their own religious practices.

We do everything in the world to try to uphold American sensibilities in this tragic situation, but that does not change the reality that we are facing terrorists that are indeed enemies of humanity.

And I wonder, if we indeed granted habeas corpus to some of the Guantanamo Bay detainees, do the proponents believe that there is a terrorist code of honor that would prevent them all from saying, "I didn't mean to do that; I wasn't really trying to fight anybody"? It is astonishing to me that we would suggest such a thing.

So, Mr. Berenson, if I could, with the time I have remaining—let me skip over to Mr. Taft first.

In the *Johnson v. Eisentrager* case, the Supreme Court said the following regarding the argument that the Constitution was meant to extend its protections to foreign enemies: "Not one word can be cited, and no decision of this court supports such a view. None of the learned commentators of our Constitution has ever hinted at it. The practice of every modern government is opposed to it."

Can you cite something to support the proposition that the Constitution extends its protections to foreign enemies that the Supreme Court missed in that case?

Mr. TAFT. Well, Mr. Franks, thank you.

No, actually, I was on the——

Mr. FRANKS. Can you pull up to the mike, please?

Mr. TAFT. Yes, sorry.

Actually, I believe I was one of the people who signed the brief that the government submitted in the *Rasul* case, which cited *Eisentrager* favorably. And I thought *Eisentrager* was good law at that time.

I will say, obviously, the Supreme Court decided that, in fact, under the statutes—not under the Constitution, but under the existing statutory law—that the right to file petitions for habeas corpus did extend to the people in Guantanamo.

They are a very special case. They really are. That is why I think I would make an exception for them. I would not extend it to the battlefield. I would not take it to Afghanistan or overseas.

But I think Justice Kennedy described fairly well the peculiar situation in Guantanamo which makes it not dangerous at all, I think, to provide habeas and does give us that extra edge of mak-

ing these decisions wisely and correctly, which will give legitimacy to our detention of those people there.

Mr. FRANKS. Thank you, sir.

Mr. Berenson, you know, the court went on to explain that if the Constitution conferred rights to foreign enemy combatants, that "enemy elements could require the American judiciary to assure them freedoms to speech, press and assembly as in the First Amendment; the right to bear arms, as in the Second Amendment; security against unreasonable searches and seizures, as in the Fourth; as well as rights to a trial by jury in the Fifth and Sixth Amendments."

How do you think that this would affect a wartime situation?

And if you would take any opportunity to expand any other issues that you think are important.

Mr. BERENSON. Well, as I indicated before, I think taking seriously the notion that our Constitution extends its protection to our military foes abroad would literally render warfare impossible.

In addition to all the things that Justice Jackson cited in the *Eisentrager* opinion, consider this: We would have to afford just compensation for any property of theirs we destroyed in bombing them. It really is absurd and unthinkable that the Constitution extends its protections to our enemies in arms. The Constitution was meant to restrain the power of our government as relates to our citizens and what happens in our Nation. It was meant to strengthen our government and strengthen our government's hand, with the recent experience of the Revolution and the Articles of Confederation in mind, when we direct our power outward at external foes.

Mr. NADLER. The time of the gentleman has expired.

Let me just comment that I think the Constitution was meant to extend, not just to our citizens but to persons in the United States, various protections.

I will now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. I commend you for these hearings. I am very happy to hear the witnesses' testimony.

I would like unanimous consent to put my statement in the record.

Mr. NADLER. Without objection.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

The writ of habeas corpus is a legal protection having its origins in the Magna Carta. For almost 800 years, it has stood as a fundamental institutional safeguard of constitutional rights and civil liberties, giving prisoners the right to challenge their detention before neutral decision-makers. In America today, this writ continues to act as an important check on executive power, helping ensure that our Nation's criminal justice system adheres to the fundamental guarantees of the Constitution.

The importance of habeas corpus is particularly critical in Guantanamo Bay, where many detainees are being held indefinitely—without charge, and without any opportunity to challenge their detention at trial. In 2004, the United States Supreme Court in the case of *Rasul v. Bush* upheld the jurisdiction of federal courts

to hear habeas petitions filed by Guantanamo detainees to challenge the lawfulness of their indefinite detentions.

In response, the Administration established the Combatant Status Review Tribunals as an alleged substitute for habeas corpus review. And Congress passed two bills—the Military Commissions Act and the Detainee Treatment Act of 2005—dealing a further blow to the rights of Guantanamo detainees. The result is a due process quagmire.

Let me just highlight a few of these problems. First, the Tribunals have proven to be wholly inadequate, because they lack the basic hallmarks of due process. For example:

- A detainee must prove himself innocent of allegations that he has no right to be informed of.
- A detainee has no right to counsel in the hearings before the Tribunal.
- A detainee has no right to present witnesses or evidence in his own defense.
- The Tribunals allow the use of evidence obtained through coercion and even torture.

Second, the Military Commissions Act eliminated habeas corpus for non-citizens held by the United States as "enemy combatants." Indeed, a detainee does not even have to be found to be an enemy combatant—it is enough for the Government to assert that the detainee is "awaiting" determination of that status.

Third, while enemy combatants may seek review of their status in the United States Court of Appeals for the District of Columbia Circuit, the Acts confine that review to the record of facts already created by the Tribunal, a process that is inherently unsatisfactory. Even more recently, the Administration has sought to limit the ability of detainee attorneys to provide even the most basic representation to their clients.

Although it is necessary for our government to have the power to detain foreign terrorists to protect national security, repealing federal court jurisdiction over Guantanamo detainee habeas corpus petitions does not advance that goal. It is critical that we maintain habeas corpus to ensure not only that we are detaining the right people, but that we are complying with the rule of law.

Restoring habeas corpus is also crucial to upholding our Nation's reputation abroad. The United States will not be able to expect other nations to afford our citizens the guarantees provided by habeas corpus unless we provide those assurances to others.

Our detention policy, both in law and practice, has damaged our reputation in the international community and undermined support for our ongoing war on terrorism. Indeed, the United States should demonstrate that while our Nation is tough on terrorism, it remains no less committed to fundamental human rights.

Mr. CONYERS. Now, what I would like to do with my time is engage a discussion between Mr. Hafetz and Lieutenant Commander Swift over the comments of Mr. William Taft, who suggests habeas as a matter of policy—well, here is his statement: "In proposing that we return to the system that was in place previously, I want to stress that I do not believe this issue should be treated as a constitutional one."

Let me begin with you, Mr. Hafetz. Can we find any agreement between the three of you in that regard, of the statement of Mr. Taft that I have just recited?

Mr. HAFETZ. Well, I certainly concur with Mr. Taft's statement that, as a matter of policy, the United States should or Congress should restore habeas corpus for Guantanamo detainees, regardless of what the courts do. It is a matter of sound policy.

Guantanamo is a failure. It is widely recognized as a failure, including by many within the Administration. And a principal reason is that the United States has denied habeas corpus to Guantanamo detainees; it has prevented any lawful or meaningful process to determine whether we are detaining people in accordance with law.

However, I also do think that, as a matter of constitutional law, Guantanamo detainees do have a right to habeas corpus.

And I would just point out in response to Mr. Franks's point about *Eisentrager* one other thing in the *Rasul* opinion—and this is from Justice Kennedy's concurring opinion—that Guantanamo in all practical respects is a U.S. territory, given the long-term exclusive control the United States exercises there, which is another reason that makes a constitutional difference.

Mr. CONYERS. Thank you.

Commander Swift?

Commander SWIFT. Yes, sir. I fully agree with Mr. Taft in several respects, in that this war, A, is unprecedented; B, that normally speaking in a conflict between nation-states, there is no constitutional protections, nor would habeas extend to that battlefield. No one here thinks it does.

Mr. CONYERS. I don't think so either.

Commander SWIFT. Guantanamo Bay is unique in that it is somewhat more like a territory.

And this conflict is unique, as Mr. Taft pointed out, in that when we throw around the word "unlawful combatant," what we should say is "criminal." That is what we are saying. Under the rubric of war, you are saying it is criminal.

Now, the question is whether, as the Chairman would have it, they be accused criminals and let's have a trial, or, as maybe Mr. Franks would have it, they are convicted criminals and there is no need for a trial.

I think that the good policy in a war where we will call our adversaries criminals is to make sure that the process comports with that that we would expect from enemy criminal defendant, and that that is the best way to go forward.

So I agree completely with Mr. Taft that the smart way to do this is to make sure that whether we are using the military justice system or the civil justice system, that we have the complete protections, including the Federal courts.

I personally believe that the Supreme Court is likely to extend it if Congress does not, but, as I have testified, why wait? We get black eyes and bloody noses every day we don't. So I think it is only prudent that Congress intervene now and move the process along.

As Colin Powell pointed out, nobody is leaving. We are just getting back to the basics of justice.

