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UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
FIRST SESSION

HEARING HELD
JULY 26, 2007

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UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, July 26, 2007.

The committee met, pursuant to call, at 9:05 a.m., in room 2118, Rayburn House Office Building, Hon. Ike Skelton (chairman of the committee) presiding.

OPENING STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. Ladies and gentlemen, the committee will come to order.

Today's hearing is about upholding the principles of habeas corpus for detainees at Guantanamo Bay, Cuba.

Many across the country and some in this hearing room may ask why Congress should bother restoring the constitutional right to challenge arbitrary detention to the men in Guantanamo (GTMO) when some of them are self-avowed terrorists.

For our first panel today, we have four very distinguished attorneys.

Mr. Stephen Oleskey, please raise your hand.

Mr. Oleskey, a partner at Wilmer Cutler Pickering Hale and Dorr, has represented six Bosnian Algerian men who have been detained at Guantanamo since 2002. Mr. Oleskey was awarded the 2007 American Bar Association Pro Bono Publico Award largely because of his work on habeas matters.

We thank you for being with us.

Our next witness, Mr. David Keene, since 1984, has served as the chairman of the American Conservative Union as well as co-chair of the Constitution Project's Liberty and Security Initiative.

Mr. Keene.

Next we welcome back to the committee Patrick Philbin, who served as associate deputy attorney general from 2003 to 2005 and is currently in private practice.

And, finally, Mr. Stephen Abraham, lieutenant colonel in the United States Army Reserve, although he is testifying as a civilian today. He has firsthand knowledge of the Combatant Status Review Tribunals (CSRT) through his work with the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC).

We welcome you, gentlemen.

Back in 1945, an American country lawyer took to his feet in a courtroom in Germany and foreshadowed a couple of answers to the important question just put to us.

Opening the Nuremberg trials of notorious Nazi prisoners, the country lawyer said that "civilization can afford no compromise with social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces survive."

Robert H. Jackson, chief counsel to the United States during the Nazi war trials, and later a Supreme Court Justice, could not have been more correct. We must prosecute those who are terrorists with the full force of the law, but we must also make sure that the convictions stick. And, gentlemen, being a former prosecuting attorney, I know full well what it is to make a conviction stick. The certainty of convictions must go hand in hand with tough prosecutions.

The problem that we face is that the Military Commissions Act (MCA), which the last Congress passed over my strenuous objections, suffers from numerous flaws that I have outlined on previous occasions. Now, none of them is more severe than the stripping of habeas corpus from the detainees. In addition, earlier legislation established a questionable system of appellate review of the defective Combatant Status Review Tribunals process.

Already, the legal weaknesses in the existing system have begun to crack. Last month, two military judges in separate opinions dismissed all charges against the only two detainees who have pending proceedings under the Military Commissions law because the legal process, under which they had been confirmed by a military panel to be enemy combatants, had not properly granted the military commissions jurisdiction over these defendants.

Until this fundamental problem of personal jurisdiction is resolved, all military trials have stopped.

Assuming that the Administration is able to correct this current mess, other legal challenges remain, which could result in known terrorists having their future convictions reversed.

Restoring habeas to the detainees at Guantanamo would enable federal courts to help the Administration identify and rectify the inherent problems within the military commissions framework sooner rather than later, and may even accelerate prosecutions.

Although the applicability of the holding in the Al-Marri case is rather limited and does not apply to the Guantanamo detainees, the U.S. Court of Appeals for the Fourth Circuit recently recognized a detainee's right to habeas and ordered the Administration to consider federal civilian prosecution of the individual, among other options, after nearly six years of detention.

As equally important as ensuring tough prosecutions is remaining true to who we are as a nation. We must match our bedrock commitment to the rule of law and human rights to the enemy's propaganda of hatred.

Restoring habeas for detainees allows us to reaffirm our global leadership on these values. On the other hand, abandoning a principle which has been a cornerstone of Anglo-American jurisprudence for nearly 600 years, arms the terrorists with another recruiting weapon and undermines our worldwide credibility.

In the course of prosecuting Nazi war criminals who had committed once-unimaginable atrocities, Robert Jackson, the country lawyer, said it best: "We must never forget that the record on which we judge these defendants is the record on which history will judge us. To pass these defendants a poisoned chalice is to put it to our own lips as well."

Citing Johnson v. Eisentrager, a 1950 case, some may propose that Justice Jackson would not have intended his words to apply to the detainees at Guantanamo. On the contrary, I would argue that Justice Jackson himself would have been affronted by the situation at Guantanamo and would have readily distinguished his Eisentrager holding from it, as the Supreme Court did a few years ago in the Rasul decision.

I am looking forward to hearing from our witnesses on these critical matters.

I now turn to my good friend, my colleague from New Jersey, a senior member of our committee, Mr. Saxton of New Jersey, for any opening remarks that he may wish to make.

Mr. Saxton.

STATEMENT OF HON. JIM SAXTON, A REPRESENTATIVE FROM NEW JERSEY, COMMITTEE ON ARMED SERVICES

Mr. SAXTON. Mr. Chairman, thank you very much.

I want to welcome our distinguished panel as well as the next panel of witnesses from the Administration. Thank you for being here. I appreciate it. We all appreciate it very much and I look forward to your testimony.

Over the last few years, this committee has spent a great deal of time focusing on our global war on terrorism detainee policy. The policy that this committee advanced last Congress takes into account how the war against terror has produced a new type of battlefield and a new type of enemy.

Our committee worked hard to pass the Detainee Treatment Act (DTA) and the Military Commissions Act, ensuring that the United States is able to detain, interrogate, try terrorists and to do so in a manner that is consistent with the Constitution and the International Laws of Armed Conflict.

I think we got it right. As we meet today, our detention policy is being executed in accordance with requirements of the DTA and the MCA and the recently revised Army Field Manual.

The long-awaited military commissions have begun. Just last week, the D.C. Circuit Court issued an opinion with respect to combat status review tribunals, which demonstrated that the DTA and the MCA framework provides detainees at Guantanamo Bay with unprecedented robust review of their status as enemy combatants.

A little less than six years after the horrific acts of September 11, we are finally seeing the congressional-authorized detainee policy beginning to work. There were challenges along the way, and through rigorous oversight the Congress improved and in many instances changed the Administration policy. But with the signing of the MCA this past October, we are finally moving forward in my opinion in the right direction.

Mr. Chairman, I have taken the time to refer back to the work of the previous Congress and to demonstrate that we have worked

hard on the issue before the Congress today and to say we ought to let this policy that Congress authorized in the DTA and the MCA have a chance to work.

Last year on the MCA, this committee voted with a vote of 52 to 8 to approve this policy. I note that today's hearing is on the principle of habeas corpus as applied to detainee policy at GTMO. Context here is important. In the same week that Congress is wrestling with how to deal with the national intelligence estimate that warns of al Qaeda's resurgence and its continued resolve to attack the homeland, this committee is considering whether we should grant members of al Qaeda detained at Guantanamo Bay more access to our courts.

I emphasize, even more access to our courts because the current system does provide significant review of both the detention of enemy combatants as well as review of military commission decisions. The DTA and the MCA framework goes beyond what the laws of war require and are unprecedented in armed conflict.

For those who criticize the DTA for not providing adequate review of the CSRT process and status determinations, I suggest you read last week's D.C. Circuit opinion, Bismullah v. Gates. In my view, the Bismullah decision bolsters the claim that the DTA and the MCA framework provides an adequate alternative to habeas corpus.

Though I would argue that the current statutory framework provides an adequate alternative to habeas corpus, I do not believe that combatants captured and detained outside the United States on the battlefield have a constitutional right to habeas corpus. The D.C. Circuit Court came to this conclusion in a decision earlier this year and the Supreme Court will in fact look at this question at the end of this year.

This leads me to the very basic question: Why are we here? Why are we seeking to bestow a right upon terrorists held at GTMO that the Supreme Court may tell us in the coming months is not required under the Constitution? In the absence of compelling national security need or a constitutional requirement, the Congress should not move to change the process it put in place less than a year ago.

There is a more fundamental problem with providing habeas rights to detainees at GTMO. It will create an avalanche of litigation that will bring our detainee policy potentially to a grinding halt.

I am not here to be an alarmist. Competitive and duplicative litigation will challenge not only the continued detention of detainees at GTMO but also the transfer of detainees from GTMO to their countries of origin. If the Department cannot continue to detain or transfer detainees because of an endless litigation, we will ultimately be forced to release these individuals. This is unacceptable.

Of the approximately 400 detainees at GTMO that we have transferred to or released under the current policy, about 30 have been killed or captured after returning to the battlefield. Press reports indicate that one of the former GTMO detainees killed himself earlier this week when Pakistani soldiers tried to capture him.

Why would we take steps that would result in more detainees returning to the battlefield? Increasing the rights of detained terror-

ists at GTMO will move the present conflict from the battlefield into our courts. This would not be to our advantage and this is no way to conduct an armed conflict.

Finally, I fear that adding habeas corpus rights to the current statutory framework produces an absurd policy, the result where detainees at GTMO would have more due process with respect to their detentions than U.S. citizens would in an analogous scenario. Additionally, to my knowledge the laws of war do not provide lawful combatants with habeas review. As a result, I am concerned that giving enemy combatants habeas corpus would in addition to the rights we currently give them create a system that rewards combatants for acting unlawfully and for using terrorist tactics.

Let me just end with one simple point that I mentioned earlier. Our terrorist detainee policy was constructed to address a new type of enemy in a new type of war. We have used the International Laws of War and the Uniform Code of Military Justice as guideposts in crafting this new policy, and that is because it is fundamentally a war policy.

Amending the DTA and the MCA framework will have the net effect of holding up the execution of the global war on terrorism detainee policy. Some would like this result. They would prefer to see terrorists tried under a criminal justice system. This is a false choice, at least that is my opinion. We can try terrorists for war crimes if it requires our soldiers to read terrorists Miranda rights or to take a battalion of lawyers onto the battlefield. We have tried the former approach, and it doesn't work.

During the trial of the terrorists responsible for the first World Trade Center bombing, the discovery rules of the criminal justice system gave the defense access to information that found its way to the al Qaeda camps in Afghanistan. The DTA and the MCA framework is crucial because it is crafted for the conduct of war providing procedures flexible enough to account for the constraints and conditions of the battlefield.

Mr. Chairman, five years-plus into this war we have crafted a new policy tailored for the new conflict that will work. Now it is upon us to exercise discretion and give this policy a chance.

Mr. Chairman, I would like to submit at this time for the record the executive summary of a report released just yesterday by the Combating Terrorism Center at West Point, which analyzes 516 CSRT unclassified summaries that took place between July of 2004 and March of 2005. I note that the CTC study found that 73 percent of the unclassified summaries meet CTC's highest threshold of a demonstrated threat as an enemy combatant, and I have the report here, which I ask unanimous consent be included in the record.

The CHAIRMAN. Without objection, it is included.

Mr. SAXTON. Thank you, Mr. Chairman.

The CHAIRMAN. I do, however, introduce the report on Guantanamo detainees by Mark Denbeaux, professor at Seton Hall, and Joshua Denbeaux—the West Point report that you have, plus the preliminary response to that report. And I wish that they also be included in the record. And the one that you, Mr. Saxton, include in the record, is the one in the middle.

Without objection, each of them will be placed in the record.

[The information referred to can be found in the Appendix beginning on page 193.]

The CHAIRMAN. I am having a little bit of trouble with your name. Is it Oleskey?

Mr. OLESKEY. It is, Mr. Chairman, yes. Thank you.

The CHAIRMAN. Okay. Mr. Stephen Oleskey, we will call on you first.

Let me also state that, without objection, each of your written statements will be included in the record in total, and if you could condense them, that would move us along much more rapidly.

Mr. Oleskey. Have I got it?

STEPHEN H. OLESKEY, PARTNER, WILMER CUTLER PICKERING HALE AND DORR LLP

Mr. OLESKEY. You do.

Mr. Chairman, thank you, Ranking Member Saxton, members of this distinguished committee.

My name is Stephen Oleskey. I am a partner in the law firm of Wilmer Cutler Pickering Hale and Dorr. I appear today to testify in support of H.R. 2826 filed by the chairman and other members of this committee to restore habeas corpus to the approximately 375 men detained in Guantanamo.

Since July 2004, my firm has been representing pro bono in habeas corpus proceedings six men from Bosnia. These men were living with their wives and children in Bosnia in October 2001. Bosnia was far from any battlefield.

The U.S. Government insisted that the Bosnian government arrest the six on suspicion on planning to blow up the U.S. embassy in Sarajevo. The Bosnians said they had no evidence of any such plot. The U.S. said it wanted the men arrested anyway immediately and so they were.

The men were held for 90 days while an extensive investigation, which included our own FBI agents, was carried out under the supervision of a judge of the Bosnian Supreme Court. The men's homes and offices were searched for incriminating evidence, but no evidence of any such plot was uncovered. After 90 days under Bosnian law the Bosnian judge ordered the men released for lack of evidence.

There were rumors, however, that the men would be sent by the U.S. to a new prison in Cuba. Therefore, their lawyers sought and obtained an order from the Bosnian Human Rights Chamber Court, set up by the Dayton Accords, prohibiting such an action.

At the U.S.'s insistence, however, the men were sent immediately to Cuba. They arrived on January 20, 2002, and have been kept there without charge or trial for five years, seven months and six days. We filed habeas petitions for them in July 2004. We have devoted thousands of hours to investigating their case, including visiting them 11 times in Cuba.

The men were all labeled as enemy combatants in the fall of 2004 by CSRT panels. Let me remind you briefly how that CSRT system was created in seven days in early July 2004 by then-Deputy Defense Secretary Paul Wolfowitz immediately after a Supreme Court decision held there must be some formal process to hold men without trial indefinitely in Guantanamo.

The Administration has said these men can be held until the end of the war on terror. This means, as Justice O'Connor wrote in 2004, that they can be held for the rest of their lives and all as a result of a CSRT process in which they had no counsel, were not told what the secret evidence was against them, could offer no witnesses except fellow prisoners, and could offer no documents to rebut the very sweeping, general claims made against them in the secret evidence.

If all of that was not enough of a stacked deck, all of the evidence the government gave the CSRT, whatever the source or quality, was presumed by the Wolfowitz order to be correct.

In 2004 in the Rasul decision, the Supreme Court appeared to say that all Guantanamo habeas corpus cases could go forward on their merits in federal district court. Then in 2005, in the Detainee Treatment Act, a previous Congress provided the limited review of CSRT decisions by the Court of Appeals in Washington, but this review was confined to whether the CSRTs had complied with their own procedures.

You will hear today from me and Lieutenant Colonel Abraham how one-sided these procedures were and how grossly unfairly they were applied.

Then in 2006, the last Congress passed the Military Commissions Act. This act sought to strip habeas corpus rights from any alien anywhere in the world seized by our military and labeled an enemy combatant by a CSRT.

Last week's decision by the D.C. Court of Appeals on preliminary procedural issues in the first cases heard under the DTA underscores how inadequate that review process is compared to a habeas procedure before a federal trial judge.