Mr. CONYERS. Mr. Taft, you get the last word on this.

Mr. TAFT. Well, I am not sure where to go from here except to say I do agree with myself—— [Laughter.]

Mr. CONYERS. You have a fair degree of agreement between Hafetz and Swift.

Mr. TAFT. I do disagree with Mr. Hafetz on the constitutional point, but for me it is a small point because I think the Congress should do this by statute.

Mr. CONYERS. Thank you very much.

Mr. NADLER. The gentleman's time has expired.

I now recognize Mr. Jordan for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman.

Let me go to Mr. Berenson, back to the hypothetical you raised when the Chairman was questioning you. You talked about Sep-

tember 10th, if Mr. Atta, a non-citizen, would have been apprehended.

I believe the Chairman's remark was he should be treated no different, even if you knew, had intelligence that told you what was going to happen the very next day, he should be treated no different than a citizen who was alleged to have committed some crime.

Can you comment on that exchange? It didn't really get to take place with you and the Chairman, but I would like your comments.

Mr. BERENSON. Yes. I think that there is no doubt that when the enemy disguises himself as a civilian, as our adversaries routinely do, they create big problems for us, legally and morally. The risk of error in detention goes up.

But it doesn't mean that we abandon the law-of-war model entirely. These are absolutely military adversaries. On September the 11th, they attacked the center of our financial power, the center of our military power, and tried to attack this building, the center of our political power.

There is no question that these are not ordinary criminals. NATO invoked article V for the first time in its history. We had combat air patrols flying over our cities.

There is very little doubt that that was an act of war. It was regarded by us as such, by the President and the Congress, by the world as such. And there is no reason to jettison the law-of-war model entirely.

All we really need to do is what Congress has already done, which is modify it to take account of some of the unique aspects of this conflict in the Military Commissions Act.

And the Mohammed Atta example I gave illustrates the dangers of just thinking it is an either/or choice and that really what we ought to do is gravitate back to a criminal law model. You cannot afford to. You could have saved 3,000 lives and all the distress that those families have endured if you could have interrogated him rather than given him a lawyer and a quarter to call his confederates.

Mr. JORDAN. And maybe you have not seen, maybe you have, today on the front page of the Washington Times, the lead story, the 6-year-old who was recruited by the Taliban, that they told this young boy, "Put on the vest, and when you hit the button it is going to spray the flowers and water the plants and the flowers." And this kid, sharp kid, 6 years old, but street-smart kid, had figured out what was going on, went to the authorities. And that is the mindset that we are up against.

Take me back—and I only caught part of the testimony here. I heard Mr. Hafetz when I walked in. And I apologize for that. But what kind of due process in fact—I mean, Mr. Hafetz seemed to allude that they had no due process, that the 750 and the 300 who still remain at Guantanamo.

Tell me about the CSRT and what exactly due process that entails.

Mr. BERENSON. The critical thing with looking at the CSRTs is the same thing as in this debate overall. You have to identify the appropriate baseline against which to measure it.

The appropriate baseline under the law of war for people who are detained and whose status is unclear, who maintain that they are not enemy combatants, comes from the Geneva Conventions, article V.

Compared to an article V hearing, a CSRT is much, much more protective of the rights of the accused. Article V hearings tend to be 2, 3, 4 minutes long in a field tent with a few harried officers. They do not get personal representatives the way the Guantanamo detainees do. There is no right to get exculpatory evidence in the hands of the government the way the Guantanamo detainees have.

There are a variety of rights that Mr. Katsas described at the very beginning afforded to people in the CSRTs that go well beyond what we would afford even to honorable, law-abiding enemy soldiers of a foreign country.

Now, that is not to say that this affords all the protections available in the civilian criminal justice system. I understand why Lieutenant Commander Swift and Mr. Hafetz want to have more rights and more protections, but that is not the right measure.

Mr. JORDAN. I understand. I appreciate it.

And I am running out of time here. Let me go to one of the folks on the other side.

Go back to the hypothetical that Mr. Berenson raised about Mr. Atta on September 10th and tell me why you think, as Mr. Berenson described it, that is not appropriate.

Mister——

Commander SWIFT. I will address it, sir.

If he were tried, as I have advocated, under the Uniform Code of Military Justice, nothing changes.

You see, if we just use the process we have in the war model, the Military Court of Appeals have held that someone can be interrogated for operational reasons without reading them Miranda. In fact, a Marine Corps private was so held. The difference, of course, is what we can't do going underneath it.

No court in the recognized world—and I don't believe we should start now—would allow us to use extreme duress on such a person or force them to confess or testify by being waterboarded or in extreme isolation or any of the above and put that testimony in.

Whether we can or can't do that in interrogation is a subject of a different hearing, but it is not going before a court.

Mr. JORDAN. I appreciate that. So let me be clear: You disagree with what the Chairman's characterization of how he would handle that same hypothetical.

Commander SWIFT. In the context of the law of war.

Now, on September 10th, we didn't know we were at war. But if on September 11th, you know you are at war and you use the Uniform Code of Military Justice, which I have always argued is appropriate for war crimes, you don't have a problem with an operational interrogation.

Now, again, that interrogation must comply with the law of war. It can't be the extreme interrogations that have been pushed forward and could be admitted in a commission.

Mr. NADLER. The gentleman's time has expired.

The gentleman from Minnesota, Mr. Ellison, is recognized for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chairman. I would also like to thank you for these hearings.

Mr. Berenson, my first question is for you. Going back to this Mohammed Atta example, of course if he would have been arrested on September 10th he would have been in the United States, according to your hypothetical. What due process, in your opinion, do you think he should be entitled to?

Mr. BERENSON. I think the system that currently exists today, which is the Military Commissions Act of 2006, the CSRT system and the like, had it been in place on September the 10th would have represented a good balance between Mr. Atta's interests in being treated fairly and having some procedural options for disputing that he is in fact an enemy combatant and the United States's interests in protecting itself and effectively prosecuting a war.

Mr. ELLISON. So you do agree that he should be afforded some due process, even Mohammed Atta the day before 9/11? I mean, it sounds like you are saying, "Yes, there should be a process even for a person like that."

Mr. BERENSON. Absolutely. He should—yes. He should receive a status review if he disputes his status. And if we want to charge him with war crimes, he should be tried in a military commission.

Mr. ELLISON. Mr. Hafetz, let me ask you this question. Today, you know, the title of this hearing is the "Habeas Corpus and Detentions at Guantanamo Bay" hearing. There has been some testimony so far about what should or shouldn't happen on a battlefield. But there is a fairly important distinction to be made between the location of the detainees at Guantanamo Bay and in the battlefield, don't you agree?

Mr. HAFETZ. Well, certainly, there is a difference between individuals who are being detained on a battlefield and individuals who are being detained at Guantanamo thousands of miles from a battlefield.

And as I note in my written testimony, if you look at the reason people were brought to Guantanamo, it was pretty simple. According to a 2001 memorandum from the Department of Justice, which was leaked to the press in 2004, individuals were brought to Guantanamo deliberately to try to avoid habeas corpus review. And the memorandum noted that if a court were to review those detentions, they would find them illegal.

Mr. ELLISON. Lieutenant Commander Swift, I know you are a lawyer, but you are a soldier.

Commander SWIFT. Yes, sir.

Mr. ELLISON. What national security dangers are presented by offering habeas corpus to detainees at Guantanamo? Are we running any risks if we do that?

Commander SWIFT. I don't believe we are.

I believe that we put our trust into a Federal court that—the federally appointed constitutional officers are capable of safeguarding our national security. I don't think the Senate would have confirmed them if they didn't believe they were.

And we have to trust someone in this, otherwise we come to the position where we trust no one except but the President, and that is not our democracy.

I actually think the failure to give habeas actually increases our national security.

Mr. ELLISON. Could you elaborate on that, please?

Commander SWIFT. Certainly. In this type of a war, the other side doesn't have to win a battle. They don't have to win a skirmish. They don't have to win a single day. All they have to do is keep fighting, and we haven't won.

How do they do that? They recruit. And Guantanamo Bay is the Uncle Sam recruiting poster for Jihad, Incorporated, period. And for every one we hold, they recruit hundreds.

It is no way to win a war. We need to stop them from recruiting, not help them.

Mr. ELLISON. Reclaiming my time, Commander Swift, could you, as well as you can—and I know you may not be prepared for this question because it is, sort of, outside of the area that we are here about.

Could you try to describe, as best you can for our panel, the argument that—and I am not going to us the term "jihadist," because I don't think it is a useful way to describe what we are talking about, but let's just talk about the terrorists.

Could you describe what pitch they make to people who are vulnerable to recruitment? What are they saying?

Commander SWIFT. They say that the United States hates Islam, that the United States hates Arabs, that the United States is racist and that all of its policies are geared against Arabs and against Islam, that we have no values.

And they demonstrate that by arguing, "See, in Guantanamo Bay, Arabs are treated different, they get second class. And in fact, citizens of England or Australia get special deals because they are America's allies. But make no bones about it, in the Middle East we get a different deal."

Mr. ELLISON. Now, Commander, there are about 1.5 billion Muslims in the world.

Commander SWIFT. That is correct, sir.

Mr. ELLISON. And all of them want to see—I mean, they are Muslims, so they are in favor of Islam, right? And so, don't we undermine our ability to protect the United States by allowing terrorists to make this global sales pitch to the entire Muslim world?

Commander SWIFT. Absolutely, sir. And with just a little indulgence, I think the story that happened when I was in Yemen demonstrates it completely.

On the last night that I was in Yemen, I was meeting with my client's family. The grandmother of that household brought together all the little girls of the household, and she pointed to my female colleague, and this is what she said, sirs. She said, "Look at her. She went to school. She studied very, very hard. And now she is a lawyer." And then she looked into their faces and said, "If you go to school and study very, very hard, you can be anything."

Now, that woman is obviously Osama bin Laden's worst nightmare. She is victory. She is exactly what it looks like. But she is counting on the rule of law for that to come true. And how we treat her son-in-law determines whether those daughters are on our side or against us.

Mr. ELLISON. Thank you.

Mr. NADLER. The time of the gentleman has expired.

The gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. And thank you for convening this important hearing.

I have the unfortunate and unenviable problem today of having to be in three places at one time, with three very important hearings going on. The other two locations are full, just like this audience.

So I want to first apologize to the members of this panel for having to miss your testimony, because testimony was going on in those other hearings at the same time and I had to make a choice.

That happens sometimes, but seldom you are put in the position of not being able to figure out where your highest priority is. And this was a difficult day because this is so basic to us that it takes precedence even over other important hearings that we are involved in.

Because I haven't been in the flow, like the Chair, I am going to try to save time to yield to the Chair to ask additional questions.

But I just want to say that I guess the real question I have heard here on the panel is between whether these are ordinary criminals or so-called enemy combatants. And my concern is that, while I guess I know an enemy combatant by profile at some level, I am not sure I trust anybody to make a dictatorial decision about what the characteristics of that person are.

And I guess the most difficult question—even if your client, Mr. Hafetz, turns out to be an enemy combatant—is how one could be basically in a courtroom on a credit card matter in 2003 and then all of a sudden be in a military brig simply because the President of the United States said, "You are not a credit card common thief; you are an enemy combatant," and then to have your client charged—really no charge brought against your client and he be held for 4 years without a charge against him and without any indication of when the detention would end, including 16 months when he was held incommunicado.

That strikes me as a country that I don't want to be associated with. Even if somebody determines that your client is an enemy combatant at some point, I don't think one person ought to be able to do that.

So I guess, in my own mind, this is just un-American for one person to be able to do that. And there at least ought to be, as Lieutenant Commander Swift has indicated, somebody other than a President who has assumed dictatorial powers making that kind of determination—a court system, a legal process, that would make that determination.

I see you are chomping at the bit to respond to my general comment, even though I haven't asked a question. So I will give you that opportunity, and then I am going to yield the balance of my time to the Chairman.

Mr. HAFETZ. Thank you, Mr. Watt.

Absolutely right, absolutely un-American.

And there is a name for individuals in the United States who are accused of plotting terrorism or planning bad acts. They are accused criminals. In the United States, we give accused criminals

trials. If they are convicted, they are punished. They go to jail for a very long time.

And actually one of the ironies of what has happened with the Administration's policies is to prevent this from happening: It failed to try a number of people when it has gone to this enemy combatant definition.

But actually every day the Department of Justice charges, tries and convicts individuals in the United States who are accused of terrorist acts. They did it before September 11, and they have done it after September 11. That is the American system.

And to shed some light on why my client, in this case Ali al-Marri, was declared an enemy combatant, we can look at statements of John Ashcroft, the former attorney general of the United States.

Mr. al-Marri, when he was accused of a crime, asserted his innocence and asked for a trial. If the government had evidence; it could have gone forward and convicted him.

But what Mr. Ashcroft said was, "Well, he refused to plead guilty, and we wanted to put the squeeze on him. So we locked him up for 16 months, denied him a lawyer, denied him any contact with the outside world, held him totally incommunicado and subjected him to horrific, cruel, inhuman and degrading treatment."

That is simply un-American, and as the Court of Appeals has ruled, allowing this kind of policy to happen in America would have disastrous consequences for our Constitution.

Mr. WATT. Mr. Chairman, I apologize to you. I told you I was going to yield you some time, but——

Mr. NADLER. I thank the gentleman, but his time has expired.

But we will begin a second round of questioning.

And let me ask Mr. Swift, Mr. Berenson said that the CSRTs afford accused enemy combatants more rights than Geneva article V would require. Why is that not true? And why is it that CSRTs do not provide at least basic fundamental fairness?

Commander SWIFT. Three reasons, sir.

The first one is, how do you know when your CSRT is over? When you are declared a combatant, that is how you know. Don't like that decision? Send it back down, get new evidence. Still find the person not to be a combatant? Send it back down, more new evidence. Under article V, one time.

Mr. NADLER. So a finding of innocent means they simply can do it over again.

Commander SWIFT. Absolutely.

Number two in the CSRT proceedings that don't comply with article V is, the definition of combatants has been radically changed. Under the CSRT definition, the little old lady in Switzerland who gave some financial support, as was explained to Joyce Hens Green, to a charity is now a combatant.

By changing the meaningful distinctions that was in an article V tribunal on what actually constituted combatancy, one spread the net so wide as to catch anyone.

Mr. NADLER. So that is wider than would be contemplated by article V?

Commander SWIFT. Yes.

Number three is the use or consideration of evidence that would have been obtained in violation of the conventions themselves. Again, evidence would not be considered in an article V tribunal that had been obtained by force or coercion.

Mr. NADLER. Any other reasons?

Commander SWIFT. Well, those are the three off the top of the head.

Mr. NADLER. Okay. Thank you.

What was referred to a moment ago by Mr. Hafetz, holding someone incommunicado for 16 months under harsh conditions, is that contemplated by article V?

Commander SWIFT. Well, in the article V tribunal, not directly. Under the Geneva Conventions, absolutely, 30 days, maximum——

Mr. NADLER. Under the Geneva Conventions, that is okay?

Commander SWIFT. No. Under the Geneva Conventions, first you must register someone with the International Committee for the Red Cross, give an opportunity to visit. Second, solitary confinement cannot exceed 30 days. Access to sunlight, et cetera, must be——

Mr. NADLER. Are these requirements met at Guantanamo?

Commander SWIFT. They were for a period of time. They are not currently, unfortunately.

Mr. NADLER. Okay.

Commander SWIFT. They were met inside the Camp 4, which was a large-scale holding which——

Mr. NADLER. But they are not currently.

Commander SWIFT. Not currently.

Mr. NADLER. Thank you.

Let me ask you a different question. If someone is at Guantanamo and he is put before a CSRT, and the CSRT says, "You are not an enemy combatant and you are not a danger to the United States"—we are holding 75 such people anyway, right?

Commander SWIFT. I don't have the exact numbers, currently.

Mr. NADLER. I don't care about the exact number. We are holding people anyway.

Commander SWIFT. Yes.

Mr. NADLER. In other words, a finding of, "You are not an enemy combatant, you are innocent," by the CSRT doesn't guarantee your release?

Commander SWIFT. That is correct.

Mr. NADLER. Under what authority do we hold people if they have been found not guilty?

Commander SWIFT. I think that you do misuse a term there, sir. They haven't been found not guilty. They have been found not to be a combatant.

Mr. NADLER. Why are they being held?

Commander SWIFT. The difficulty is, in our spiriting these people away from Afghanistan, is now—and others are more qualified to testify about it—the ability to find someplace for them to be.

Mr. NADLER. Well, Mr. Hafetz, if someone is in the United States and we think that he shouldn't be in the United States, we try to deport him. If no government will accept him, do we keep that person in jail?

Mr. HAFETZ. No, we cannot keep that person in jail indefinitely. There is a period of time——

Mr. NADLER. So under what authority—and I think I will ask Mr. Berenson, too, in a moment—under what authority do we keep someone who has been adjudged not a threat, not an enemy combatant, do we keep them in jail because we can't find—having brought them to Guantanamo, would the law not require that we simply release them in the United States if we brought them here and they can't go anywhere else and they have been judged not a threat and not an enemy combatant?

Mr. HAFETZ. In my view, it would. And the answer that the government would rely on is the President's power as Commander-in-Chief, which, in its view, allows it to do virtually anything.