We are left with a host of unresolved questions about what a Court of Appeals review of each CSRT will involve and how long it will take to resolve even a single case. These unresolved issues are not surprising. Usually, but not here, an appellate court reviews a detailed record of a lower trial court or federal administrative proceeding in which lawyers were present for all parties. Usually, but not here, recognized rules of evidence are applied. Usually, but not here, there is no issue of evidence arising from torture or coercion. Usually, but not here, all parties are able to offer documents, witnesses and cross examine each other. But none of this happened for any detainee in the hundreds of CSRTs that took place.

Let me give you three brief examples from our own six cases of how truly unfair these CSRTs were and why habeas review is required.

All detainees were declared enemy combatants based almost entirely on secret evidence they were not allowed to see much less able to abut. As our client, Mustafa Ait Idir said to his CSRT panel, "You say I am al Qaeda and I say I am not. You say I am al Qaeda based on evidence that you cannot show me and that I cannot respond to. Maybe if you tell me who says this, I can say I know this man from somewhere and I can respond. But this way, I can do nothing. Excuse me, but if someone said this to me in my country, we would laugh."

Mr. Ait Idir and another of our clients asked that the decision of the Bosnian Supreme Court from January 2002, that they be released immediately for lack of evidence, be given to their panels. Obviously, this would be an important fact to consider. Both panels found this publicly filed legal document available on the Web and in our pleadings not reasonably available.

Not one of the six panels for our clients ever saw this important document.

Let me give you a third example of how fundamentally unfair these procedures were. The procedures allow detainees to call reasonably available witnesses. One of our clients asked that his panel contact his boss at the Red Crescent Society of Abu Dhabi in Sarajevo where he was a full-time employee doing relief work with Bosnia orphans when arrested. The panel declared the witness was not reasonably available.

Three months after this finding, I went to Sarajevo. I picked up the local telephone book, found the number for the Red Crescent Society and called the witness. Within 24 hours, I had interviewed him. He confirmed my client's account of his employment and outstanding character, an account that his CSRT never heard.

As these and many other examples show, the CSRT process is too full of holes for any Court of Appeals to patch years later. Based on our extensive experience and observation, the CSRT process is disgraced and disgraceful. No amount of limited tinkering with individual CSRT proceedings by a federal appeals court is likely to produce a fair result because the CSRT process itself was not designed to be fair or to consider objectively whether to continue to hold these men.

Finally, let me tell you a few important facts about a habeas hearing. Habeas is not a jury trial. It is a hearing by an Article III federal judge alone, one who reviews habeas petitions frequently. Habeas hearings are not exotic. They are routine. There were 22,000 habeas petitions filed last year in the federal courts. We are talking only of an additional 375. Habeas is not a criminal trial. There will be no Miranda issues. The only issues for a habeas judge will be, one, whether the government's evidence before the court is sufficient to hold the detainee indefinitely or, two, in some cases whether the detainee can be transferred by the government to another country where he fears torture.

The habeas standard will not be the criminal law standard of proof beyond a reasonable doubt but a lesser standard of review. The habeas judge will independently review the evidence he or she considers relevant, whether that evidence was given to the CSRT or not. And that judge will look at exonerating evidence for the first time, virtually none of which was provided to any CSRT panel.

Finally, under habeas the trial judge can order a detainee released in a proper case instead of being sent back for yet another CSRT. In a habeas hearing, American citizens can have some confidence there is likely to be a fair and final decision thoughtfully arrived at. Contrast this with Brigadier General Jay Hood's statement several years ago in the press. He had been in charge of Guantanamo. He said, "Sometimes we just didn't get the right folks, but nobody wants to be the one to sign the release orders. There is no muscle in the system."

A federal trial judge in a habeas hearing will put some muscle in the system, and some muscle is what the chairman's bill will provide. The jury-built seven-day CSRT process needs finality and certainty, not endless do-overs where a Court of Appeals sends cases bouncing back to yet another CSRT and the case then rebounds again back to the appeals court while more years pass.

H.R. 2826 brings integrity and finality to this process. It restores the habeas rights that the last Congress took away. It leaves the federal trial judges, not appellate judges, doing what trial judges do every day and do very well, sift the evidence, assess it, decide what other evidence the detainee should be allowed to offer. In a habeas case, a trial judge, not three military officers, decides whether the government has shown enough to justify holding a detainee for a lifetime or should instead now be released.

Yes, let us take the truly evil men who our military seized on the real battlefields in this world, put them on trial in federal court or in appropriate cases before a military commission. There have been over 300 terrorists convicted or who have pled guilty in recent years in federal court.

By passing H.R. 2826 this committee can begin to restore the confidence of the rest of the world that this great country remains a shining example of a nation committed to living by the rule of law, no matter how much our new enemies provoke us to experiment with seven-day fixes and seemingly stacked decks.

Thank you, Mr. Chairman and members of the committee.

[The prepared statement of Mr. Oleskey can be found in the Appendix on page 95.]

The CHAIRMAN. Mr. Oleskey, thank you.

Now Mr. Keene.

STATEMENT OF DAVID A. KEENE, CHAIRMAN, AMERICAN CONSERVATIVE UNION AND CO-CHAIR OF THE CONSTITUTION PROJECT'S LIBERTY & SECURITY INITIATIVE

Mr. KEENE. Chairman Skelton, Mr. Saxton and members of the committee, let me begin by thanking you for the opportunity to appear before you this morning.

My name is David Keene. I am chairman of the American Conservative Union and co-chair of the Constitution Project's Liberty and Security Initiative.

I am here today because as a conservative I believe that ours is the greatest and freest nation on the face of the earth. I am here today because as a conservative I believe we can defeat our enemies without compromising the values that have made this Nation great.

As citizens, we owe it to ourselves to support realistic measures needed to protect our Nation. But men and women of goodwill, regardless of party, have to be able to work together to make certain that our rights survive the stresses of the war in which we are today engaged and the zeal of those fighting it, who sometimes forget just what it is they are fighting to protect.

Since 9/11, Congress has granted the executive branch extraordinary powers to identify, pursue, and eliminate threats to the safety of this country and her citizens. I am one who believes that Congress was correct in granting much of the power sought be-

cause of the need to deal with a new kind of enemy in an age of technological advancement that might otherwise have given our enemies advantages that we couldn't match.

The fact that we have successfully avoided another attack within our borders is testimony to the effective way in which those charged with our protection have pursued their mission using the traditional and newly granted powers available to them.

On the other hand, as a conservative I believe it is always wise to look critically at every request for more governmental power. Those charged with protecting us naturally want all the power and flexibility they can get to pursue their mission, but sometimes forget that in protecting us there is a danger that they might inadvertently damage the very values they are trying so desperately to protect and preserve.

A few days after the terrorist attacks in New York and here, then-Defense Secretary Don Rumsfeld said that if we change the way we live as a result of the terrorist threat we face, the terrorists will have won.

The question we have to ask ourselves as we pursue victory over those who would destroy our way of life is whether the steps we take to achieve victory risks the destruction of who and what we are. It is vital that we preserve the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

I am here today not to question the validity of holding terrorist suspects at Guantanamo Bay or anywhere else, but to urge that those we do hold have the ability to seek an objective review of the legality of their incarceration.

Throughout our Nation's history, the great writ of habeas corpus has served as a fundamental safeguard for individual liberty by enabling prisoners to challenge their detentions and to obtain meaningful judicial review by a neutral decision maker.

Although I agree that our government must and does have the power to detain foreign terrorists to protect national security, repealing federal court jurisdiction over habeas corpus does not serve that goal. It is crucial that we maintain habeas to ensure that we are detaining the right people and complying with the rule of law.

Those who argue against extending habeas rights to those being held at Guantanamo like to describe those incarcerated there as among the most dangerous of our enemies and suggest that anything that might lead to the premature release of any of them would constitute a dire and immediate threat to our national security.

I have no doubt that some of those being held there today are enemies who deserve to be exactly where they are. But the purpose of a habeas hearing is not to release the guilty but to separate the innocent from the guilty. Many of those being held there were shipped to Guantanamo without any proof whatever that they ever even intended to engage in actions against us.

Defense Department data suggests that there is evidence that about 8 percent of them have actually fought against us, but that as much as 55 percent of the remainder have never committed a hostile act against the United States or our allies.

Many of these people have been in prison for five years or longer and may be held indefinitely without ever being brought to trial for anything at all, even though the Central Intelligence Agency (CIA) reported five years ago that most of them don't belong there.

If we are to hold people indefinitely without charge, we should at the very least want to be certain that we are holding the right people.

Restoring habeas corpus is also important to protecting Americans overseas. America's detention policy has undermined our reputation in the international community and weakened support for our fight against terrorism, particularly in the Arab world. Restoring habeas rights would help repair that damage and demonstrate America's commitment to a tough but rights-respecting counterterrorism policy.

Having said this, however, I have to say that I am personally concerned not so much by what others might think of us or do as a result of our policies but of what the cavalier dismissal of fundamental rights for those we are holding says about who we are.

Therefore, I urge Congress to restore the habeas corpus jurisdiction eliminated by the Military Commissions Act because of who we are and what this Nation represents. You can do that by supporting H.R. 2826, reporting it out of committee and urging your colleagues to do the same when it reaches the floor of the House of Representatives.

Thank you very much.

[The prepared statement of Mr. Keene can be found in the Appendix on page 115.]

The CHAIRMAN. Thank you, Mr. Keene.

Mr. Philbin. Correct?

Mr. PHILBIN. Yes, sir.

The CHAIRMAN. Please proceed.

STATEMENT OF PATRICK F. PHILBIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. PHILBIN. Chairman Skelton, Ranking Member Saxton and members of the committee, I appreciate the opportunity to address the matters before the committee today.

The detention and trial of enemy combatants are critical functions in the continuing armed conflict against al Qaeda. The procedural rights that Congress grants enemy combatants to challenge their detention and trial are vitally important also both because they can affect the success of the military mission at hand and because they play a role in reflecting America's commitment to fairness and the rule of law.

The recently released National Intelligence Estimate (NIE) provides a reminder that our conflict with al Qaeda still presents a grave continuing threat to our national security. Even in the face of this ongoing threat, Congress and the executive branch working together under the guidance of the Supreme Court have created a fair system for reviewing enemy combatant detention and trial by military commission, a system that exceeds the United States' obligations under the Constitution and under international law.

First, to address the risk of erroneous detention, the executive has established an elaborate system of review, the Combatant Sta-

tus Review Tribunals, or CSRTs. Although none detained at Guantanamo are American citizens, these CSRTs were crafted to satisfy the procedural requirement that the Supreme Court had previously indicated would be sufficient to justify detaining even American citizens as enemy combatants when detained in the United States.

The Supreme Court outlined those factors in the Hamdi decision. Indeed, the CSRTs provide detainees with more rights than are required for status determination under Article V of the third Geneva Convention for lawful combatants potentially entitled to prisoner of war (POW) status for it grants detainees not only the assistance of a personal representative but also a right to review of the CSRTs determination in a U.S. Court of Appeals for the D.C. Circuit and subsequent review in the U.S. Supreme Court through a Petition for Certiorari.

Just last Friday, moreover, the D.C. Circuit made clear in Bismullah versus Gates that its review of the determinations of Combatant Status Review Tribunals would be robust. The court rejected the government's position that reviews should be based solely on the record developed before the CSRT, that is the information actually presented to the CSRT. Instead, the court will review all information available to the government, whether it actually made it into the CSRT process or not.

That extraordinary level of judicial review for a military decision will ensure that even if there have been flaws in a particular CSRT proceeding, the court will be able to look beyond what was presented to the CSRT.

Mr. Oleskey has suggested that habeas is necessary because an Article III judge will put muscle into the system. I believe that the Article III judges of the D.C. Circuit have already demonstrated that they will put muscle into the system of reviewing the CSRT decisions.

Second, Congress has established in the Military Commissions Act a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in Hamdan versus Rumsfeld. And Congress has also granted detainees the right to challenge military commission judgments in the D.C. Circuit as well.

These review rights are unprecedented in the history of warfare. There is no legal requirement to permit detainees another largely duplicative round of federal court review through habeas corpus. The civilians held at Guantanamo Bay have no constitutional rights to assemble under the First Amendment. They also have no constitutional right to habeas corpus. And even if they did, the current system nonetheless would satisfy that right by providing an adequate substitute for habeas corpus through federal court review in the D.C. Circuit.

Given the absence of any legal defect in the current mechanisms Congress has provided for reviewing the detention and trial of enemy combatants, it becomes clear that amendments proposed to the MCA and DTA should be evaluated solely as policy choices for Congress to make.

But from a policy standpoint, the case for reestablishing habeas review is not compelling. It would add a confusing parallel avenue

of judicial review that would sacrifice the benefits of the order we have received through Congress established in the MCA. Moreover, it would do so without providing any additional substantive rights for the detainees. Nor would the simple step of adding habeas review cure any specific practical deficiencies that might exist within the current CSRT and military commission procedures and to which the D.C. Circuit might well provide answers in any case as the recent Bismullah decision indicates.

There are also two specific problems with H.R. 2826 that I would like to focus members' attention on. First, there is a substantial risk that the geographical reach created by habeas review created by H.R. 2826 would burden military commanders in the midst of critical operations overseas, precisely the danger the Supreme Court wisely warned against more than 50 years ago in Johnson versus Eisentrager.

Although H.R. 2826 contains an exception barring habeas jurisdiction over actions brought by aliens held "in an active zone of combat," it is unclear what areas would qualify under that undefined term. Defining that term would be left up to endless rounds of litigation. Moreover, because the laws of war generally require commanders to evacuate prisoners from combat zones in any case, there can be little assurance that this exception would accomplish its apparent objective of preventing the expansion of habeas jurisdiction to areas like Afghanistan.

Second, as a final point, I would like to make sure that close attention is paid to provisions in H.R. 2826 that would clear the way for exercise of jurisdiction over actions, "for prospective injunctive relief against transfer." The transfer of detainees has traditionally been an executive process and that is so because it involves delicate and flexible negotiations with foreign powers. Through these negotiations, our government assures itself that the receiving government is willing to accept responsibility for ensuring that the detainee will no longer pose a threat to the United States or its allies and also that the detainee, once transferred, will not be subjected to torture.

Inserting the courts into this process, which involves negotiation with foreign governments, particularly without providing any particular standards they are to apply, would be extremely disruptive.

Thank you, Mr. Chairman, for the opportunity to address the committee. I would be happy to address any questions the committee may have.

The CHAIRMAN. Mr. Philbin, thank you so much.

[The prepared statement of Mr. Philbin can be found in the Appendix on page 124.]

The CHAIRMAN. Mr. Abraham.

STATEMENT OF STEPHEN E. ABRAHAM, LIEUTENANT COLONEL, U.S. ARMY RESERVE

Mr. ABRAHAM. Mr. Chairman, Ranking Member Saxton and to the honorable members of this committee, I am here to speak as a witness to events while assigned to OARDEC.

The lens through which I describe what occurred was at the time of my assignment, based on 22 years as an intelligence officer and

10 years as a lawyer. I will resist the urge of a lawyer and be brief, if I may.

In that time of note, I served as lead terrorism analyst for the Joint Intelligence Center Pacific following the brutal 9/11 attacks. I was at OARDEC from September 2004 to March 2005, the time during which nearly all of the CSRTs were performed.