Mr. NADLER. Mr. Berenson, the President's power as Commander-in-Chief allows him to hold someone in jail who has been judged not an enemy combatant, not a threat and guilty of no crime, indefinitely?

Mr. BERENSON. As soon as someone is determined not to be an enemy combatant, our government tries very hard to find a place——

Mr. NADLER. Yes, but let's assume it could never do that. What then?

Mr. BERENSON. Well, the notion of bringing them into the United States strikes me as extremely dangerous. Let's not forget that there have been mistakes made.

Mr. NADLER. Excuse me. Why is it extremely dangerous to bring someone in the United States who has been adjudged not to be a threat to the United States?

Mr. BERENSON. Because we are not always right about that. There are dozens of documented instances where——

Mr. NADLER. Fine. Then let me ask a different question.

So it is dangerous to bring them into the United States, we have brought them here, and, because of our mistakes, we are going to hold them in jail forever, even though we have adjudged them not to be guilty of anything, not to be an enemy combatant and not to be a threat?

Mr. BERENSON. I don't think anybody wants to hold those people forever or——

Mr. NADLER. Never mind they want to, but that is what we are going to do if we can't find a foreign country to accept them?

Mr. BERENSON. Well, we are going to work as hard as we can to find someplace to send them, and eventually we will.

Mr. NADLER. Do we have the right under our law, in your opinion, to keep them in jail forever if we cannot find such a foreign country?

Mr. BERENSON. I mean, if the only alternative is to release them into the population of the United States and give them immigration status——

Mr. NADLER. Your answer is yes.

Mr. BERENSON. I am just not—it is a series of bad choices at that point——

Mr. NADLER. That we have created.

Mr. BERENSON. Well, listen, we make mistakes all the time in this and lots of other arenas. And, you know, the question is, what

do we do to fix them? And I think we try very hard to fix them in these cases.

Mr. NADLER. I thank you.

My time has expired. The gentleman from Arizona?

Mr. FRANKS. Well, thank you, Mr. Chairman.

I guess, just for the record here, Commander Swift had mentioned some time ago that I had made some sort of a reference to criminal defendants; that I would have the criminal defendants not have any due process at all.

First of all, I have never referred to them as criminal defendants, because I think that implies that they are defendants under the Constitution of the United States, which I do not believe. And I believe that that is the pertinent question before this Committee.

Indeed, I believe that they are unlawful combatants, and I believe that that law that I speak of that makes them unlawful is essentially every war laws that we have in the world. And what makes them unlawful combatants besides is their willingness to slaughter innocent people.

There was a statement made that the notion that we wouldn't afford them constitutional rights was un-American. First of all, America has never afforded constitutional rights to people in the battlefield. So that is, kind of, on the face of it, an incorrect statement.

But let me tell you what is really un-American. What is un-American is blowing innocent women and children up. What is un-American is cutting people's heads off with a hacksaw while the victims scream in front of a TV camera. Those things are the un-American things.

And, again, I am just astonished at how much we have veered off of the real subject here. It is too bad that we don't have as much focus in this Committee and in Congress on stopping terrorists from continuing to wreak the havoc and hell that they have done in the past. We are focused on making sure that we give them more due process than any country in the history of humanity has done and which we already do.

With that said, Mr. Berenson, as I suggested, your testimony here has been so compelling. And I am hoping that you might be able to expand on some of the points that you were talking about earlier with the Chairman.

Mr. BERENSON. Yes, I guess the main point there has to do with the risk of error in these detentions.

Everybody understands that in any kind of detention, whether it is in our criminal justice system or it is in wartime in a traditional war like World War II or in this kind of unconventional war, there is going to be an error rate in detention, just as there is in who you shoot, who you drop a bomb on, what property you destroy. That is just reality.

The question is, what kind of error rate shall we tolerate, and how much process shall we build in to reduce the risk of error? More process probably will reduce the risk of error, but the question is, at what price?

And one of the prices that we pay for building in more process is creating more of the opposite kind of error; that is, erroneous releases rather than erroneous detentions.

In wartime, nations have traditionally not regarded protecting the rights of their presumed adversaries as the paramount value. They naturally protect themselves and protect their societies and understand that a lot of innocent people are going to get hurt in the process, and that is just one of the terrible but unavoidable things about war.

If we engraft habeas corpus protections onto the existing system, I can guarantee that we will have more erroneous releases. Each erroneous release represents a risk of another 9/11 or worse.

Even under these procedures, and earlier ones which some of the other panelists think are manifestly inadequate, there are dozens of documented instances where we have found detainees to be not enemy combatants, repatriated or released them, and then found them on the battlefield fighting against us once more. That is a very high price for a nation at war to pay.

Mr. FRANKS. Thank you, sir.

Mr. Chairman, I guess I will just try to associate myself with Mr. Berenson's comments. I believe that if we grant the writ of habeas corpus to prisoners in Guantanamo that we believe are terrorists, that the effect will be more of our soldiers will die and that we will take a greater risk of endangering American citizens.

And I truly believe that a dirty bomb or some terrible terrorist attack on this country will transform this debate very dramatically.

With that said, I would like to ask one question of Commander Swift.

The Military Commissions Act, far from abolishing the writ of habeas corpus, provides captured unlawful enemy combatants with judicial review opportunities that far exceed constitutional requirements.

Can you describe any system of judicial review in any other country in the world that has provided greater procedural protections to unlawful enemy combatants that were at war with that country than we have?

Commander SWIFT. The International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, the current tribunal set up for Sierra Leone, the Uniform Code of Military Justice, the British detainment act, the Israeli detainment act, all provide more and none permit tortured testimony.

Mr. FRANKS. Nor does ours. Under our laws, it is 20 years in prison to torture any person in our custody, and if they die, it is a death penalty.

There is a lot of distortion there, Mr. Swift.

Commander SWIFT. Well, sir, it might be a penalty for it, but under the Military Commissions Act nothing prevents the government from entering testimony that was obtained by inducing the system a feeling or sensation or drowning to the point that one believes one is going to die. And at that point, if the confession or statement against someone else is brought forward, the Military Commissions Act permits that testimony to be entered.

It permits testimony to be entered—I will just give you one example, sir.

Mr. FRANKS. Forgive me, Mr. Chairman, I know my time is up here. But if such testimony was going to save millions of lives, or

thousands, or tens of thousands of lives, we would be derelict in not making sure that we understood that.

Commander SWIFT. Sir, you asked me whether those systems would permit it.

Mr. NADLER. The gentleman's time has expired. The witness may answer the question.

Commander SWIFT. Yes, sir.

A, the debate on how to interrogate someone is a different debate. The debate for here is whether a court of law should consider the testimony or not, sir. And under none of those systems, including Israel's system, would that testimony be considered.

Great Britain has dealt with this in Ireland. Israel deals with it every day. And when we look at both of those systems, they have been able to do it without compromising their judicial integrity. And I argue that the military system and the existing Federal system can do it as well.

Mr. FRANKS. Mr. Chairman, I just have to respond, with unanimous consent, for 30 seconds.

Mr. NADLER. Gentleman is granted——

Mr. FRANKS. If indeed——

Mr. NADLER. By unanimous consent, the gentleman is granted an additional 30 seconds.

Mr. FRANKS. If indeed the gentleman is suggesting that Israel—I don't know about Rwanda—but that the gentleman is suggesting that Israel grants its own constitutional rights to its prisoners of war in a suggested situation like that, I would love to see the proof of that.

And with that, I yield back.

Mr. NADLER. Well, the gentleman can answer that question.

Commander SWIFT. Sir, I am referring basically to the Israeli Supreme Court decision in the use of testimony and the trial of persons detained, members of the PLO or other terrorist organizations.

Mr. FRANKS. That wasn't my question. That wasn't my question.

Commander SWIFT. I thought it was.

Mr. NADLER. The gentleman's time has expired.

The gentlelady from Florida?

Ms. WASSERMAN SCHULTZ. On that note, thank you, Mr. Chairman.

I represent a district in south Florida, so obviously Guantanamo is of strategic importance and concern to my constituents and to me.

And quite honestly, I have not determined that I believe that Guantanamo should be closed. In fact, Lieutenant Commander Swift, I believe in your testimony you said that Guantanamo Bay should represent the best of the rule of law.

And that is really the spirit in which I view how we should be conducting operations at Guantanamo. I think, rather than simply closing it, we should be conducting investigations and questioning in an appropriate way that upholds human rights.

And I want to ask you, Commander Swift, about the President's conversation last week with Vietnamese President Nguyen Minh Triet. And they discussed trade and human rights issues. The President was quoted to have said, "In order for relations to grow

deeper, it is important for our friends to have a strong commitment to human rights, freedom and democracy."

Do you think that the continued detention of hundreds of men without charge and without habeas rights at Guantanamo makes us hypocrites?

Do you not feel that this paints us as hypocrites when we ask countries such as Vietnam, China, Sudan to adhere to standards that we ourselves don't follow?

Do you think that this undermines U.S. efforts to win hearts and minds, an essential component of any successful counterinsurgency strategy?

And do you not also believe that this puts U.S. troops at risk, making it harder to credibly object if our own soldiers are taken into custody and held indefinitely without charge and without the ability to contest the basis of their detention?

And, lastly, I will say that, as a Member of Congress who also argues that we should ensure that Cubans have human rights and who stands up for their human rights and supports the current restrictions on our interactions with Cuba, doesn't it further make us hypocrites, right on the very land that we are violating people's human rights, that we insist that the country on the other side of the fence do the same?

Commander SWIFT. You missed my earlier testimony, ma'am. Yes. The answer is yes. I will only expand on this.

You know, down in Guantanamo Bay, you can't help but hear the Cuban radio station. It bleeds over. And my translator is fluent in Spanish, and I am okay, barely okay, and we listen to it.

And what strikes us is that, if you listen to the regular news, well, I guess they have their spin is the best I can put on it, until they get to Guantanamo Bay, wherein they don't spin it at all. They just read it off and argue that this demonstrates, here on Cuban soil, who the United States really is and how they act toward people who don't agree with them.

And, again, that part, the image that Guantanamo Bay poses to us and the danger that it presents to us not to follow the rule of law, I agree with Mr. Berenson: There is always this question in safety, on procedure. But I disagree on the idea that if you let one guilty person go, you are—an incredible threat.

To me, Guantanamo Bay, as a recruiting magnet and as a cloak for those who would abuse human rights the world over, does far more damage than any one person who might be let go by following the rule of law.

Ms. WASSERMAN SCHULTZ. Mr. Hafetz, since my time has not expired, if you wouldn't mind addressing my question as well.

Mr. HAFETZ. Well, I agree completely with everything that Commander Swift said.

You know, the goal here is to create a rights-respecting approach to national security policy, an approach that balances liberty and national security, that enables us to effectively fight terrorism and remain strong while remaining true to our values.

And Guantanamo contradicts that. It undermines that in every possible respect. It undermines the United States's moral credibility. It undermines support among moderate Arab and Muslim

communities whose support is absolutely essential to fighting terrorism.

So, you know, for these reasons, Guantanamo is really an eyesore and it undercuts the fight against terrorism.

And, again, one of the principal reasons for that is the absence of a lawful process, the absence of habeas corpus and the failure to provide what is really a cornerstone of our values and our system, and has always been.

Mr. NADLER. Thank you. The gentlelady's time has expired.

The gentleman from Ohio is recognized for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman.

I want to go back to—and Commander Swift has actually alluded to this twice now, but earlier he was a little more adamant about it. He said that Guantanamo Bay represents the biggest recruitment poster that there is for terrorists.

And I would just kind of want to get the rest of the panel's response. And let me attempt to frame it first before I ask you what your response to his statement.

Because I am always troubled by this, that somehow America's actions are what caused the terrorists to do the things, the bad things they have done to us. And I would say, you know, what was the recruitment poster prior to the USS Cole? What was the recruitment poster prior to the Khobar Towers? What was the recruitment poster prior to the first World Trade Center? What was the recruitment poster prior to our Marine barracks being bombed in Lebanon? What was the recruitment poster prior to 1979 when they took over our embassy in Iran and held hostage American citizens?

I mean, at what point does that logic break down? Because you can go all the way back.

And I have been here for an hour now and haven't heard from Mr. Katsas, so let's start with Mr. Katsas.

Mr. KATSAS. I think that is a very good point. The notion that if we ratchet up the protections at Guantanamo Bay with respect to combatant status review tribunal procedures, military commission prosecutions, how we treat the individuals there, the notion that incrementally improving or substantially improving the procedures would cause al-Qaida to just wither away and say, "Well, that is fine, never mind, we will stop," seems to me fanciful. There will always be radical elements willing to attack the United States.

With respect to the different question about how reasonable people react to what is going on, I frankly think there must be a failure of explanation on our part, because the fact of the matter is, both with respect to protections in the combatant status review tribunals and with respect to protections in the military commission prosecutions, we have exceeded historical norms for the conduct of a war. We have exceeded norms applied internationally, judged by reference to the relevant law-of-war baseline. And I don't think the United States has anything to be ashamed about in that record.

Mr. JORDAN. Mr. Taft?

Mr. TAFT. Thank you, sir. I would just make two points.

I agree, generally, with what Mr. Katsas said about the effect of what we are doing and how we are conducting ourselves in the war

on terror on our enemies. They are not impressed. They will not be better or worse because of what they see us doing.

I think there is a cost to us, actually, with, potentially, our friends, who—their publics are not—have been very distressed and publicly unsupportive of a lot of actions that we take, not necessarily in the war on terror but in Iraq, in other areas of the world, where their enthusiasm for our policies has been diminished because of disagreements over the policies that we have been following vis-a-vis the terrorists.

And when the British, for example, said that they couldn't accept our system down there because it was not consistent with civilized norms, I think that hurt us very much in getting cooperation and assistance from that crucial ally, who wants to think as well of us as it possibly can.

And so that is where the cost comes. It is not with your enemies; they are hopeless.

Mr. JORDAN. Thank you. I have got 30 seconds.

Mr. BERENSON. I will be brief because I have very little to add to what Mr. Taft and Mr. Katsas said.

I think it is absolutely correct that Guantanamo is a recruiting tool. Surely it is a recruiting tool. But if we were to wave a wand and make it disappear tomorrow, that would not stop recruiting efforts. And I think it would not meaningfully slow recruiting efforts.

They have a laundry list of other grievances. September 11, 2001, happened after a period in which President Clinton invested more of this Nation's capital and energy in trying to resolve the Arab-Israeli problem than had happened in a long, long time.

One of their grievances against us in the 1990's had to do with our stationing troops in Saudi Arabia, which happened only because we intervened to protect one Muslim nation, Kuwait, from another, Iraq.

So the world view on the other side is so warped and so different that certainly nothing having to do with habeas corpus rights is going to, in my view, meaningfully affect recruitment.

Mr. JORDAN. Thank you, Mr. Chairman. I think my time——

Mr. NADLER. Thank the gentleman.

I now recognize the gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

And if any of this is duplicated with other questions, I apologize.

I think it was Mr. Berenson, when I listened to your testimony, you talked about this being a war on terror and unique situations.

How do we define who the combatants are in a war on terror?

Mr. BERENSON. I actually am one of those people who believes "war on terror" is a bit of a misnomer. That is a tactic that could be employed by a variety of different people.

I think it is a war on an ideologically motivated group, religiously based fascists, militant Islamists, who are willing to use extreme violence to try to reimpose a caliphate on at least part of the world. And I think our adversaries, the enemy combatants, are defined by their adherence to that philosophy coupled with their pledged commitment to use extreme violence against us to try to make it ascendant.

Mr. COHEN. So they have to be Islamists? If they just wanted to rain terror on our country for some other reason other than religiously inspired, they would not be considered part of the war on terror?

Mr. BERENSON. I believe that is correct. I am not aware of any other terror group at this point that the United States government regards as posing a military threat to us.

Mr. COHEN. So anybody else, would you think it would be all right to give them habeas corpus?

Mr. BERENSON. Well, if they were here in the United States or if they were U.S. citizens, we would. If there were terrorists of some other sort in Indonesia and our intelligence services had some reason to interact with them, I don't believe habeas corpus would extend to them there.

Mr. COHEN. But there would have to be a religious test. Somebody would have to determine what their religion was to see if they fell under the war on terror, to see whether or not they were disqualified from having this particular American cornerstone of justice extended to them?

They would have to fail this religious test and be one of the anti-religions. Is that right?

Mr. BERENSON. It is not a religious test. I need to be very clear about that. The vast majority of Muslims are in no way affected by this at all.

It is a test about belonging to particular militant groups that have been waging war against us for more than a decade. That would be al-Qaida and its affiliated organizations and the Taliban.

It is really those groups. There is a religious component to who they are and what they believe, but the test is not itself religious.

Mr. COHEN. What if there was, like, an agnostic over there, but they didn't like the fact that we had invaded their country, destroyed their culture, destroyed their economy, but they didn't like us as an invading power and they did some act against us and they were captured.

Would they qualify if they didn't want the caliphate to be reimposed, they just——

Mr. NADLER. The gentleman's time has expired. The witness may answer the question.

Mr. BERENSON. I don't think al-Qaida or the Taliban would be a particularly comfortable place for agnostics, but I think there probably are people of that description in Iraq, for example. And I believe our nation's current policy is to treat them according to the Geneva Conventions, and I believe that is what we do.

Mr. NADLER. Thank you.