In that time, I was called upon to serve as an intelligence officer, a liaison officer with other agencies, and a CSRT tribunal member. What I expected and what occurred were two entirely different things.

The process was described to me as one in which we would determine in the first instance if detainees were enemy combatants. The reality was that the process was designed to fail, to validate prior determinations. The very name OARDEC by its letters, its initials and by the words for which they stand, the Administrative Review of the Detention of Enemy Combatants, did not merely invoke a presumption but a mandate.

As a liaison officer, I was charged to validate the existence of exculpatory evidence. In practice, I was denied the ability to review relevant information or confirm the existence of exculpatory evidence.

As an intelligence officer, I expected to see files developed on detainees using specific information developed through post coordination with other intelligence agencies. In reality, the information upon which CSRT decisions were based were vague, generalized, dated, and of little probative value.

And as a CSRT board member, I expected to be presented with sufficient material from which to reach conclusions regarding the status of detainees. What our board received was not only insufficient but evidenced a profound lack of credibility as to both the source of the information and the process of review.

When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy combatant, we were told to reconsider. And ultimately, when we did not alter our course, did not change our determination, did not go back and question the very foundation by which we had reached our decision, a new panel was selected that reached a different result.

What I expected to see what a fundamentally fair process in which we were charged to seek the truth free from command influence. In reality, command influence determined not only the enlightening past face of the 500-plus proceedings but in large part the outcome, little more than a validation of prior determination that the detainees at Guantanamo were enemy combatants and, as we have heard so many times, presumed to be terrorists who could be detained indefinitely.

I am not here today as an advocate for any detainee, no matter what their status. I am not here as an advocate for legislation but rather for truth silenced too long. I am here as a person charged by my oaths as a commissioned officer and as an officer of the court to uphold and defend the Constitution of the United States. What I witnessed while assigned to OARDEC respected neither oath.

The process of which I was a part did not discover the truth but ratified conclusions made long before my assignment. Those conclusions are entitled no deference by this body or any other.

If I may, I recall a line from "Casablanca," where at the end Captain Renault said, "Round up the usual suspects." Today, they would be at Guantanamo.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Abraham can be found in the Appendix on page 153.]

The CHAIRMAN. Thank you, gentlemen, very, very much.

Each of the four of you cause me to recall the valiant efforts of long deceased Colonel Carl Restine from my hometown of Lexington, Missouri, World War I veteran and recalled as a judge advocate general officer during the Second World War.

Colonel Restine was appointed to defend a man by the name of Dasch, one of the eight German saboteurs captured in 1942, four of which landed at Ponte Vedra, Florida, four of whom landed in Long Island, New York. They were all captured and tried.

Colonel Restine, being the great lawyer that he was, and I am likening your testimony and your commitment to his record, Colonel Carl Restine's client, a fellow by the name of Dasch, was not executed as the others were as a result of the tribunals conviction that year, 1942.

So I thank each of you for putting forth your thoughts as great advocates and I appreciate each of the four of you doing this.

Mr. Oleskey, in your opening statement you highlighted the reasons why the CSRTs and its appeal are not adequate. Would you please review again the reasons why you believe the Supreme Court will find that the current system does substitute that for habeas, please?

Mr. OLESKEY. I think the Supreme Court will find it is not a substitute because it doesn't allow in the DTA process any real challenge to the evidence that was available to the governments in the CSRT. It is going to be impossible in reviewing the record in a Court of Appeals to call witnesses, offer affidavits, perhaps to offer documents that weren't included in the CSRT file.

It is only a record review of what happened in Guantanamo and what the statute says is that the Court of Appeals should review that record to see if the military complied with its own procedures.

The burden of the testimony today is that in their creation and in the implementation, those procedures were fundamentally unfair. I don't believe, and many other lawyers and commentators don't believe that in that circumstance the system can be found to be an adequate substitute for habeas and it will not be so found.

The CHAIRMAN. Thank you.

Mr. Saxton.

Mr. SAXTON. Let me ask Mr. Abraham, if I may, the case that I referred to in my opening statement, the Bismullah case, and I said in my view the Bismullah decision bolsters the claim that DTA and MCA framework provides an adequate alternative to habeas corpus.

The Bismullah case—and the decision did in fact give the Federal Court of Appeals of the D.C. Circuit the right to review, as

well as to take into consideration, evidence that was not considered by the CSRT, did it not? Do you know?

Mr. ABRAHAM. My understanding, sir, is that it did. However, unfortunately the record that was placed before the court, as are the records in the cases of every single detainee, do not contain all of the information that was reasonably available. The process was never calculated to allow for or accommodate all of the information that was immediately or even reasonably available. And moreover, the process itself created a scheme, and I don't mean that in the pejorative sense, but a system by which through its streamlining, orientation, and focus a quick result was preferred over a probing inquiry.

Mr. SAXTON. My understanding is that the court, under this decision or pursuant to this decision, has the right to look at evidence that was considered by the CSRT as well as any other evidence that exists. Is that not correct?

Mr. ABRAHAM. My understanding is that you are correct as to the power or reach of the court. The problem is that the tools that are available to gather that information, certainly at the disposal of any of the intelligence communities and that would have been available within any other procedure, were not applied in the case of the CSRTs.

Mr. SAXTON. Just for the record, once the CSRT has rendered its determination of status of the detainee, the detainee, under the current law that we created last year, is entitled to an annual administrative review board process and, not being satisfied with that process, has access to the Federal Court of Appeals in the D.C. Circuit. And it is the Federal Court of Appeals that we are now talking about.

And of course, if the detainee is not satisfied with the result of the Federal Court of Appeals, he has access to the United States Supreme Court. Is that correct?

Mr. ABRAHAM. My understanding, sir, is that that is correct.

Mr. SAXTON. Mr. Philbin, what is your view of the Bismullah decision and how it affects the ability of the Federal Court of Appeals to do its work?

Mr. PHILBIN. Well, Mr. Saxton, I think you have described it correctly. It shows that the D.C. Circuit will be able to look at not only the evidence that was presented to a CSRT, so this is not only review on a closed record. The D.C. Circuit has said that it will have access and must be presented all evidence available to the government.

And even if in the original CSRT proceeding the recorder, I believe it is the recorder that is supposed to gather the information available to the government, even if there is some question as to whether all of the properly available information has been gathered, that too I believe would be subject to challenge in the D.C. Circuit, because part of their view is did the CSRT comply with its own rules, which include having available reasonably available evidence.

The D.C. Circuit will be able to review how that standard is applied and whether it was properly applied in the CSRT in determining whether or not the CSRT complied with its own rules.

So I think this is a very robust form of review and in fact it is a more searching, factual review than has traditionally been allowed in habeas corpus for military tribunal decisions of any sort. A lot of the discussion here about habeas is simply assuming that habeas review in this circumstance would be identical to the way habeas is handled in the criminal justice system. And that is not necessarily true.

The writ of habeas corpus, when it has been applied to military decisions in the past, the Supreme Court has made clear is very limited in its review and does not include searching into the facts and second guessing the facts that were before a military tribunal.

So new law would have to be made to develop the law of habeas corpus to give it the kind of robust application that many are suggesting here.

Mr. SAXTON. Thank you both very much.

The CHAIRMAN. Mr. Reyes, please.

Mr. REYES. Thank you, Mr. Chairman.

Gentlemen, welcome and thank you for your testimony.

Mr. Philbin, I first wanted to thank you because we had former Deputy Attorney General Comey in my committee, the Intelligence Committee, where we were taking his testimony about what had transpired on the issue of the Terrorist Surveillance Program, and I wanted to thank you for your principled stand on that issue in terms of making sure that we comply with the Foreign Intelligence Surveillance Act and the deficiencies that were in that program, which we are looking into now. But thank you for that principled stand.

Mr. PHILBIN. Thank you, sir.

Mr. REYES. Knowing your work through that experience in my committee, I am interested in getting a reaction from you, because in reading your statement you state, "I gained significant expertise with respect to both the legal aspects of the detention of enemy combatants and military commissions during my service with the Department of Justice (DOJ) from 2001 to 2005. And although it has been almost six years since the attack on the World Trade Center, al Qaeda continues to pose a grave threat to the Nation."

And then you quote from the NIE of this month, which was put out last week, and you also state in there that, "even in the face of such a threat, the United States has exceeded its obligations toward detainees in the conflict with al Qaeda under both our Constitution and under international law. The political branches, through recent legislation, have crafted a system that provides unprecedented levels of review and access to civilian courts for combatants detained by the United States in the midst of an ongoing armed conflict."

So my question for you is, I would like your reaction to the testimony of Mr. Abraham and his experience being part of one of those panels and obvious frustration at what he was anticipating or expecting as a participant of those panels and what his real experience was. What is your reaction to Mr. Abraham's testimony?

Mr. PHILBIN. Well, obviously, Mr. Reyes, I have no personal experience with the conduct of a particular CSRT proceeding, and from what Mr. Abraham describes, it sounds concerning to me, if that is the way a CSRT is conducted.

But I don't think that the solution for that, if there is a problem in the way particular CSRTs are conducted, because when I was in government I dealt at the level of policy, here in Washington. We set policies and then expect things to be carried out as the policies are set.

I believe that the CSRT policy, the way the system is set up as a policy, is adequate and ought to work properly. If in fact in the field it is not working properly, then the mechanisms for dealing with that ought to be more directly addressed to fixing the CSRT process rather than doing something like passing legislation that simply restores habeas jurisdiction.

Habeas jurisdiction is just another round of litigation, another avenue of federal court review. It doesn't specifically address the kinds of problems that Mr. Abraham was describing.

I think that the D.C. Circuit has made clear in the review Congress has already provided, the D.C. Circuit is going to be able to get into those kinds of problems. If there was other evidence out there that wasn't presented at the CSRT, the D.C. Circuit has already said it is going to be able to look at that and find out about that.

If a CSRT is applying a standard of what is reasonably available that makes things that are available seem unavailable, then the D.C. Circuit is going to get into that on review. The argument will be made to the court that the CSRT did not comply with its own standards, that it applied an unreasonable standard of availability, and the court will rule on that.

So I think that the judicial review that is already provided provides a mechanism for getting at the kinds of problems that Mr. Abraham was describing.

Mr. REYES. So if what his experience was, Mr. Abraham's experience was, if that is the rule rather than the exception, is it your feeling or your observation that we don't need to do anything, that the system will take care of that?

Mr. PHILBIN. It is difficult to say that is the rule rather than the exception. I think that——

Mr. REYES. Well, I am asking if that were the rule rather than the exception, what would you say we would need to do?

Mr. PHILBIN. I think that Congress ought to allow the D.C. Circuit review process to operate, at least for the time being, to see what sort of result it does produce.

The Bismullah decision already indicates that some of the types of problems Mr. Abraham has indicated will be looked into, will be questioned by the D.C. Circuit. And if the first round of D.C. Circuit review demonstrates that problems are uncovered and CSRT decisions are overturned because those problems are discovered, I think that demonstrates the system is working.

But at least the first round of review ought to be allowed to continue to determine whether or not it is going to have that effect.

Mr. REYES. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

Thank you, gentlemen, for your testimony.

We live in a great, free country which I am really honored to serve. We are one person out of 22 and we have one-quarter of all the good things in the world. And I ask myself, what is so special about us that we should be so blessed, so privileged, that this one person out of 22 has one-quarter of all the good things in the world?

There are several reasons, perhaps, but I think prime among them is our enormous respect for the rights of the individual. There is no other constitution, there is no other equivalent to our Bill of Rights that provides such rights to the individual. I think this established the climate and milieu in which entrepreneurship and creativity could flourish.

I think we put at risk who we are if we put at risk these great civil liberties.

Civil liberties are always a casualty of war. Abraham Lincoln suspended habeas corpus, my second favorite President, and Norm Mineta, who served as secretary of transportation, he told me, he said, "Roscoe, I remember as a little boy holding my parents' hands when they ushered us into that concentration camp in Idaho." We are embarrassed now that we did that.

We are engaged in a long war and I want to make sure we don't put at risk our civil liberties as a result of our zeal to catch terrorists. I had some initial concerns about Guantanamo Bay. We put those captured men there, saying that since they were not legitimate soldiers they were not protected by the Geneva Conventions. And we put them in Guantanamo Bay, which is not on our soil, and we said that they are therefore not protected by our Constitution.

I know that there is a Geneva 4 that protects everybody that has fallen through the cracks of the other Geneva Conventions. And I know also that the Constitution doesn't protect just our citizens. It protects people, and I am very pleased that the Supreme Court said that those who are under our control are people protected by our Constitution.

My concerns were heightened by the Military Tribunals Act. It said that we could use coerced evidence. That is torture in common language. And that we could use secret evidence that the accused couldn't see in convicting them. I dubbed it the "let's torture them and then try them in a kangaroo court" bill. I voted present when that bill was passed out of committee because of my enormous respect for the chairman of this committee. But when it got to the floor, I voted against it.

Mr. Keene, thank you very much for your testimony. I was beginning to lose confidence that many of my conservative colleagues didn't seem to understand the importance of these enormously valuable civil liberties that we had. I thought I might be in trouble with my constituents with this vote, but so many of them called in saying thank the congressman for voting against the torture bill.

I want to ask you, why should we be looking for a substitute for habeas? Why should we invite criticism?

Mr. PHILBIN. Is that question directed to me, sir?

Mr. BARTLETT. No, sir. I am directing the question to all of you. I would like all of you to answer. Why should we be looking for a

substitute for habeas corpus? Why should we invite the criticism of the world?

Mr. OLESKEY. My response, Congressman, is that we shouldn't. You have addressed some of the issues why the Military Commissions Act doesn't substitute for habeas.

Just to be clear in view of the prior testimony, the Appeals Court will be reviewing what the record is from the CSRT. And whether it complied with its own procedures. Those procedures, as you just pointed out, allow evidence based on coercion or torture. Those provisions allow the CSRT to determine what was reasonably available.

The Circuit Court could find that my client's boss's testimony in Sarajevo wasn't reasonably available, but in habeas I could supplement that with an affidavit. I probably can't do that in the Court of Appeals. And the Court of Appeals, last week in the decision Mr. Philbin is talking about, the Bismullah decision, rejected attorney-client privilege by allowing mail that I sent my client in Guantanamo—I can't get there very often. I have to fly there when the military allows me to, so mail is a really important way for me to communicate with my client.

The Appeals Court felt under the Military Commissions Act and the DTA it had to do what the government wanted, which was to say that the government can screen my correspondence with my client about their case and if I object to that, that they can go ahead and tell somebody in Guantanamo, or in the Defense Department, what it is I am objecting to about the correspondence that I am having with my clients.

Habeas and the existing protective order that exists in the District Court under the original cases won't allow that kind of interference in a very basic right that is critical to the effective representation of anybody, particularly where potential indefinite life sentence may be the result.

Mr. BARTLETT. Mr. Keene.

Mr. KEENE. If I may say something, I have listened to all of this and I have asked myself that same question. What we have done is or what is being suggested here is that Paul Wolfowitz in seven days could do a better job than the drafters of the Magna Carta and the United States Constitution, the Bill of Rights and the jurisprudence of two centuries.

And yet we find the court decision, which was argued as a reason for not doing anything about it, the court is torturously trying to fix what Paul Wolfowitz did, because there was no conceptual part of that plan that would have the D.C. Circuit look behind what was done at the earlier level.

So the court is trying to fix something that was thrown together and doesn't work. And I listen to this and I looked out at you. How many times have you been told not just on this issue but on dozens and dozens of other issues that we do this at a policy level. And then after the policy is set by the people who look at things at that level, it doesn't work where the rubber meets the road.

And there is only one person on this panel that was there where the rubber meets the road, and it is not enough to just dismiss that. Because we have dismissed it in government action and government action, not just in the national security field but through-

out. And you know, in dealing with your constituents, that those folks at the policy level often develop things that just don't work on the ground.

It has been a long time since I have been to law school, and I don't practice law. But when you look at laws, I think they say they have got problems on their face or they have got problems as they are applied. What the witnesses here have said today is that this law has problems on its face and it has problems as it is applied.

And an alternative was in place before these laws and procedures came into being. It was developed centuries ago and it worked and what is wrong with it?

Mr. PHILBIN. I would like to make a comment, Member Bartlett.

You ask why should we be looking for a substitute for habeas. Let me start by saying the background rule until the Rasul decision and the peculiar circumstances that the Supreme Court saw in Guantanamo Bay, the background rule from Johnson versus Eisentrager, is that habeas is not available to those detained as part of an armed conflict overseas. So the background rule is no habeas, no judicial review at all, whatsoever.

That was changed by the Rasul decision so that there could be habeas for those at Guantanamo Bay, but I think that it is a somewhat pervasive error in my view, an error to claim that habeas review for enemy combatants detained during an armed conflict is this very well-defined, very well-known specific set of review rights. It is not.

There has never been habeas review for enemy combatants detained in armed conflict before because of the Johnson v. Eisentrager rule. So the law has to be developed about what exactly the court will do in habeas review.

I think that it was a wise decision for Congress to step in and say we are going to have judicial review, we are going to have Article III court review but we are going to set up specific procedures for it so that we are not just developing things through litigation, through endless litigation about what the habeas review will be. We are going to set up specific standards.

And I think that the standards that were set up for review in the DTA are sufficient to address the concerns of allowing serious, robust judicial review.

The D.C. Circuit has made clear that that review is going to go outside the record of the CSRT. It is not limited simply to the evidence that was presented to the CSRT. It is going to include all available evidence. If there are issues like the particular petitioner believes that evidence that was available was improperly ruled unavailable, that can be challenged in the D.C. Circuit, and the D.C. Circuit will rule on that. And there is no reason to think that the Article III judges in the D.C. Circuit are going to be any worse or any more lenient on ruling on basic questions like that than some district court judge in a habeas action would be.

And so I think the question also is now that Congress has established this specific procedure, a new specific procedure to deal with a new and unprecedented situation, why should we be adding habeas corpus, an undefined and somewhat amorphous habeas corpus

review, as an alternative on top of that so that there are two avenues for judicial review that will simply add burdensome litigation?

I think that the system Congress has set up in the DTA provides for adequate Article III court review and returning to allowing habeas as a duplicative form of access to the courts is unnecessary and unwise.

Mr. BARTLETT. If I might say, Mr. Chairman, I think that——

The CHAIRMAN. I would suggest that Mr. Abraham answer the question. We have run out of time.

Mr. BARTLETT. Okay.

The CHAIRMAN. And because of the excellent nature of the question, I think everyone should be given the right to fully answer.

Mr. Abraham, why don't you answer it and then your time will expire.

Mr. BARTLETT. Thank you.

Mr. ABRAHAM. Thank you. I will be very brief, sir.

I can only speak about the CSRT process, but through a very, I think, distinctive perspective.

Sixty years ago on the soil of two continents people were rounded up. Nobody spoke for them and nobody listened. In the past six years, people have tried to speak from Guantanamo and elsewhere and no one listened.

I can't speak to which process is better, but I can tell you today the CSRT process was neither a forum for speaking nor for listening.

The CHAIRMAN. The gentleman's time has expired. Thank you very much.

Mr. Smith, please.

Mr. SMITH. Thank you, Mr. Chairman.

A couple of comments and one question based on, actually, that last question there.

Two things. First of all, the point of habeas corpus, as I understand it, and you know a great deal more about that than me, is basically that you should have a review from some group other than the people who locked you up in the first place.

My colleague, Dr. Snyder, was telling me that it is interesting that the people who are most excited about habeas corpus are the ones who remember what it was like to be a country lawyer back in the day, if you will, like our chairman, which is that if you are picked up by the local sheriff and your review is his brother-in-law and his cousin down the street at the county courthouse, that is fundamentally unfair. So we put this in place so that you have some place to go where it is not the same people who locked you up.

And that is an obvious problem with the CSRT process, is it is in essence the same organization if not the same people, and I think that is what Mr. Abraham encountered. So that is to credibility. And I understand it is a little bit different in each case.

And that is the second point which Mr. Bartlett made quite well, and that is we have a major public relations problem in the world right now in what we have chosen to call the global war on terror. We are losing the larger battle for ideas, which as I like to put it means that somehow we have found a way to lose a public relations war to Osama bin Laden.

This is a piece of it, okay? There are other pieces and I think the focus on this has a lot to do with some of those other pieces. But to come out and say, look, we have habeas corpus that is established, as Mr. Keene described, let's stick with that, would help us enormously in that larger battle, and ultimately that does help our troops, that does help the fight. I think our values are very important, and this in Guantanamo is one thing that is undermining them.

And, you know, the final point on this, Mr. Saxton made the point that this overwhelming cost, I gather, of doing habeas, which I find just not terribly supportable when you are spending $12 billion a month in Iraq. The defense budget has gone up enormously since 9/11, which is fine. You know, we are spending all this money to fight this battle. But, you know, a few cases, a few judicial reviews are going to break the bank?

I would submit that having our credibility intact is every little bit as important in fighting this battle as making sure that we have our troops where we need them.

So with all of that said, the judicial review point that was made, I would like to ask the first two witnesses to comment on that. Why do you not think that this judicial review process, as was described, is adequate?

Now, my bias is that it is not, that habeas is, basically, as we have said, well-defined law. It gives you that clean look, whereas this is going to be necessarily restricted to a few things. I mean, the first thing that occurred to me was the whole, you know, innocence is not a bar to conviction thing. That basically judicially you just look to see if the process worked. Not if the process worked, sorry, but if the rules were followed. And if the rules were followed, then however bad the result may be, that is fine.

But I am curious on your thoughts on the judicial review process and why it is not an adequate substitute in this case for habeas.

Mr. OLESKEY. Well, first, because, as several speakers have pointed out among the Congress and here, coerced testimony, testimony procured by torture, can and apparently was admitted in the CSRTs and may stand on review by the Appeals Court.

Second, because as you just pointed out, Congressman, by specific command, the Detainee Treatment Act of 2005, the Appeals Court review is limited to reviewing the record. And Mr. Philbin says, well, the Appeals Court just said last week it can go to what would have been reasonably available, but that leaves out all kinds of evidence that an advocate would want a fact finder to have in the first instance and therefore on review, if that fact finder is going to say you can be locked up for the rest of your life based on this kind of limited review.

So it is a limited review. It ultimately will turn on what an Appeals Court says was or should have been reasonably available, so that is a limit placed by Congress. It is a limit placed by Congress to determine whether the procedures were followed, and those procedures were written by Paul Wolfowitz in seven days.

And as to the point about taking time and money, you know, there are 22,000 habeas reviews a year. We are talking about 375——

Mr. SMITH. At most.

Mr. OLESKEY. At most. And these are not new skills for these trial judges to learn. It is what they do. It is not what Appeals Court judges do. These are very smart, talented judges in the circuit here, they are very respected judges, but they are now being asked to do something by Congress that they shouldn't be asked to do in making these reviews.

Mr. SMITH. Mr. Keene, if you could just quickly, if you have any thoughts on the judicial review process versus habeas. I am asking you to respond to your thoughts on the judicial review process versus habeas.

Mr. KEENE. As I indicated earlier, as it was designed, the court was not to look beyond what was presented from the initial hearing. And this decision, the recent decision where the court says, well, we are going to look at what might have been reasonably available at the hearing level, is an attempt to fix that.

But going to the question of why do we need to do it this way rather than through habeas, I hear the objection that, well, the habeas route requires a lot of effort and judicial, all this stuff. And yet what we are trying to do is replace it with procedures, as the previous—as Mr. Oleskey pointed out—procedures where we lay the same responsibilities or similar responsibilities on people who haven't had to do that before when there is a whole process and a whole body of law and a whole way to do it.

And I just don't understand it. I have to tell you, I think your point—people understand because of the fact that the right to habeas corpus, the right to have somebody look at whether you ought to be where you are or whether there is a case that you should be there, is something that is understood worldwide, and people that don't have that right in nations that don't have it, wish they do. So why replace something that is one of the, from the beginning of our Nation, has been one of the things that we have been most proud of and one of the rights of our citizens that we are most proud of?

Even if you come up with something and name it something else which reasonably accomplishes the same thing, which we haven't, why would you do that?

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

I lay before the committee a letter dated July 25 this year by Karen Mathis of the American Bar Association and ask that it be placed in the record without objection.

[The information referred to can be found in the Appendix on page 233.]

The CHAIRMAN. And I also notice that several members are not present at this moment that came in before the gavel, so we will go to the list of after the gavel.

Mr. Jones.

Mr. JONES. Mr. Chairman, thank you very much.

I am not a lawyer. I think I understand the Constitution and the importance that each one of you have in your own way made reference.

I want to read a quote, then I think I do have a question.

General Matthew Ridgway, a great World War II general, wrote a book "Soldier, the Memoirs of Matthew B. Ridgway," in 1956. In it, he said, "To me, nothing could more tragically demonstrate our complete and utter moral bankruptcy than for us deliberately to initiate a preventive war. Once we take that absolutely fatal step, our civilization would be doomed. We would have to rely on conquests for survival from then on until our society crumbled as the empires of Alexander and of Rome crumbled from their own inner decay. In all the history of the world, no civilization based on conquest has long endured. America would be no exception."

When I think about Paul Wolfowitz, Richard Perle, David Wurmser, Douglas Feith and all these neo-cons that created the justification to go into Iraq, and I listen to learned men like the four of you on this panel today, I am offended. And I voted for this legislation, quite frankly. I am offended that we have to be here today to try to defend and protect habeas corpus, which as Mr. Keene said is the bedrock, one of the bedrocks of this Nation.

I just want to know when I hear each of you speak, and Mr. Philbin let me say that I have great respect for you and I don't disagree with you, but any time—and it should be debated and thoroughly analyzed by courts, what the Congress does, and there is no question about that. I fully agree with you.

But as was said by Adam Smith earlier, and said by many of you who spoke today, the world looks at America. We have been and I hope we can still be the great nation that people across this world have envied. But one of those reasons is because we have two sacred documents in this country that we revere. The Bible and the Constitution. And I do not understand how people who believe that they have been given a privilege to serve in the Congress, and we can all disagree on what the policies should be as it relates to terrorists and terrorism.

But my question is a simple question. I am not the intellect that my friend from Maryland, Mr. Bartlett, is. But the simple question is, how would you say to the average American, like myself, that this is critical to maintaining a strong America?

I will start with you, David Keene. I know you will probably be repetitive, each one of you, but I heard the colonel say that, you know, you were told to assume that it is true. I know that is military, but it is still wrong. We shouldn't assume truth. Truth should be true, just like the words of Jesus Christ.

David, would you try to give me an answer to what I am fumbling with?

Mr. KEENE. Well, I think the purpose here, to discuss the question of whether or not we should grant habeas corpus rights to those goes to the nature of what our country is. And as I said in my prepared remarks, I am not so concerned—it should be a concern of this committee and it should be a concern of our policymakers. But I am not so concerned about what others think of us as I am about what we think of ourselves and who we are.

And I urge the support of the chairman's bill to restore these rights precisely because I think it reflects who we are and who we should be.

The CHAIRMAN. I thank you gentleman.

Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman.

As you know, I am very interested in this subject having brought the Commissions Act Bill two years before this committee ever took it up. I also, as you know, have a bill out, H.R. 2543, the Military Commissions Revision Act of 2007, which would address the concerns, I believe by the Administration about giving unprecedented habeas access to war prisoners which, as Mr. Philbin said, has never been done before in the history of this Nation, and also the need for the executive to have his Article 2 power to conduct military and intelligence operations free from judicial interference, but also recognizes the gravity of the liberty interest involved, the ambiguous and unconventional nature of this conflict and the inadequacy of the CSRTs to ensure that mistakes and executive abuses are curbed.

So I would encourage members to take a look at that piece of legislation.

International law and the Supreme Court recognize the power of military commanders in warring nations to capture and to detain enemy combatants for the duration of a conflict. Historically, the U.S. has not extended the right of habeas corpus to alien enemy combatants held as POWs. In fact, in 1925, Johnson v. Eisentrager, these prisoners did not have a constitutional right to habeas corpus review.

And, of course, in 2004 the court said that enemy combatants held at Guantanamo Bay, Cuba, did have statutory rights to habeas review, but that decision was, of course, pretty much mollified by the MCA last year.

So my question to you is, if you can write some of these down because they are detailed. I want to ask the panel, do you believe that enemy POWs or detainees have a constitutional right to habeas? And if so, what is the basis of your view? What limitations would such a right have? And if so, why was the court wrong in Eisentrager? And would you favor the statutory right of habeas corpus to apply everywhere, to all enemy POWs?

For example, would you have granted it to Iraqi prisoners captured in Kuwait during the first Gulf War, go to into the federal courts in D.C. and to challenge their capture on the battlefield? Would you have permitted German POWs captured in North Africa or Sicily in 1943 the right to challenge their internment through habeas?

And if we could start down at the end.

Mr. OLESKEY. I will be happy to start, Congresswoman.

Johnson and Eisentrager, the case at the end of World War II, involved prisoners who had been through military commissions with lawyers and trials. Evidence was taken. It was a regular procedure that you have some confidence in. And the Supreme Court looked at that and said we will examine whether habeas should apply to German prisoners who did acts in China, who are held in an allied war prison in Germany. We don't think that habeas should extend that far. It never has. So it didn't go any further.

And then in the Hamdi and Rasul cases, as you say, in 2004, they looked at the people in Guantanamo and said, you know, this is, under that lease that the United States had since 2001 that gives us a unilateral right to be there, this essentially is part of the

United States. These people didn't get the screening the POWs get under Geneva or Army Regulation 19080 on the battlefield, unlike what happened in the first Gulf War or in most other wars that I am aware of.

Therefore, there needs to be some process put in place now.

Ms. SANCHEZ. But now we have the MCA. Do you believe that they have a constitutional right to habeas now that we have the MCA?

Mr. OLESKEY. The Supreme Court has said in some cases that fundamental rights under the Constitution can extend outside of the continental United States. It addressed in the Rasul case in a footnote that has been much discussed, it said if what these men are alleging is found to be correct, it would make our conduct in violation of the Constitution, statutes or laws of the United States. That is as far as the Supreme Court has gone.