And we have been joined now by the gentlewoman from Texas, Ms. Jackson Lee, who is a Member of the full Committee but not a Member of the Subcommittee.

With unanimous consent, she will permitted to sit in the Subcommittee and will be recognized for 5 minutes to ask questions of our witnesses after the Members of the Subcommittee have had the opportunity to do so.

Mr. FRANKS. Chairman, I would have to object on that.

Mr. NADLER. Excuse me?

Mr. FRANKS. Kind of a longstanding objection to Mr. Smith, Mr. Chairman.

Mr. NADLER. I would ask my colleague to reconsider the gentlewoman from Texas a Member of this Committee. I realize that the Ranking Member of the full Committee, the gentleman from Texas, has a declared policy of objecting to the participation of other Members of the Committee in our work. That is regrettable and not helpful to our work.

For example, in the past, the minority has objected to the participation of our full Committee colleague from Massachusetts, Mr. Meehan, in the hearing on the reform of the Lobby Disclosure Act, an issue on which he is the recognized leader and expert.

In prior Congresses, other Members of the Committee and other Members of the House have been allowed, as a matter of comity and courtesy, to proceed in our proceedings. No one has objected.

It is a small courtesy that has previously been extended to Members on both sides of the aisle. I hope the gentleman would reconsider his objection on this occasion.

Does the gentleman insist on his objection?

Mr. FRANKS. Mr. Chairman, unfortunately I have to insist on the objection. If there is an opportunity for the Chairman of this Committee and the Ranking Member of the Committee to work this thing out in the spirit of comity, I would be certainly very amenable to that. But given the nature of the situation, I would hope that we could take that up with the Ranking Member of the full Committee.

Mr. NADLER. The gentleman is within his rights under the rules. The objection is heard.

Clause (2)(g)(2)(C) of Rule XI of the Rules of the House declare, "A member, delegate or resident commissioner may not be excluded from non-participatory attendance at a hearing of a committee or subcommittee." Pursuant to the rule and in light of the gentleman's objection, the gentlewoman is entitled to non-participatory attendance.

I would remind my friend that I fully intend to apply the rules in a consistent and even-handed manner. I very much regret this objection. I am glad the objection was not heard yesterday at this Committee's hearing on the 9/11.

On behalf of the Subcommittee, I want to apologize to our colleague from Texas.

I will now recognize——

Ms. JACKSON LEE. I thank the Chairman.

Mr. FRANKS. Might I just tell the gentlelady that there is certainly nothing personal intended on my part whatsoever.

Ms. JACKSON LEE. Thank you.

Mr. NADLER. And I should add that the only reason that the objection was not made yesterday was that we had the unanimous consent before our Members of the minority were present. [Laughter.]

So as not to make it seem as if the Members of the minority are discriminating against the gentlelady from Texas.

Ms. JACKSON LEE. Thank you. I watched that on late-night television. So thank you, folks. [Laughter.]

Mr. NADLER. You are quite welcome.

Ms. JACKSON LEE. Thank you for clarifying that it is not personal. Thank you.

Mr. NADLER. I now recognize the gentleman from Minnesota for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chair.

And I also want to extend my apologies to Congresswoman Jackson Lee, who is always insightful and always has excellent and important questions that are often missed. So it really is too bad we couldn't get better cooperation.

But my question is for Mr. Katsas and also for you, Mr. Berenson. And I would like if you both feel free to jump in. You have both been clear; you have articulated your positions very well.

While I will freely admit I don't agree, let me ask you this. What about this point: that by having fewer rights for the detainees, or having—to put it like this, the situation in Guantanamo and the detainees, the lack of habeas corpus rights there, don't you agree that we do pay a cost?

I mean, I am not asking how highly you rate it, but don't you agree we do pay a cost, in terms of our reputation, in terms of our standing in the world, with regard to being a symbol of civil and human rights?

Mr. BERENSON. I do agree, Congressman Ellison. In my written testimony, I acknowledge that extending greater procedural rights to the detainees, along with probably lots of other things, could be expected to have some benefit. How big is a very big question in my mind, as an earlier answer suggested, but it could be expected to have some benefit, in terms of world opinion.

And I don't discount the value of world opinion, not just for making us, as a Nation, feel good about ourselves and feel true to our traditions and our principles, but also in terms of the effectiveness of the war. I am not dismissive of that. I am skeptical about whether extending habeas rights will meaningfully impact that.

I also think we have to be careful not to over-weight those considerations, because sometimes the Nation has to act in its own interests to protect its own citizens, even when that will make it unpopular.

But I don't discount that at all.

Mr. ELLISON. Mr. Katsas?

Mr. KATSAS. I think I would give the same answer that I gave a few moments ago. I don't think it has any material effect on the people who are actually waging war against us.

Mr. ELLISON. Okay, thank you. Thank you.

There was an earlier question in which we were talking about this subject, and I think one of my colleagues made the point that there had been other instances in the past, and they asked the rhetorical question, "What was the poster child then?"

But I think it is—and just recalling my own history for a moment, it sounds to me like not all of these incidents involving people who call themselves Muslims, who either attacked the United States or an embassy—that these are different historical circumstances in some of those cases.

For example, in 1979, when the American embassy was stormed, aren't the historical circumstances in Iran quite a bit different from

what led to the historical lead up to, say, the 1993 World Trade Center incident and also the World Trade Center?

Mr. Hafetz, what is your understanding of history? Can we lump all these things together, or are they, in some ways, different?

Mr. HAFETZ. I think it is very dangerous to lump those things together, and I didn't quite understand the reference to the "they" in the 1979 in Tehran. I assumed the "they" was the——

Mr. ELLISON. It is the students.

Mr. HAFETZ [continuing]. The students, which I have not read anywhere were responsible for September 11th. You know, it is a different issue.

I think it is very important to keep in mind, I think this is a problem with this, sort of, notion of this global war on terrorism and unchecked executive power, is that it prevents carefully thought out, calibrated responses to the real threat. It allows for or it leads to often bad information, misjudgments.

And sort of lumping everyone together prevents us sometimes from seeing clearly what the real threat is and then going after that real threat, rather than just sort of lumping everyone together in a generalized "us and them" mentality, which, frankly, according to many experts, including I would refer you to the work of Louise Richardson, a leading terrorism expert—according to many of these experts, actually this plays exactly into the terrorists' hands.

Mr. ELLISON. When you say "they," as if all the people involved in these incidents are all united and are operating out of a central plan, that does actually feed directly into the argument that I believe Commander Swift was referencing earlier, is that I am sure that Osama bin Laden would love to be able to say that "They are against all of us," even though the historical circumstances behind these incidents is unique and different.

Commander Swift?

Oh, we are done?

Mr. NADLER. Finish your question.

Mr. ELLISON. Commander Swift, would you like to respond to——

Commander SWIFT. Certainly.

Mr. NADLER. The time of the gentleman has expired. The witness may answer the question.

Commander SWIFT. Yes, sir. I will put it simply in respect to Guantanamo itself.

In Guantanamo, those of us who have represented down there know that there is an ongoing battle between those who absolutely, immediately say, "Yes, I will kill Americans; there is no process." Those people, in my experience, the hard core in Guantanamo, don't meet with their lawyers, don't want their lawyers, don't want anything to do with this.

Those who want to believe in the process, who may or may not have been picked up in error, who are represented—there is a constant battle inside the prison itself for recruitment on who you are going to recruit. Constantly my client has suggested that he is a fool to put his trust in an American lawyer or to spend any time with him and that of course I will sell him out because of who I am. And that battle goes on every day.

I don't mean to suggest that without Guantanamo Bay there won't be those to oppose us. But I would ask whether, the day after 9/11, whether we think the majority of the Muslim world was against us or with us, the majority of Saudi Arabia, the majority of Yemen. And as these policies go out, it is for that elastic center that we play.

There will always be enemies. The question is, how many friends can we make?

Mr. NADLER. Thank you.

The gentleman from Indiana is recognized for 5 minutes.

Mr. PENCE. Thank you, Chairman. And thank you to the Committee for assembling this learned panel of distinguished Americans.

I would like to focus my questions on Mr. Berenson, the few minutes that I have.

And having been otherwise employed today at a few markups and otherwise, I apologize to the panel for not being here for their live testimony. But I look forward to reviewing the transcript.

But I must tell you, Mr. Berenson, I am preoccupied every day with the issue of the protection of the American people. It seems to me that the oath of office I take really begins with making those decisions necessary to provide for the common defense.

And so the question of whether the Constitution was meant to extend its protections to foreign enemies of this country is kind of inherently contradictory to me. But I am willing to consider these issues, because I cherish the Constitution, and I am willing to consider these issues thoughtfully.