My own view is that the right to be free from indefinite imprisonment without a hearing is so fundamental. It is in the Constitution, it is right there, the framers put it in Article I, Section IX.

Ms. SANCHEZ. And it applies to United States citizens and those people within our boundaries. But would you extend it to Sicily? Would you extend it to a war in Iraq? And after you answer that, I really need to move on. I want to hear the other opinions.

Mr. OLESKEY. I am only advocating today for this bill, which does not extend it to those places, does not extend it to battlefields, talks about restoring habeas for Guantanamo, where my clients are.

Ms. SANCHEZ. Anybody else?

Mr. KEENE. I am not going to speak to the constitutional history, but I will suggest that there are some differences.

I wouldn't extend it as a matter of policy to battlefield POWs and the like. Many of the people that are being held at Guantanamo, like your clients, were not picked up on the battlefield, scooped up by American troops. Many of them were picked up on vague suspicion. Some were in fact turned over to us by tribes that were collecting bounties for doing it.

And then what makes matters worse is then we have a situation in which we are not holding them until an emergency in historical terms is over, but we can hold them forever in essence because the war on terror could go on forever. And that I think qualitatively changes the situation and is why the chairman's bill addressing those kinds of prisoners in that location is worthy of support.

Ms. SANCHEZ. I would just say read my bill, because it addresses that also.

And, Mr. Chairman, if you would indulge me Mr. Philbin's comment, I would like to hear it.

The CHAIRMAN. Mr. Philbin.

Mr. PHILBIN. Thank you, Mr. Chairman.

I will just make two brief points. I do not believe that aliens outside the United States have a constitutional right to habeas. I think the Supreme Court got that right in Eisentrager. And the Eisentrager decision was not based in any way on the fact that there had been military commission proceedings. It was based on a fundamental assessment of whether constitutional rights extended extraterritorially to aliens.

And in the 1990's, the Supreme Court emphasized, and I am quoting, "Our rejection of extraterritorial application of the Fifth Amendment was emphatic in Eisentrager." It had to do with extraterritorial application.

And in terms of extending habeas all around the world, certainly it would not extend habeas to detainees or POWs outside the United States, but I think that the committee should be aware that there is a very real risk in H.R. 2826 that by excluding simply active combat zones, that bill could create a negative implication that anything that is not an active combat zone, and who knows exactly what that is, anywhere else in the world, habeas does apply. It will have that negative implication of extending habeas, and I think that is a serious problem with the bill.

Ms. SANCHEZ. Thank you, gentlemen.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. McHugh, now.

Mr. MCHUGH. Thank you, Mr. Chairman.

Gentlemen, welcome. I appreciate your comments.

I want to play a little bit off of what the gentlelady from California was pursuing, but I would like to start with Mr. Philbin. You said something pretty emphatically. You stated that the process and the review and such under our current system, the CSRTs as well as the MCA, give rights that are, "unprecedented in the history of warfare."

I assume I can deduct and deduce from that that you feel that our obligations as a lawful and as a respectful country are being fully met as defined under the third Geneva Convention for enemy combatants. Is that true?

Mr. PHILBIN. That is true. In particular because the third Geneva Convention doesn't apply to al Qaeda. Al Qaeda is not a signatory, so al Qaeda combatants have no rights under it. And for Taliban detainees, they don't have status as POWs.

Mr. MCHUGH. Well, that was actually going to be my next question. I appreciate your prescience.

Therefore, the fact that you just defined these are not signatories, they are not technically covered, yet we extend at least equivalent rights, would kind of suggest we are more than meeting what most nations on this earth would consider our legal obligations, true?

Mr. PHILBIN. Yes, sir, that is true.

In fact, we are going beyond. If we were in a conflict with another signatory and detained people outside the United States and gave them POW status, they would have no right to access U.S. courts.

Mr. MCHUGH. Two other things. I assume one of the reasons we encourage people to participate under the Geneva Conventions is that there will be some semblance of rule and some semblance of propriety in warfare. My understanding is that if this bill were to be enacted and if those who are detained currently at Guantanamo extended the rights, the rights would actually be duplicative.

In other words, there is nothing in the bill before us that in any way takes away the current CSRT and MCA process but in fact

layers another process of appeals and habeas corpus review. Is that true?

Mr. PHILBIN. That is my understanding, yes.

Mr. MCHUGH. Would we not, in your language of creating sort of a perverse incentive, would we not therefore almost be encouraging people not to abide by Geneva, to in fact participate in this kind of unlawful combat and hopefully get sent to Guantanamo? They would actually have better protections than those afforded under the rules of standard warfare?

Mr. PHILBIN. Well, it would be backwards, yes, sir. Because we would be providing more process to those who are unlawful combatants than would be provided to those with POW status under Geneva.

Mr. MCHUGH. Thank you very much.

Mr. Keene, I noted in your very impassioned plea about restoring habeas rights, and that was the word you repeated used, restoring habeas rights. You also used the comment, "Those are the things that we have always provided to our citizens," and those were your words, "our citizens."

You are not arguing that we somehow on these detainees stripped them for the first time of rights of due process and such and that they are citizens of the United States?

Mr. KEENE. No, Congressman. I was referring to the fact that the court had statutorily suggested that there were habeas rights extended there until it was removed by the Military Commissions Act. And my reference to our citizens was that habeas is one of the things that we have always valued in this country for our citizens. I did not mean to confuse those two.

Mr. MCHUGH. So I take it from that that you don't take exception or disagree with Ms. Sanchez's comments that the provision of habeas rights would be revolutionary in our history, we have never done that before?

Mr. KEENE. I would not support extending it, as the examples she was giving, to battlefields, to everybody outside the United States.

I think that the situation that we face with these people in that location, because of all of the contingencies that we know about, the fact that they can be held there forever, the fact that they were not captured, many of them, on the battlefield, and extending habeas rights there, where the question is not whether you can hold without these rights enemy combatants, the question is whether they are. And that is the threshold question that is not being answered under the current process.

Mr. MCHUGH. I thank the gentleman.

Mr. Chairman, with your forbearance, and I would use as precedent I think every other member here has gone well over, I appreciate the comment.

I just, for the record, I am very concerned that there have been statements from the witness panel today that somehow the United States, and by suggestion this Congress, supports torture and that torture is part of that. The fact of the matter is, the MCA expressively and very clearly excludes the admission of any statement or evidence by torture, a statement attained by the use of torture

shall not be admissible under military commission under this chapter.

So I understand the passion that is involved here, but I think when you start accusing the United States of formally using torture in a process and, by rote and by suggestion this Congress of formally endorsing torture, it is just not correct.

Mr. KEENE. If you are referring to my testimony, I never used the word torture and never talked about it——

Mr. MCHUGH. I am not asking. That is not a question. With all due respect, Mr. Keene, that was not——

Mr. KEENE [continuing]. And it has nothing to do with what I had to say.

Mr. MCHUGH [continuing]. Your question. It was my statement.

The CHAIRMAN. Thank the gentleman.

Mr. Andrews from New Jersey.

Mr. ANDREWS. Thank you, Mr. Chairman.

I thank the witnesses.

I think the meaning of the suspension clause of the Constitution is that absent some emergency limited circumstances, this country will not be a party to a situation where any person can be held indefinitely without being confronted with the charges against him or her so there can be some fair and just resolution of those claims.

And so, Mr. Philbin, I wanted to explore with you your conclusion that the procedures that have been set up under the CSRTs are a sufficient guarantee that such procedures are in place for the detainees that we are discussing here today.

Is there any provision in the law or regulation that sets up the CSRTs for competent and effective counsel for the detainees?

Mr. PHILBIN. There is not a provision for legal counsel, no. There is a provision for——

Mr. ANDREWS. So a personal representative, which I think is the phrase that you use, need not be a lawyer, correct?

Mr. PHILBIN. Correct.

Mr. ANDREWS. Need not be a competent lawyer, if the person is a lawyer, correct?

Mr. PHILBIN. Well, it is not defined in terms of legal ability.

Mr. ANDREWS. So the person could be a person who is trained to process paperwork, for example, correct? That could be the personal representative, who doesn't know the law.

Mr. PHILBIN. It is a military officer who is not necessarily trained in the law.

Mr. ANDREWS. Okay. Under the provisions that are set up for the CSRT, is a detainee permitted to see evidence that would be used against him subject to some in camera limitation or emergency limitation? Can they see all the evidence that is going to be used against them?

Mr. PHILBIN. I believe that they cannot see the classified evidence.

Mr. ANDREWS. Well, isn't the phrase they can see written summaries of the evidence that is going to be used against them?

Mr. PHILBIN. I don't recall the exact phrasing of the rule.

Mr. ANDREWS. It is the phrase that I think is used in your testimony.

So if a detainee were held because of a hearsay report of someone in Bosnia, for example, the detainee would not know who the person who made the hearsay statement was, necessarily, would he?

Mr. PHILBIN. I am not aware exactly how the rules are applied, sir. I believe that that is possible. But if I could go to——

Mr. ANDREWS. I think Mr. Abraham has given us a very detailed description of how the rules are applied. My understanding is——

Mr. PHILBIN. Well, in some circumstances. But if I could go to the basic——

Mr. ANDREWS. Well, no, I would prefer that you answer my questions.

Under the procedures that were set up on the CSRT, is the right of the detainee to confront witnesses in the proceeding guaranteed?

Mr. PHILBIN. I believe that he has a right to call witnesses who are reasonably available and may not be able to confront all witnesses because of security or classification or other restrictions.

Mr. ANDREWS. Well, and under habeas proceedings, isn't it true that if there is a witness that might disclose something classified or sensitive, there would be an in camera proceeding in front of a judge, where the competent lawyer representing the person who is the subject of the habeas petition would have a chance to confront the witness in that limited setting? Isn't that right?

Mr. PHILBIN. That is not necessarily true. I think that if you are talking about a habeas proceeding in a criminal case in the United States, where all of the constitutional protections that are attached to criminal prosecutions apply, that might be the case. But for a habeas proceeding coming out of the detention of an enemy combatant, it is not clear what rules will be applied.

And this goes back to something that is fundamental to what we are discussing here, which is whether or not there are constitutional rights that bring the suspension clause into play. And I don't think there are constitutional rights for enemy combatants detained at Guantanamo.

Mr. ANDREWS. Well, of course, sir, that is—higher authorities than you or me are going to litigate and decide that question of what the suspension clause means.

I wanted to ask you about the review. You put great credence in the review that takes place in the D.C. Circuit, but that review is based on the record that is created below by the CSRT, isn't it?

Mr. PHILBIN. I don't think that is accurate, sir, because of the decision just last Friday in Bismullah. The government had argued——

Mr. ANDREWS. I understand that decision. I understand that it says that all the evidence that was available to the tribunal has to be made available to the Court of Appeals. But of course, that is evidence that has not been vetted through the process of confrontation of witnesses. That is evidence that has not been vetted through the process of discovery. There is a difference between evidence and documentation. That is the essence of our adversarial system.

So I respectfully disagree with your conclusion and I would yield back.

Mr. PHILBIN. Well, sir, you are correct that it is not the way things are handled in our adversarial system. Our adversarial sys-

tem was developed for criminal law. These are not criminal prosecutions. This is fighting a war.

The CHAIRMAN. Thank the gentleman.

Mrs. Drake.

Mrs. DRAKE. Thank you, Mr. Chairman.

Gentlemen, thank you for being here.

I have to start by saying I think Congresswoman Sanchez really summed this debate up very well and what divides this discussion in my mind is whether or not you think an enemy combatant who is captured on a foreign battlefield, a person who has sworn to kill each and every one of us, is covered by the U.S. Constitution. And I personally do not believe that they are.

Now, reasonable people can disagree, and we have heard that disagreement here today, but I truly do agree with Congressman Saxton and his assessment that we have not given these laws an opportunity to work, and this discussion may be a little bit premature.

But what I wanted to ask about, and to me it is really apparent and I think to everyone, that our terrorist enemies are really adept at public relations, much better than we are. They have proven quite capable of using the World Wide Web to promote their message, their hate, and to recruit others to their cause.

So the question is if additional rights are extended to unlawful enemy combatants, would you agree that this would greatly assist their efforts to recruit other people to their cause?

And the second question I have is if we do extend habeas rights to unlawful enemy combatants, what would be the expectation for our military at that point? Are they now going to be charged with collecting evidence? Are they going to have a dual role as a warfighter and as a police officer to compile this information? And so what would their role be?

So those two questions, what impact it will have on what appears to be the success of our enemy, and we all know from previous NIE reports that the one thing that will destroy them is if they believe and the world believes they are losing. And I think this argument would give them the opportunity to think that that is one more thing they are winning on.

Mr. OLESKEY. Congresswoman, let me start off on that.

The issue of the rights extension troubles me because I have been to Guantanamo 9 times personally, my firm has been 11 times. I have seen what happened to my clients there in the early years. I have seen my client has been in solitary confinement for 14 months, 24/7. I have seen my client has he is trying to commit suicide right now because he thinks that is the only thing that he has left that he has any control over. And the notion that any of these people would want to go there and be held as they are held, even my clients who are not now in solitary confinement, I just think is a nonstarter.

As Mr. Keene has said repeatedly, we are not talking about people in most cases who were found on the battlefield. Five percent of them were. We are talking about people who were not found on battlefields and the very question or the issue is are they unlawful enemy combatants or not. And we need a fair process to resolve that.

In terms of the second part of your question, what the military obligations will be, if the military had been allowed to do what it has done in every other war, as to the five to eight percent found on the battlefield, and made screenings then of whether they were lawful or unlawful combatants, we probably wouldn't have this today if the Administration hadn't decided back in 2001 that it would be a great idea to put people in Guantanamo, because then the Eisentrager case from 1945 could be cited as precedent where they wouldn't have any right to habeas, even though habeas goes back to the Magna Carta and aliens got habeas in the New World, before the Constitution, then we wouldn't be here today.

So that is my answer to your questions and I hope I am responsive.

Mrs. DRAKE. Mr. Philbin, would you like to answer?

Mr. PHILBIN. Sure. I think that in terms of how it would affect al Qaeda, I am not sure that it would affect their ability to recruit more members, but it would be helpful to them, particularly in training operatives for resistance to interrogation.

We know from captured al Qaeda manuals that they are trained to exploit what they perceive to be the weaknesses provided by our legal system in order to resist interrogation. And the more it is apparent that they will have access to courts and will have access to lawyers, that is something that they can train for and use to resist interrogation when captured.

I think that in terms of how it would change the military's role, it depends on how broadly habeas is provided. And I think there are dangers in the current proposal, H.R. 2826, that it would go well beyond just Guantanamo and you would just be burdening the military. You know, there are already attempts to have habeas petitions, I believe, in Iraq and in Afghanistan, and you could end up, you know, as Mr. Oleskey said, his firm has been down to Guantanamo 11 times. Lots of other firms have been down there lots of times. You could have lawyers going to bases in Iraq and Bagram, Afghanistan, and diverting the military, just as the court warned in Eisentrager, from its mission.

Mrs. DRAKE. Thank you, Mr. Chairman.

I yield back.

The CHAIRMAN. Thank you.

Before I call on Mr. Loebsack, Mr. Abraham, true or false, coerced statements are allowed in CSRTs as has to do with continued detention.

Mr. ABRAHAM. I am sorry, sir, I didn't hear the question.

The CHAIRMAN. Coerced statements are allowed in CSRTs as it has to do with continued detention, on the one hand, as opposed to the military commissions which are for the purpose of prosecution and finding of guilt under a crime. Is that correct?

Mr. ABRAHAM. It is true, but fundamentally flawed in the question asked. Through the process——

The CHAIRMAN. My question is flawed, Mr. Abraham?

Mr. ABRAHAM. Forgive me, sir. It presumes that in the CSRT process——

The CHAIRMAN. Wait a minute. How would you rephrase the question, Mr. Abraham?

Mr. ABRAHAM. Well, what I would have asked is, "In the CSRT process do you know anything about how you got the information?" It is an important first question, because while it is true in the commission process, in the trial, the war crimes trials, that coerced statements, the fruits of terror, may not be used, none of these are issues that we can retrospectively examine properly nor could even have answered through the CSRT process.

You have to understand, the documents that the individuals saw, not only the recorder who summarized documents given to him by report writers, but that the board saw, were heavily redacted. They were excerpts. They were summaries. You didn't know where it came from in large part, whether it was the product of coercion, and in fact the only thing that you would know and the only remarkable document would be one where it was explicitly noted "the detainee said." So you knew a source, but you didn't know how that information had been obtained.

Mr. MCHUGH. Mr. Chairman, will the gentleman yield for a moment?

The CHAIRMAN. You bet.

Mr. MCHUGH. Thank you.

I have great respect for the chair and my point, because I believe your comment was directed to the comment or the reading I made, was that several of the witnesses, contrary to Mr. Keene's objection, I never mentioned that it was his statement, I want him to be clear on that. I didn't accuse you of that.

But witnesses today have said very affirmatively, as have members of this panel, that torture, I didn't use the word coercion, nor does the MCA, torture was being used. And I think that is an important point that needed to be clarified.

So my point was to torture, Mr. Chairman, as it applies in the MCA.

The CHAIRMAN. Thank you, sir.

Mr. MCHUGH. I thank the gentleman for yielding.

The CHAIRMAN. You bet.

Now, Mr. Loebsack, maybe you can ask a clearly defined question of the panel. Mr. Loebsack.

Mr. LOEBSACK. Not being a country lawyer or any kind of lawyer, I am not sure that I can do much better, but thank you, Mr. Chairman.

And not being an attorney, this is all very interesting to me, but I want to move away from some of the, I guess, the legal aspects of what we are talking about, because I have a grave concern, as others on both sides of the aisle have expressed today, about the reputation of the United States and what all of this has done to the reputation of the United States.

I just want to begin by mentioning a "Meet the Press" interview where Colin Powell was present on June 10, 2007. And for the record, I ask unanimous consent that we put that transcript in the record. Is that okay, Mr. Chairman? Thank you.

Colin Powell was asked about Iraq by Tim Russert and in the course of that discussion Colin Powell mentioned a letter that he had sent to Senator McCain and he is quoted as saying, "The world is beginning to doubt the moral basis of our fight against ter-

rorism." And also I would like to put that letter in the record, if I may as well ask unanimous consent.

The CHAIRMAN. Without objection.

[The information referred to can be found in the Appendix on page 235.]

Mr. LOEBSACK. Thank you.

Colin Powell went on to—he was asked about Guantanamo, among other things, and he went on to say, "I would simply move them," talking about the prisoners, "to the United States and put them into our federal legal system." The concern was, "Well, then they will have access to lawyers, then they will have access to writs of habeas corpus. So what, let them. Isn't that what our system is all about? And by the way, America, unfortunately, has two million people in jail, all of whom have lawyers and access to writs of habeas corpus."

And then he goes on to conclude, "And so, essentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like the Military Commission. We don't need it and it is causing us far more damage than any good we could get for it, but remember when I started in this discussion saying, "Don't let any of them go," put them into a different system, a system that is experienced, that knows how to handle people like this."

In other words, Colin Powell, like I think everyone on this panel and everyone on this committee, is concerned, obviously, that we are at war with terrorists, and that we have to do what we can, of course, to protect American interests. But at the same time, part of America's interest has to do with values, as has already been mentioned here. We talked about—many of us have talked over the course of American history about America as an exceptional nation. Ronald Reagan talked about that and "Beacon on the Hill" with John Winthrop back in the 1600s.

And I think a lot of us have the concern that what is happening with Guantanamo and by withholding habeas from these prisoners, that we are not a beacon on the hill around the world. Now, some will say that is fuzzy thinking, that is naive, what have you. But I would submit that it is in fact a vital American interest that we maintain our reputation, because we do need, whether we like it or not, cooperation of countries around the world to fight this war and to protect our vital national interests as well.

So I just have one question for Mr. Philbin, when, in December, he wrote this letter to John Yoo, or this memorandum, that was in December 2001, and you mentioned the Eisentrager case that has been mentioned here a number of times, and you talked about Guantanamo and how none of this applies to Guantanamo because it is outside the sovereignty of the United States, and I realize that the Justice Department doesn't deal in foreign policy.

But did anyone think about at that time the consequences for America's reputation when you were discussing these issues? And did anybody in the Administration that you know of, and I will ask witnesses of the next panel the same question, but did anybody give any consideration to how this might affect our reputation and our standing in the world?

Mr. PHILBIN. Well, sir, let me just correct one item for the record. It was a memorandum co-authored by John Yoo and myself——

Mr. LOEBSACK. I apologize.

Mr. PHILBIN [continuing]. Which we addressed to the Department of Defense (DOD). We were just addressing a legal question and I couldn't go into policy discussions in any event. I think that is a question better asked of the Administration witnesses.

Mr. LOEBSACK. I will ask Mr. Keene, because you said that, you know, you weren't quite as concerned, but that you were concerned, obviously, about the United States and our citizens and who we are. But are you at all concerned about our reputation as well around the world?

Mr. KEENE. Of course I am, because America has always stood for something special to the people of the rest of the world. What I am merely saying is that my real concern is not about what others think about us. That is something that should be of particular concern to this committee because of your mission and responsibilities.

But my concern is us, not them and not what they think, but what we think and what we are.

Mr. LOEBSACK. Thank you.

Mr. PHILBIN. If I could add one further comment, I certainly agree with you that it is important for the United States how the United States is perceived around the world, because we do need allies. But I believe that a fundamental problem many countries around the world have with the United States is the basic war paradigm that we have used for handling the conflict with al Qaeda, treating it as an armed conflict. And it is not just habeas, and habeas is not going to solve the problem that the rest of the world has, of those who have a problem with us, with the way we are handling the conflict.

Mr. LOEBSACK. Thank you and I yield back.

The CHAIRMAN. Thank the gentleman.

Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

And thanks to the witnesses for being here.

It has been a tremendously interesting discussion today, whether or not you are a lawyer, and I hasten to say that I am not, like my friend Mr. Loebsack.

It seems to me that we are fundamentally trying to answer the question whether we are in a war paradigm, a law of war paradigm, or a criminal paradigm as we look to whether or not we should grant habeas rights to enemy combatants for the first time ever.

I would just like to make a comment. There has been a lot of discussion about the Constitution. I firmly believe that every member of this committee has a great love for the Constitution. We are all of us sworn to uphold and defend that Constitution and I believe that we are trying to do so to the best of our abilities.

One of the issues we have discussed quite a bit is this issue of CSRTs that has been folded into this discussion. And so Colonel Abraham, Mr. Abraham, you are the expert witness here and I would like to ask a series of questions here so we can better understand your level of experience and expertise, if I can do that.

So I would just like to go through these and have you answer as quickly as you can, please.

In your opening statement, you have a discussion about what was done by case writers, those people whose job it is to gather information. Were you ever a case writer?

Mr. ABRAHAM. I worked close with the case writers.

Mr. KLINE. You were not a case writer?

Mr. ABRAHAM. I did not physically write many reports.

Mr. KLINE. Thank you, sir.

Your statement also discusses what members of quality assurance teams do. Were you ever a member of a quality assurance team?

Mr. ABRAHAM. No, I was not.

Mr. KLINE. You were not a member. Thank you.

Mr. ABRAHAM. Correct.

Mr. KLINE. You were an intelligence liaison as I understand it. Can you give us some idea of how many times you visited intelligence agencies?

Mr. ABRAHAM. Three to four times I physically went to one particular agency. And on many other occasions I communicated directly with those agency representatives.

Mr. KLINE. Three or four times. Thank you very much.

There were, according to my notes here, panels—there were a number of duties that people could perform, recorder, personal representative, convening authority, legal advisor. Were you ever any of those?

Mr. ABRAHAM. Well, I was in fact a member of a tribunal. I was thereby prohibited from serving in any of the other positions.

Mr. KLINE. So you were a panel member?

Mr. ABRAHAM. I was a panel member.

Mr. KLINE. Okay. My notes here show that we have had 558 CSRTs conducted. How many of those were you involved in? How many panels were you on?

Mr. ABRAHAM. I was on one panel that heard one detainee's case.

Mr. KLINE. So I appreciate that that brings a perspective, but we are looking to you for information about this entire process and you have served on one panel out of 558 in a role as a panel member where you were precluded from these other things and you weren't a case writer and you weren't on the quality assurance team.

So I don't doubt that you paid close attention and you are reporting accurately on your participation, but it seems to me that this is not the depth and breadth of experience that we probably ought to be hanging our decisions on. Why do you feel qualified to tell us about the entire process with what appears to be a fairly limited participation?

Mr. ABRAHAM. If I may, sir——

Mr. KLINE. Please. It is a question to you.

Mr. ABRAHAM. Thank you, sir.

The questions that were asked do not necessarily reflect the totality of the experiences that I had. Specifically, you asked me if I was a case writer. Case writing was the responsibility of many individuals who were assigned there, very few of them having any involvement in intelligence activities or intelligence products.

One of the things that I did as a qualified intelligence officer was work with each of those case writers as questions arose, as the circumstance dictated, explaining to them the type of products that they were reviewing and, in fact, dealing with them on questions of the very products they were reviewing.

In that regard, then, I saw not just one file or one detainee's file but more than 300 files and thousands of individual documents.

Mr. KLINE. Excuse me. What did you do most of the time? What were the majority of your duties?

Mr. ABRAHAM. The majority of my duties——

Mr. KLINE. Were you involved with the tracking system or what was your principal function down there?

Mr. ABRAHAM. Well, sir, I had three functions, neither of which I don't think anybody could describe as being principal.

One of them was to individually track every step of the process for the detainees that were being tracked between September 2004 and February 2005. So what I literally did, if I may, sir, was I generated the letters that gave notice to the detainees that they were going to have a hearing within 30 days. I generated the letters that were sent out to the various ambassadors, to the Department of State, to the intelligence agencies, asking them to begin to review their files. I generated the letters that were used to identify the individuals that were going to be put on the panels.

Mr. KLINE. Excuse me. So most of your time, you were writing letters?

Mr. ABRAHAM. No, sir.

Mr. KLINE. Or were you participating in panels? I mean, what concerns me, I know that somebody has to track. There has to be a tracking system——

Ms. TAUSCHER. Will the gentleman yield?

Mr. KLINE. I would be happy to yield.

Ms. TAUSCHER. Mr. Kline, I am much more interested in understanding about habeas corpus than I am in having you impeach this witness.

Mr. KLINE. Thank you.

Reclaiming my time, this issue of CSRTs was brought up by the chairman by bringing this witness, and I think we need to understand better what the witness' level of experience is, because his testimony is relevant to what the chairman wanted to do.

I yield back.

The CHAIRMAN. Before I yield to Mr. Sestak, let me ask the witness, was there any command influence, in your opinion, on your work in CSRT?

Mr. ABRAHAM. Yes, sir. There were two aspects where command influence came directly to bear, again, in my perspective and based on my experience.

The first related to one of the what I believe was highly significant tasks that I was charged to do. Following the opinions of the courts as were then applied in the practices of the CSRT process, through OARDEC, I was specifically charged to go certain intelligence organizations, whether physically, directly, or through communications, and validate the existence or nonexistence of exculpatory information.

As a part of that process, I also reviewed the thousands of documents that were included with many of the tribunal packets. I immediately advised my seniors, senior leadership, the deputy director of OARDEC and the director of OARDEC, that, one, when I went to the agencies I was not only frustrated but prevented from seeing or knowing the extent or even the existence of exculpatory evidence. That to my mind was a mission show stopped and I was dismissed by the comments.

Second, as related to the documents themselves, I raised frequent concerns with the individuals who asked me about the documents, the individuals who used the documents, regarding their substance, the so-to-speak logical leaps that were included in their superficial oftentimes review or review of incomplete documents. I expressed these concerns. These were dismissed.

Finally, when I was on a tribunal, yes, sir, one tribunal, all three members said this is not even evidence. We were told, go back and do it again.

And if I may address a prior question that was asked of whether or not these practices followed a procedure or whether they were just individual string, in fact if you look at the CSRT implementing guidelines, they very specifically say that no matter what we find it is little more than a recommendation to the director of OARDEC, who can choose to accept or reject it.

It was that rejection to my mind was the paramount and clearest expression of command influence that I could have seen in the entirety of the time that I was there.

The CHAIRMAN. Thank the gentleman.

Mr. Sestak.

Mr. SESTAK. Thanks, Mr. Chairman.

Listening to today's discussion does give me concern why we don't have habeas corpus. I remember being at the U.S. Naval Academy and they gave us a book to read, "Military Justice is to Justice as Military Music is to Music." Obviously, it was a critique of the uniform code of military justice.

But I was taken, when I read it, in this profession that I was about to embark on for 30-some years, in the middle of a war, Vietnam, that how we try to instill the dignity, even in a war, the dignity in danger by the rule of law, not of command influence.

I then ended my profession having walked through Kuwait in another war and discovering that there were 50,000 individuals there that have nowhere to go because when Kuwait was established you had to find your lineage to a certain number of family, and if you couldn't, you couldn't leave Kuwait but you couldn't be a member of Kuwait. So they are the ones you see along the road selling rags and stuff. They have nowhere to go. No law to resort to, no court.

So as I stepped back, I was taken in warfare that we always wanted to have still the rule of law. And I looked at Kuwait and it just reminded me that down here in GTMO, Guantanamo Bay, we actually are holding men on trial for how long? Until a man decides, not the rule of law. And as I look at how the CSRT was originally established, it is a man, not a court, that decides whether statements of coercion, however anyone wants to describe that, are actually—statements that are actually a result of coercion and if there is value to them.

So as I step back, I am concerned for three reasons. Mr. Keene, you stressed the first for me. What was I fighting for? Everybody knows when you are out there in combat you are fighting for the guy beside you. But for this Nation, you are fighting for these ideals.

So two questions, since they have gone back and forth on almost everything. If this really is, sir, for you such an important issue, why only GTMO? Habeas corpus is so simple. You talked about the great right in the 14th century. All it is is for an individual to go have the government order a court to tell a warden the legal authority for detainees. Why only GTMO? Why not elsewhere?