Let me ask very specifically, Mr. Berenson, if the detainees from Guantanamo are transferred, as some have suggested, to Fort Leavenworth, Kansas, can you describe for me, as a result of that change in their geographic location, how would their rights change?

Mr. BERENSON. There is an important respect in which their rights would change, and then there are some other significant disadvantages.

Once they are on U.S. soil, they do have a greater claim to the protection of our laws and our Constitution. There would be a much more serious question about the constitutionality of the Military Commissions Act's restrictions on judicial review as to people who are located in Kansas than people who are located in Cuba. And I believe Mr. Hafetz's client, Mr. al-Marri, was in that category. So their legal rights would be greater. The claims that they would have on our system would be greater.

Perhaps equally as important, bringing them to Leavenworth would put the citizens of Kansas at risk because immediately Fort Leavenworth becomes an accessible target to their confederates on the outside, an object of possible terrorist attack. And it is here on our soil. I don't know why we would want to create more targets than we already have here on U.S. soil.

And finally, I think bringing them into a mainstream U.S. prison population creates the potential for, as we have been discussing in other contexts, recruitment. I think that unless you were going to keep these people segregated or in solitary confinement or in some other way, there is no doubt but that they would try to recruit U.S. citizens.

And by far the most dangerous kind of adversary we have here, the most prized kind of recruit for al-Qaida, is a U.S. citizen, precisely because of the citizen's ability to blend into the population, its knowledge of our customs and our mores, and their ability to avoid some of these tougher measures that we can apply to alien enemy combatants.

Mr. PENCE. So you said, with regard to the law and the Constitution, I am very interested in your notion that there is something about being on U.S. soil that gives one greater purchase——

Mr. BERENSON. Absolutely.

Mr. PENCE [continuing]. Protections of the Constitution. I don't discount that. And it in very many respects is the focus of this hearing.

Let me make sure I understand your second point, if I can. Specifically, the people of Leavenworth, Kansas, should know that at the moment at which enemy combatants are transferred to their facility, that Leavenworth would become a very attractive target for terrorist elements.

Is that what you are referring to, or——

Mr. BERENSON. That is my own personal view. Leavenworth would gain the kind of currency in jihadi circles that Guantanamo currently has. The difference is that one is in Cuba and one is in the heartland. I would rather have their focus on Cuba than on Kansas.

Mr. PENCE. Going back to your first point, the greater purchase on rights associated with questioning military tribunals and detainment, habeas corpus rights, elaborate for me, if you will. Because I think most Americans don't understand the nature of that greater purchase on the Constitution: that once we bring people onto the soil of the United States of America, there are rights and privileges that attach to persons.

It is one of the great miracles of the Constitution. It is one of my bases for my pro-life positions. And I think the Constitution answers to persons, and the argument over personhood is very much the American argument throughout our history. And so we are not a Nation that extends our rights and privileges to citizens.

So talk to me, if you can, about when an individual becomes a person within the jurisdiction of the United States.

Mr. BERENSON. Sure.

Mr. NADLER. Gentleman's time is expired. The witness may answer the question.

Mr. BERENSON. There is a general point and a specific point.

The general point is that the protections of the Constitution flow to people who have a meaningful connection with the United States. They are at their fullest flower with U.S. citizens, and they follow those citizens throughout the globe. So what our government cannot do to me here, it cannot do to me in France, so there is a nationality principle.

But then there is also a territorial principle. That is, the Constitution reigns where the United States government reigns territorially. So even aliens, even illegal aliens, who come onto our soil are entitled to a much greater level of protection from our Constitution than they would receive if they were abroad.

The Supreme Court in the *Verdugo-Urquidez* case said that DEA agents were not violating the Constitution when they essentially kidnapped a drug lord down in Mexico. If that drug lord had been in the United States, the same thing could not have happened. You would have had to arrest him according to constitutional norms and treat him as a criminal suspect.

The specific point relates to habeas corpus: the wartime cases where the Supreme Court has reviewed enemy combatant determinations have involved people here. The Nazi saboteurs came ashore on Long Island and were captured here, and that is why they had access to the Federal courts.

So the policy choice that I believe Congress has, as it relates to Cuba or other places outside our shores, is largely taken away if we bring those people here in the U.S. The Constitution will dictate access to the courts.

Mr. PENCE. Thank you, Chairman.

Mr. NADLER. With unanimous consent, I will ask for 30 seconds.

Mr. Berenson, didn't the Supreme Court, on your last point, in one of the cases—or Mr. Berenson, Mr. Hafetz—say that, given the control the United States has in perpetuity over Guantanamo, it is essentially the same as the United States for geographical purposes?

Mr. HAFETZ. Yes, it did——

Mr. NADLER. Mr. Berenson first, and then Mr. Hafetz.

Mr. HAFETZ. Oh, sorry.

Mr. BERENSON. No, no, go ahead. We will do point/counterpoint on this.

Mr. NADLER. No, Mr. Berenson first because I asked you first, and then Mr. Hafetz.

Mr. BERENSON. Yes, sure.

The Supreme Court has not held that Guantanamo Bay is the United States. There were some comments made by Justice Kennedy in a concurrence, which, if you stitched them together with some comments made in Justice Stevens's opinion, give grounds for people to expect that it is possible that when this next comes up before the Supreme Court there will be five votes to say that our Constitution extends to Guantanamo Bay.

I believe that that view is not correct. There will probably be a full briefing on it.

Among other things, in Guantanamo Bay—I learned this when I went and visited there—we don't have the most basic element of a property right; namely, the right to exclude. Cuban commercial vessels are entitled to traverse the bay on our territory, without our permission.

So there are a lot of reasons to think that——

Mr. NADLER. But they can't come onto land, can they?

Mr. BERENSON. No, I don't believe they can come onto land, but they can traverse the bay——

Mr. NADLER. Thank you.

Mr. Hafetz?

Mr. HAFETZ. I think the court's opinion in the *Rasul* case makes clear that Guantanamo is considered U.S. territory by virtue of the long-term, permanent, exclusive jurisdiction and control that the

U.S. exercises there. It is, for all intents and purposes, U.S. territory.

Mr. NADLER. And the fact that, as Mr. Berenson points out, commercial vessels can criss-cross the bay, that is irrelevant for the court's decision?

Mr. HAFETZ. I think that consideration would have been irrelevant to the court's decision. I don't know that I have looked at that, but it was irrelevant.

I mean, the fact of the matter is this, as I say, basically, for all practical purposes, U.S. territory. Again, it is in the concurring opinion of Justice Kennedy where he says it is essentially United States territory. And having been down to Guantanamo a number of times, I mean, this really looks like the United States. It has McDonald's, it has Starbucks, et cetera.

Mr. NADLER. I have been there, too. But it is not important what it looks like; it is that the Supreme Court seems to think so.

Mr. HAFETZ. Yes, this is a U.S. enclave.

Mr. NADLER. Thank you.

On behalf of the Subcommittee, I want to thank our witnesses for appearing here today, for your testimony on this very important question.

Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can so that your answers may be part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And again, let me thank the witnesses and thank the observers for being patient.

And with that, this hearing is adjourned.

[Whereupon, at 4:15 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

STATEMENT OF REP. JERROLD NADLER
CHAIRMAN
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
OVERSIGHT HEARING ON
"HABEAS CORPUS AND DETENTIONS AT GUANTANAMO BAY"
JUNE 26, 2007

This hearing is the second in our series titled "The Constitution in Crisis: the State of Civil Liberties in America."

The right to petition for a writ of habeas corpus, the "Great Writ" has been a fundamental pillar of our legal system since the time of the Magna Carta in 1215. So fundamental to our system of laws and our liberties did the Framers consider it, that the Great Writ was enshrined in Article I of our Constitution before the adoption of the Bill of Rights.

Alexander Hamilton, in Federalist 81, explained the need to preserve the writ of habeas corpus by quoting Blackstone: "To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trail, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

Hamilton goes on to say that "as a remedy for this fatal evil [Blacksone] is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls 'the BULWARK of the British Constitution.'"

And so it has been a BULWARK of our Constitution and our freedoms until now.

This administration seems to believe that it has greater wisdom and virtue than governments of the last 800 years; that it can be trusted to make correct and just determinations about who should be locked up without any independent review.

That is an extraordinary and dubious claim.

What has been the result? A violation of our laws and values, and a self-inflicted stain on our national honor.

Even this administration will now concede that it has held, and continues to hold, individuals who have done nothing against the United States, who are not a threat to the United States. Many of these people have sat in Guantanamo for years, often in solitary consignment. Some have been subjected to torture, or creative questioning or whatever euphemism you prefer.

Benjamin Franklin observed that "those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." A devil's bargain to be sure, but, if this administration has asked us to sacrifice liberty, has this lawlessness really made us any safer? Is there really no alternative that to abandon the rule of law?

I continue to believe that we have no alternative but to defend the rule of law. That is why we are here today.