And sir, for you, I was taken by your comment, it is disruptive. Mr. Oleskey, please for that first. You kept coming back, why set a second system up, because it is disruptive. I have seen a lot of disruptive things in my career, but to have that as the basis for why not beginning with a system that has already established, habeas corpus, which you may not agree goes to an individual, but I do think the suspension clause is important.

Somebody, as Mr. Andrews said, higher will decide. But here we have taken a judiciary, in my opinion, and deprived it of the jurisdiction over law which the Constitution gives it.

Tell me why disruption, a second system, has anything to do with the concern of starting out initially with what was already given by this Nation, the rule of law by habeas corpus. Sir, could you answer that, first, Mr. Oleskey. Why not have habeas corpus for wherever the U.S. Government detains people? Why only in GTMO?

Mr. OLESKEY. Which one of us are you addressing?

Mr. SESTAK. You. Yes, sir. You. You touched upon it but you never went over.

Mr. OLESKEY. I am a lawyer, so I generally argue and respond in terms of the law as I have understood it and as it may evolve. The law as it stood has been that habeas corpus can be extended beyond the United States in some instances.

What the Supreme Court has been grappling with are some of the issues that we have been talking about today, which is where is it appropriate to extend the writ. Thus far, it has been extended to the Philippines in limited cases and in other dependencies and now to Guantanamo.

As a lawyer who advocates for personal liberty, I would be willing to see the process more broadly extended. As a lawyer advocating for clients in Guantanamo, I make the case for my clients within the bounds of where the law has been. The law has been that they are entitled to habeas since Rasul in 2004. I just want that process to go forward.

I know that the Court of Appeals under the Military Commissions Act and the DTA doesn't have the power to release people, even if they disagree with what the CSRTs did. They can apparently just send it back for another round of CSRTs and we are right back in what Lieutenant Colonel Abraham was talking about.

A habeas judge can release people he determines who have been held for five or six or seven years, which is what we are getting to, who shouldn't be kept any longer without trial or charge.

So within those bounds, as an advocate, that is where I come out. I take your larger point, but it goes beyond what I am here to advocate for today.

Mr. SESTAK. Sir?

Mr. PHILBIN. I think that we fundamentally disagree on whether or not there are constitutional rights—of the privilege of the writ of habeas corpus. The privilege of the writ does not extend to aliens outside the United States.

In getting to your question about disruption and why is that a basis, that the law all along until Rasul for the Nation's entire history has been that when the Nation conducts military operations overseas and seizes people in military operations, they are not entitled to the writ of habeas corpus. Over 600 attempts to get writs of habeas corpus after World War II were turned down by the Supreme Court and the big opinion that explained why was Eisentrager and it said rights do not extend to aliens outside the United States.

And that explained part of the reason that that makes sense, a practical reason that the Constitution is structured that way, is that it would be a great hindrance to military commanders in the field who are trying to subdue an enemy.

Mr. SESTAK. I am out of time, but I meant with GTMO, why would it be disruptive?

Mr. PHILBIN. It has been disruptive with GTMO. When——

Mr. SPRATT [presiding]. We need to move on to the rest of the members here today, if you will wrap it up in a sentence or two.

Mr. PHILBIN. The habeas actions were disruptive in the amount of control that petitioners wanted courts to exercise over access to GTMO and conditions there, and I think Congress responded responsibly by providing judicial review through a mechanism that is less disruptive to the military operation of GTMO but that still provides Article III court review.

Mr. SPRATT. Mr. Wilson of South Carolina.

Mr. WILSON. Thank you, Mr. Chairman.

As I hear the discussion about military law, I served 31 years in the Army National Guard, 28 years as a Judge Advocate General (JAG) officer, and I have always been impressed by the people serving in the JAG corps, their professionalism, their efforts to be fair. I have heard criticism of the military code of military justice, but in each instance that I have had the opportunity to proceed with the code and work with the code and work with Guard and military members, I have just been so impressed by fellow JAG officers and the code and the whole system of military justice.

And additionally, I have visited Guantanamo Bay twice. I was very impressed by the military personnel there, the intelligence personnel. We had full briefings. We had full access. It was incredible to me to see through interrogation the information that was received which uncovered terrorist cells in Europe, in the Middle East, in the United States. It was incredible the information that protected and saved, I think, thousands of lives of determining techniques of recruiting, the extraordinary ability to finance attacks on the United States, attacks on other countries around the world.

And all of this because of the ability we have had of detaining people who have every desire and intent to kill all of the American public.

As I look at this and look at the bill before us, Mr. Philbin, I am very concerned that there are legal landmines present in what we are discussing. And in particular, that habeas corpus for alien combatants would not apply for persons who are in a zone of active combat. And the question would be, does that include Iraq and Afghanistan, all of Iraq and Afghanistan?

Mr. PHILBIN. I think that that is a difficult question and that is a problem, in my view, with the bill, because the term is not defined what is an active zone of combat.

And what will happen in litigation, people have already filed and others will file petitions for habeas corpus for persons held in Iraq or at Bagram in Afghanistan, and then they will start to argue in the courts about what does an active zone of combat mean.

And there are probably other provisions in the U.S. Code that will refer to zones of combat. I am not specifically sure, but for purposes of combat pay or other reasons, and they might be defined in a certain way and they might be only zones of combat but not active zones of combat. And then that will be a way for lawyer to say, well, even if DOD considers all of Afghanistan a zone of combat for one reason, it is not an active zone of combat under this provision.

If there is going to be a carve out that works and is intended to ensure that habeas petitions are not entertained from Afghanistan or from Iraq, it ought to be a much more well-defined provision. And as I pointed out in my prepared statement, there is also the concern that under the laws of war, generally commanders are required to remove prisoners from the zone of combat. That is the term used in the third Geneva Convention.

And while that convention doesn't specifically apply here, the general presumption under the laws of war is that you must take those that you detain out of the zone of combat. There is an argument for lawyers to make that anywhere they are held is not part of the zone of combat and that habeas therefore would apply.

So those are big dangers, big unknowns with using that language in this bill.

Mr. WILSON. Additionally, I have had the opportunity to visit with our troops who I so greatly appreciate. I have got four sons serving in the military, so I have a personal interest. I have visited with the troops in Kuwait. I have visited troops in Kyrgyzstan. My next-door neighbor served in Djibouti. Would those be active zones of combat?

Mr. PHILBIN. Again, it is hard to say because the term is not defined. I think that it is most likely that some place like Djibouti would not be considered an active zone of combat, at least from what I know.

Mr. WILSON. Well, having heard discussions from people serving there, it is a very interesting place.

My final question. There is also reference to action solely for perspective injunction relief against transfer. What does relief against transfer mean?

Mr. PHILBIN. I believe that what that is intended to do is give the courts authority to stop temporarily, hear and decide on whether or not a detainee can be transferred to the custody of another country.

It is part of the United States' policy at GTMO to try to transfer as many detainees as possible to the custody of other nations who are willing to accept responsibility for them.

Mr. WILSON. But they couldn't—there is a potential they could not be held and could not be transferred.

I yield the balance of my time. Thank you, Mr. Chairman.

Mr. SPRATT. Ms. Boyda.

Mrs. BOYDA. Thank you, Mr. Chairman.

And I certainly appreciate the testimony of all four of you this morning, taking your time to do this.

I would ask the committee's indulgence for a few minutes to share my own personal story in this.

Five years ago, if somebody would have said I was nonpolitical, that would have been an overstatement. I was completely apolitical for some different reasons, and have listened to my father and my mother and my grandparents carry on for years about the younger generation and what is going on in our country and what is going to happen, and listened to this debate, and worried about our country for years on how things are going to resolve themselves, but always rested in that assurance that things would take care of themselves. And that it didn't need my participation.

About four years ago I stood up, kind of like you, Mr. Abraham, and said I can't remain quiet any longer. I don't know what to do. The very core of our foundation of our country is about a balance of power, it is about checks and balances, so that nothing can get too far out of line and that the problems we solve some way or another, the pendulum will swing back and we will get this country back on track.

The reason that I sit here today is because I believe that those checks and balances have been so severely undermined, and the CSRT, it may be a good system, it might work, but it doesn't provide us any assurance that there are any checks and balances, and that is a very fundamental right and a fundamental core of our democracy.

And so I applaud what you are doing to stand up and talk about what has been going on and I hope that you are able to get that message out. It is not just that it didn't work. It is just that it was fundamentally flawed. And a core value that we share in this country is now under the consideration of this committee and will be under the consideration of this entire House of Representatives, and I hope that our country has not gone so far that we cannot bring it back into balance.

I certainly sit here today as one of those people who is a new kid in Congress because enough people in Kansas said it has gone too far. And that gives me hope.

Now let me ask my question. I do represent Kansas. I represent Leavenworth. And so the discussion certainly is about GTMO and I have a very specific question for you.

Does the problem that we have seen at GTMO, somebody will go down and say, you know, they have got good meals, they have got

a good place to exercise in the day, there is not a problem. And we are going that is not the issue at GTMO. The issue is are people being held, detained, without being charged? Do they have a right to even ask questions about their detention in a way that we are used to in these United States?

So it is not about the physical facility. It is about the black eye that has been put on.

And my question to you would be, can we carry out justice at GTMO were this Congress to say we do want to return to the fundamentals of our democracy and we do want to bring back habeas corpus? Can justice be served at GTMO? Do we have to physically close GTMO or can we do it there?

Mr. ABRAHAM. What I can speak to, Madam Representative, is to what happened in the CSRT process. But we have to begin by remembering that the Constitution did not invent the rights of life and liberty, that all it took was the absence of truth, a silence demonstrated in the CSRT process, to literally extinguish it.

We speak of the bulwarks of our Constitution of rights that, at least as far as this Nation is concerned, existed for 200 years, and yet we measure the lives of men in decades. Some of these individuals will spend a great part of their adult lives in detention, whether it is at GTMO or somewhere else.

Again, I can't speak to how the freedoms that we enjoy are eroded or our reputations are eroded, but what I can do, if I may, is say that the CSRT process was our opportunity to find the truth, to identify the truth, and by that process determine whether these individuals should be detained for one more day than they were at the time of the CSRT process. Now, years later, we still don't know why many of them——

Mrs. BOYDA. Let me just yield. The point of my question is, again, now that this has such a black eye, the good people of Leavenworth, Kansas, are asking why do we want to bring that into our community? And some are asking—these are different opinions. But I, on the position of do we close GTMO, I have said we don't have to close GTMO to have justice being served. Would you care to, or would anyone else, care to comment on that?

Mr. OLESKEY. I agree with you, Congresswoman, and I thank you for your time and the time you extended to me in May when we chatted briefly about this issue.

The issue is justice. It is the principle to be served. There are issues raised today about whether it will be litigation, about restoring habeas. There has already litigation about the system in place and a point of fact, if the Administration had accepted the Rasul ruling and Hamdi and put in place a proper process and agreed to let habeas go forward, we wouldn't be having this discussion today.

Mrs. BOYDA. Exactly.

Mr. OLESKEY. So I think that you are on the right track, absolutely.

Now, the question is when and where are we going to serve the interest of justice, in this case individual liberty, not where are we going to put people who we continue to deny those rights.

Mrs. BOYDA. Thank you.

Mr. SPRATT. Mr. Franks of Arizona.

Mr. PHILBIN. If I can make a brief comment.

Mr. SPRATT. Who would like to comment?

Mr. PHILBIN. I would, sir, on the representative's question.

Mr. SPRATT. I am not trying to truncate anybody's full explanation of the facts of the law, but we do have a full day, so do it as expeditiously as possible, please.

Mr. PHILBIN. I agree with you, Madam Representative, that Guantanamo does not need to be closed for justice to be served. But I just wanted to comment that when the discussion refers to the rights we are used to, the things we are used to and people being held without charge, I think that is putting the discussion in the wrong context, because it is importing the rights of the criminal law into war fighting.

People can be held at GTMO without charge. That is what happens in war. And I think it is important to keep that distinction in mind.

Mr. SPRATT. Thank you, sir.

Mr. Franks of Arizona.

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

Mr. Chairman, I first want to say that I identify so much with the heart and the sentiments of Mr. Keene and Mr. Bartlett, that this country is unique and that we do have a higher standard than the rest of the world, because we are not only the unipolar superpower of the world, that we are essentially the focus of freedom and the depot of freedom throughout the planet.

That said, I have a great concern here that today we are inflating, if that is a good term, war and law enforcement. I serve as ranking member on the Constitution Committee and with the committee's indulgence here, I would like to do two things. I would like to read in the Constitution where the writ of habeas corpus I think has its most relevant reference for us today, and then to relate some of the testimony given before the Constitution Committee.

In Article I, Section IX of the Constitution, it says, "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."

Now, the Founding Fathers anticipating the possibility of having to suspend the privilege of habeas corpus, even in this country, for certain critical reasons, to protect this Nation. And I think it is important here, first of all, for us to realize that this action in Guantanamo Bay, this action in the fight against jihadist terrorism, is not law enforcement. This is a war between the free peoples of the world and the most dangerous enemy they have thus far ever faced.

In the Constitutional Committee, we have had testimony that essentially went this way: habeas rights would also give detainees the ability to compel witnesses, the context of enemy combatant combatant detention, in that context, the most relevant witnesses would be those soldiers who captured those detainees. It is hard to contemplate a system in which our soldiers are recalled from the battlefield to be cross-examined by the very enemy combatants whom they captured. Indeed, it would be hard to think of anything more demoralizing for our soldiers.

As the court in Eisentrager noted, "It would be difficult to devise more effective fettering of field commanders than to allow the very enemies he is ordered to reduce to submission to call him to ac-

count in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. The detention of enemy combatants during wartime is not criminal punishment." And I think that is so important for us to understand.

The purpose of detention is prevent combatants from returning to the battlefield, as some have done upon their release. Detention is a matter of military necessity that has long been recognized as legitimate under international law.

As former Attorney General William Barr testified before the Senate Judiciary Committee in July of 2005, he said, "What we are seeing today is an effort to take the judicial rules and standards applicable in domestic law enforcement context and extend them to fighting wars. Nothing could be more farcical or more dangerous."

And, you know, I have a hard time understanding that if indeed we are committed to extending habeas corpus to enemy, in this case unlawful enemy combatants, why don't we go ahead and extend bail and Miranda rights and counsel. Why don't we make sure that our soldiers, before they fire on anybody, give them their rights and all of these kinds of—it is just an hysterical notion. It just does not work in reality.

And this notion of torture that was brought up, Mr. Chairman, it is—our penalty for torturing a prisoner is 20 years. If the prisoner dies, it could be the death penalty. So this nonsense that we are in this country trying to torture our prisoners is just that.

And the idea of bringing back habeas corpus, that was mentioned earlier today, that is another misnomer. Habeas corpus has never been given to military combatants, especially nonlawful ones.

I guess I will just close up my thoughts here and ask Mr. Philbin to respond.

We face the most dangerous enemy we have ever faced. We are at war and the survival of this republic, I am afraid, is in question if we are unable to not be the victims of our own sense of propriety to the point that we throw out every justice point of view completely, then we will, I am afraid, disintegrate from within.

Mr. Philbin, do you think that if we apply full habeas corpus rights to prisoners, that somehow this will denigrate our ability to fight war?