The current policy has created a law-free zone outside our civil law system, outside our system of military law, outside the laws of war, outside every domestic and international obligation this nation has ever undertaken voluntarily or demanded of other countries.

We have faced many threats over the years and we have prevailed. At times, we have forgotten who we are and acted in ways which, in calmer times, we have deeply regretted, such as the wholesale internment of Americans of Japanese descent. One day, we will look back on this period with the same sense of shame and regret.

Today's witnesses will address the legal and practical issues of the policy as it now exists. As many of you know, I have introduced legislation to restore the right of habeas corpus simply to determine whether someone is being lawfully detained. This administration's credibility, however damaged, is beside the point.

Blackstone was right, Hamilton was right, our nation has been right for over two hundred years: no president, no matter how virtuous, should ever have the authority to throw people into prison, to make them disappear, and not have to answer to anyone for his actions.

I look forward to the testimony of our witnesses. I can think of no more important issue for the Subcommittee on the Constitution, Civil Rights and Civil Liberties to consider. Without the right of habeas corpus there is no other liberty.

I yield back the balance of my time.

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August 6, 2007

By Courier

Subcommittee on the Constitution, Civil Rights,
and Civil Liberties
Attn: Susana Gutierrez
B353 Rayburn House Office Building
Washington, DC 20515

Re: Additional Question from Rep. Trent Franks

Dear Ms. Gutierrez:

Enclosed please find my response to the additional question from Rep. Trent Franks forwarded by the Honorable Jerrold Nadler, Chairman, regarding my July 26, 2007 testimony on "Habeas Corpus and Detentions at Guantanamo Bay."

If you need anything further, please do not hesitate to contact me.

Sincerely,

Bradford A. Berenson

Enclosure

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

Question from Rep. Trent Franks, Ranking Member

Is Commander Swift correct that the court martial criminal process would be sufficient to protect our country's security interests if it were applied to suspected al Qaeda terrorists captured on our soil? Would that be sufficient to deal with the Mohammed Atta hypothetical you posed in your testimony?

Response:

I do not agree with Commander Swift that applying the rules for courts-martial as set forth in the Uniform Code of Military Justice (UCMJ) to suspected al Qaeda terrorists captured on our soil would adequately protect our nation's legitimate security interests. To be sure, those rules are superior to those that would apply if we were required to treat foreign terrorists on our soil as mere criminal suspects in the civilian system; Commander Swift is correct that they allow somewhat more leeway for operational interrogation. But they still put us at a significant disadvantage compared to the traditional law-of-war rules under which a foreign fighter may be captured, interrogated, and held without charge until the end of the conflict.

As an initial matter, I believe Commander Swift overstates the extent to which interrogation could effectively take place if the UCMJ were the only military option for detaining enemy combatants. Article 31 specifically forbids interrogation unless the detainee is first informed of the accusation against him and advised that he does not have to make any statement regarding that accusation, and that any statements he does make can be used against him. This is far closer to the Miranda warning approach that even Commander Swift seemed to agree would be inappropriate than it is to a true enemy combatant detention approach, which requires no such notice or warning.

This highlights the most fundamental problem with relying solely on the UCMJ for military detention: the court-martial process is still a criminal process. As such, it does not permit preventive detention, which has been the core function of enemy combatant captures throughout history. Under the UCMJ, absent probable cause to believe a war crime has been committed, a suspected enemy combatant cannot be detained at all. And even if detained, absent evidence sufficient to bring and sustain a criminal charge, the United States would be obliged to release the detainee within a short period of time after capture.

Under these rules, many suspected foreign terrorists captured on our soil could not be arrested, much less held and interrogated. That is because, in many cases, it simply will not be possible to establish probable cause or bring criminal charges, under the UCMJ or any other source of law, against such individuals. Due to the need to preempt rather than merely respond to attacks, as well as the unique circumstances of our adversaries' clandestine combatancy, it will often be impossible to charge them with war crimes. Sometimes that is because they have not committed them -- at least not yet -- and at other times, the inability to charge a suspected al-Qaeda sleeper agent in the U.S. will arise from evidentiary difficulties.

Importantly, both categories of problems are particularly acute in the most urgent situation confronting us: one in which we are trying to prevent an attack before it takes place. In such a situation, the detainee is likely to be a person who has information about unexecuted plans to attack our civilians. But in such circumstances, the crime may be too inchoate, the role of the detainee too peripheral, or the evidence too scarce or inadmissible to permit criminal charges to be brought. Yet the key to preventing an attack may be the ability to hold such a person and interrogate him to learn of our enemies' plans. Relying on the UCMJ alone might require us to release such individuals before we have been able to extract their full intelligence value -- or any intelligence value at all.

When we are trying to prevent future terrorist attacks rather than punishing those responsible for attacks that have already been carried out, the evidence will often be far less concrete or conclusive than evidence of a completed crime. Indeed, in the context of international terrorism, much of the evidence will likely come in the form of foreign intelligence information, i.e. reporting from cooperating foreign intelligence services or from clandestine signals intelligence. Such evidence is often impossible to use in any court, including a court-martial, for a combination of reasons, including multiple layers of hearsay, the unwillingness of foreign governments to allow agents of their intelligence services to testify, or the unacceptable risks to sensitive sources and methods of intelligence that using such information in a prosecution may pose to ongoing intelligence operations.

To illustrate the problem, consider again the hypothetical case of Mohammed Atta captured in the days just prior to the attacks of September 11th. If we had captured him during that period, we probably would have known few, if any, details of the 9/11 plot. We would have been engaged in the proverbial exercise of trying to connect seemingly unrelated dots. Whatever clues we had about the threat he posed to our nation would probably have come in the form of evidence that, at that point, would have been thin, inadmissible, or both -- something far short of what would have been needed to establish probable cause to detain him or to bring a criminal charge and keep him in custody under the UCMJ.

For example, the sum total of our knowledge at the point of capture might have consisted of the following four (purely hypothetical) facts: (1) Reports from Saudi intelligence that he had unspecified ties to al Qaeda leaders, which the Saudis would disavow if their cooperation with U.S. intelligence were disclosed; (2) observations by undercover U.S. intelligence assets in Asia of Mr. Atta meeting in a hotel with a group of other individuals affiliated with radical Islamic groups, some of whom are known to have traveled to the United States around the same time as Mr. Atta; (3) electronic intercepts of a telephone conversation in which Mr. Atta speaks cryptically to an unidentified confederate in Pakistan of an upcoming "feast day"; and (4) isolated reports from the FBI of young Arab men enrolling in flight schools and behaving strangely. It is highly doubtful that these facts would have been sufficient under the UCMJ to allow our military to detain Mr. Atta. Even if they were, and even if they were all fully admissible in a court-martial, they almost certainly do not constitute sufficient evidence of an actual war crime to permit the United States to charge and hold Mr. Atta under the UCMJ. And it is clear that little or none of this evidence could be admitted into evidence in a court-martial in any event. Thus, if the UCMJ were our only military option, the capture of Mr. Atta would

likely have been followed by his quick release. And the attacks against the World Trade Center and the Pentagon would have proceeded.

In addition to the problem posed by having to release a suspected terrorist if you cannot charge him with a crime, application of the UCMJ would also impair our ability to effectively interrogate a high-level al Qaeda detainee even during a period of detention. As previously noted, Article 31 would require an advice of rights that would discourage suspected terrorists from speaking to military interrogators. Moreover, if the UCMJ were our only non-civilian option, we could not employ any of the enhanced interrogation techniques that have now been approved for use by our intelligence services. I am of course not referring to torture or cruelty, which are abhorrent and clearly prohibited by U.S. law, but rather those classified, controlled techniques that are not available to the uniformed military under the Army Field Manual but which the CIA is lawfully permitted to employ in its high-value detainee program. The President and the intelligence community have strongly vouched for the importance and effectiveness of these techniques in extracting actionable intelligence, especially when detainees have had extensive counterinterrogation training, as many high-value al Qaeda operatives apparently have. Yet they would be unavailable to use against the next Mohammed Atta, or the next Khalid Sheikh Mohammed, if the tools of traditional courts-martial were the only ones we could employ.

In summary, then, the UCMJ and courts-martial do not provide an adequate answer to the Mohammed Atta hypothetical or to the serious problem it symbolizes. When the nation is facing a serious military threat – a threat of the kind that turned the streets of lower Manhattan into the bloodiest killing ground for civilians we have ever witnessed on our soil – protecting our cities and our civilian population require the power and flexibility of traditional law-of-war detentions. There may be new and creative ways of dealing with the al-Qaeda threat and accommodating some of the unusual features of the current conflict that Congress can devise in future legislation, but of the existing legal paradigms, neither the civilian justice system nor the military justice system can provide a satisfactory or complete solution to the problem.

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