The CHAIRMAN [presiding]. Please proceed.

Mr. PHILBIN. I think that it would have a deleterious impact on the war fighting mission. I think that Congress responsively in the DTA and the MCA provided a review mechanism that is keyed onto a military procedure first, to something that the Supreme Court suggested in the Hamdi decision would be a fine mechanism, that would satisfy due process rights, even for American citizens, and it already adapts a mechanism for going beyond anything that is provided before to the war fighting situation by providing a form of review that keys off of prior military proceedings.

Habeas corpus would be a disruption and the current system should be allowed to play itself out.

Mr. FRANKS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

Let me remind the members that we have another panel following these distinguished gentlemen, and please proceed accordingly.

Ms. Tauscher?

Ms. TAUSCHER. Thank you, Mr. Chairman. Thank you for holding this hearing.

I am honored to be an original cosponsor of your legislation and I think it is very important that we move ahead to restore habeas corpus.

Gentlemen, thank you for being here.

Mr. Chairman, I have, with your permission, some letters for the record in support of the restoration of habeas corpus that I would like to include in the record.

[The information referred to can be found in the Appendix on page 239.]

Ms. TAUSCHER. I represent Walnut Creek, California, some of the smartest people in the world, not because they have elected me six times but because they understand fairness very up close and very far away. And I think what my constituents and what I think many people around the world understand about how we have created a Gumby-like situation with the Constitution and thrown the Constitution up as an excuse when we choose to and then quickly hide it when we don't, is a stain on the conscience of the American people.

And it is about Guantanamo and those people that are there now, that they cannot find any way to prove who they are and what they were doing in a situation that is completely asymmetrical to any war that we have ever done. And frankly the situation of how they got to Guantanamo is completely different to anything that has ever been done in American history.

And the fact is that we have people that are absolutely willing to justify this by comments, Mr. Philbin, that say even in the face of such a threat, the United States has exceeded its obligations toward the detainees in the conflict under both the Constitution and under international law.

That does not satisfy me and it doesn't satisfy my constituents, because they know that there is actually something even better than the Constitution and international law. It is their own gut sense that these men, particularly in Guantanamo, specifically in Guantanamo, have never been given a chance to understand who turned them in, how they got picked up and how they are going to get themselves home. How are they going to get themselves home?

And for our government to constantly bend like a pretzel the excuses for why these habeas rights shouldn't be extended to these people after we intricately designed Guantanamo to be a place where we can slip the noose on having anybody really pay attention to what we were doing there for a long time is on the face of it very necessarily rejected by my constituents and average Americans.

Why is this stain of Guantanamo not enough for us to understand as we are battered about the head internationally, consistently, by our friends and our allies? Why isn't it enough for us to

understand that this is wrong and that we have to do something about it?

Mr. Philbin.

Mr. PHILBIN. I think that it is certainly the case that we withstand, we take criticism internationally, for Guantanamo.

Ms. TAUSCHER. Why?

Mr. PHILBIN. I do not think that the policies at Guantanamo, though, should be changed to provide habeas corpus rights for enemy combatants detained there in response to that.

I believe that the United States——

Ms. TAUSCHER. Because the criticism is illegitimate or because we don't deal with what other people think?

Mr. PHILBIN. But the criticism doesn't depend simply on habeas corpus rights or on specific judicial review rights. The United States has already provided——

Ms. TAUSCHER. Mr. Philbin, the criticism is consistent. It is specific to this issue.

Mr. PHILBIN. The criticism relates to what you have referred to as the stain of Guantanamo. It is an abomination of various things that other——

Ms. TAUSCHER. Is it legitimate?

Mr. PHILBIN. I do not believe that it is legitimate. I do not.

Ms. TAUSCHER. I do.

Mr. PHILBIN. Well, we disagree, Madam Representative, and——

Ms. TAUSCHER. I will tell you one other thing——

Mr. PHILBIN [continuing]. I believe that——

Ms. TAUSCHER. Excuse me. In your comments, I find it fascinating that you say, "The political branches through recent legislation." I am not a political branch, Mr. Philbin. I am a legislator.

Mr. PHILBIN. Forgive me, Madam Representative, but lawyers refer to both the legislative branch and the executive branch as political branches because they are politically elected, they are representative bodies. Those are the political branches, and then the judicial branch is not a political branch.

Ms. TAUSCHER. We are the legislative branch. But let's get back to the issue.

Mr. PHILBIN. And the issue, in terms of criticism of the United States will not be solved by providing habeas corpus rights to detainees at Guantanamo.

The United States has already provided mechanisms of judicial review and Article III courts that go beyond anything that has ever been provided to any detainees in wartime before. And the——

Ms. TAUSCHER. The only thing that will solve the problem of Guantanamo is to close it. The only thing that will solve the problem of Guantanamo is to make sure we don't repeat the mistakes that we made in creating Guantanamo.

Mr. PHILBIN. The problem——

Ms. TAUSCHER. I yield back, Mr. Chairman.

Mr. PHILBIN. If I could respond, Mr. Chairman.

If the problem of Guantanamo to which you refer is that we receive international criticism about it, then I believe you are correct, that the only way to stop all of our critics from——

Ms. TAUSCHER. No, the problem is that we are wrong.

Mr. PHILBIN. If I could finish—if I could finish, Madam Representative, answering your question. The only way that we could respond to all our critics is to do everything that they want and to stop treating this as a war and to start treating it as criminal law enforcement. And that is not——

Ms. TAUSCHER. That cannot be your legal opinion. I would say that is your ideological opinion.

Mr. PHILBIN. No. That is my view of the only mechanism that could be used to stop all international critics of the United States. And that is why I do not believe that U.S. policy should be dictated by whether or not we receive international criticism for it.

We have determined that we are in a war and that we will conduct our conflict with al Qaeda according to the laws of war, and I believe that is the right decision and it is the policy that we should stick with.

Ms. TAUSCHER. This is not——

The CHAIRMAN. The gentlelady's request regarding the documents will be entered into the record without objection.

Ms. TAUSCHER. Thank you, sir.

The CHAIRMAN. Thank you.

And now Mr. Hayes from North Carolina.

Mr. HAYES. Thank you, Mr. Chairman.

I know that it has been a long session and thank you all for your time and interest and intellect.

And, Mr. Chairman, I think this is a very worthwhile discussion. I have listened with fascination and come away with a conclusion that Guantanamo is the right thing to do. We don't need to close it. And our enemies, who are very hard to define, they don't typically wear uniforms, have declared the whole world as a battlefield.

To close Guantanamo Bay and bring these people to a community near you, as Ms. Boyda pointed out, she is not particularly anxious to have them at Fort Leavenworth. I agree.

A couple other points. As I look at a press clipping from July 25, a top Taliban commander who became one of Pakistan's most wanted men after his release from Guantanamo Bay, Abdullah Mehsud, killed himself because he didn't want to be captured. We have got some dangerous people here. They are not jaywalkers. They are not there for littering.

We had a process, and Mr. Abraham I find your testimony quite fascinating and I think Colonel Kline's comments were appropriate because in this kind of forum, the public has a hard time seeing and understanding everything that goes on in a broader context, so your comments are appropriate but I think Colonel Kline was saying it shouldn't be disproportionately weighted in the overall process.

And in the interim, the responsibility of this committee is to protect and defend, raise an army, whatever it takes to defend this country. I am going to ask you a hypothetical question. It may not be quite fair, but each one of you all is an attorney, and that is perfectly fine. The professional responsibility you have is to defend your client, and that is crucial. That is crucial to our rule of law and the way we look at things. And you all have done an admirable job of that in the abstract and in the specific today.

Given the circumstance that you were defending a murderer, you knew he was guilty, the whole world knew he was guilty, couldn't get a fair trial because of the weight of the evidence against him, all of the sudden you had to reverse and no longer were you the defense attorney. You sat on the jury. What would you do?

We in this committee are a jury of sorts charged to defend this Nation. The *Cole,* they didn't have habeas corpus. Daniel Pearl had no habeas corpus. Folks in the 82nd who are faced with improvised explosive devices (IEDs) every day, there is no habeas corpus there. We are defending the country.

My question to you, if you had to come sit on the jury all of the sudden and defend these people that you know are guilty, how would you do that? Because that is what we are called to do here. And people back home want to know—it is a criticism. We are all criticized because, as you said, we are in the political branch. Criticism, one of the reasons that we are criticized by the world is that it is an easy thing to do, and witnesses and members create the ability and information that we are criticized.

Guantanamo is correct. If we need to have another combatant status review tribunal, then that is what we need to do. But the Magna Carta and habeas corpus said we have to have these people a chance to have a review of their status. Well, we have done that.

And, Mr. Abraham, you said we didn't do it that well, but the Federal Court of Appeals said it was done right. So it seems if anything has come out of this, it is we got a process that is not as good as it ought to be. Let's go back and correct that process. But to give people who are out to do away with us, to give them rights as though they were U.S. citizens having earned this right would be a terrible mistake.

I know I am running out of time, but again, the jury question, you all left, you are no longer the defender, you are the jury. What would you do?

Mr. Keene, you have got a smile on your face. That is a good start.

Mr. KEENE. Well, Congressman, I agree with almost all that you say. I have listened to some of these things. I don't think there is a need to close Guantanamo. I don't think the question is whether people are well-fed at Guantanamo. I think what we are discussing is how do you get an answer to the threshold question does someone belong there.

There have been references to that they are all unlawful enemy combatants, but that is the question and that is the threshold question. Are they? Many of them weren't captured on the battlefield. Many of them were turned in for bounties. And the process by which we ask that question, not the subsequent questions—I think they ought to be interrogated, I think all of those things are true.

And, actually, I am agreeing with you because you say whether it is habeas or something else, if we need to review that, let's fix it.

What we have doesn't or hasn't or is demonstrably in some cases not gotten to the threshold question, not answered that accurately. And that is what you, as the jury, have to decide how to do. We think that habeas is a way to do it. But at the end of the day, you

have to say can you go to sleep knowing that all of the 375 people that are at Guantanamo deserve to be there. And that the process that we now have that says that they do deserve to be there, is it flawed? And if it is flawed, does that mean some of them don't? And that is the question, and that is what you have to wrestle with.

Mr. HAYES. Thank you, Mr. Chairman.

I don't think habeas is the way to go, and I don't think we ought to close Guantanamo.

Thank you very much.

The CHAIRMAN. Thank you very much.

Ms. Davis from California.

Mrs. DAVIS OF CALIFORNIA. Thank you. Thank you, Mr. Chairman.

Thank you to all of you for being here.

I wanted to follow up with a few things that were said, if I may.

Mr. Philbin, you mentioned that we have many, several hundred, many hundred individuals that have not come under habeas, would not come under habeas. But as I understand it, I think they would be covered by the Geneva Convention. Is that not correct? Who are you referring to that we would have to—if we chose to bring enemy combatants under the habeas corpus, who else would that impact? Who else would that include?

Mr. PHILBIN. Well, I am not sure. I think what I referred to was that at the end of World War II the Supreme Court rejected habeas corpus petitions from over 600 people who were being held. I think that is the only——

Mrs. DAVIS OF CALIFORNIA. Were those individuals, though, whose countries were signatories to the Geneva Convention?

Mr. PHILBIN. Most probably were. I don't know if all were. But——

Mrs. DAVIS OF CALIFORNIA. But that makes a difference, correct? That they at least are covered as opposed to being in what we would consider this kind of "Never Never Land"?

Mr. PHILBIN. Well, those who have POW, who are members of the armed forces of signatory nations and who meet the requirements of POW status will have protections under the Geneva Convention (GPW). Those protections do not include Article III court review of their detention. They are simply held until the end of the conflict.

But if I could get, I think, to part of the point of your question, what would happen if Congress now passed legislation that broadly said habeas corpus is available for enemy combatants overseas and we will have a carve out for active combat zones. There will be a ton of litigation about what an active combat zone is, and people particularly in Afghanistan, who do not have POW status under the GPW would have access to habeas corpus if it were determined through litigation that they were being held in an area that is not an active zone of combat.

Mrs. DAVIS OF CALIFORNIA. Would you advocate, do you think it would be better to bring everyone in a war zone, even if their countries are not signatories to the Geneva Convention, would it be preferable to have them covered under the Geneva Convention?

Mr. PHILBIN. To have——

Mrs. DAVIS OF CALIFORNIA. Would it be preferable to have them basically be POWs then as opposed to coming under the folds of habeas corpus, if in fact this was changed?

Mr. PHILBIN. I don't think so. I think——

Mrs. DAVIS OF CALIFORNIA. Let me move on.

Mr. PHILBIN. The Geneva Conventions are set up to create a series of incentives for conducting war in a certain fashion. To give POW status to those who are actually unlawful combatants, I think, is a very bad idea, because it perverts the incentives of the entire Geneva Convention system, which is designed to force people to do things like wear uniforms and not attack civilians.

Mrs. DAVIS OF CALIFORNIA. I understand that, but I am just trying to—see, we have individuals who are in this "Never Never Land" and we are trying to—in some ways, is it true that we are trying to find a home for them of sorts? So that the laws——

Mr. PHILBIN. I don't think——

Mr. OLESKEY. We are trying to find a remedy for this unusual situation that has been created by the decision to put people deliberately in a place where they have no rights, which is what Mr. Philbin was tasked in doing, as I understand it, when he was in the Justice Department, and he makes no bones about that, and I understand and appreciate his candor.

But now we have this situation. There has been a lot of talk about criminal process today. Habeas is not a criminal process, but the confusion is that usually when we deprive people of liberty, for their lives, we do it through a criminal process which has all kinds of safeguards. And I think what is running around in this room is, we are holding folks, which the Administration says it can hold for the rest of their lives, without the safeguards that most of us feel, at least folks I talk to, ought to attend taking away your life and liberty forever.

So we are talking about a problem that has been created that needs a solution, and does this thing that Wolfowitz, Secretary Wolfowitz built hastily in seven days withstand six years? And the burden of the argument from this side of the table is it doesn't.

Mrs. DAVIS OF CALIFORNIA. I was concerned, Mr. Philbin, because I think at one point you did say that habeas is just another round of litigation. Does that sound true to what you meant, that it is just another round of litigation? Or is that——

Mr. PHILBIN. Well, let me address that, and if I could address some other points from what Mr. Oleskey said.

First, I believe he mischaracterized my testimony in saying that I made no bones about the fact that, as he put it, my job at DOJ was to find someplace to put these people where they had no rights. I was asked to answer a legal question about whether or not there would be habeas jurisdiction at Guantanamo, and I answered that question.

Second, Mr. Oleskey referred to this process that Paul Wolfowitz put together in seven days. In fact, the CSRT process had been in the planning stages for much longer, before the Rasul decision, and in any event is modeled on AR190–8. It is not something that was just dreamed up in seven days. It is modeled on an existing set of Army regulations and provides more protections than that set of

regulations, which is usually what is used to determine on detaining someone.

In terms of my reference to habeas as another round of litigation, I don't know if I said it exactly that way, but let me put it this way. Congress has already provided an adequate mechanism for Article III court review. It has established a system of review both for military commissions and CSRTs that allows Article III courts to examine those decisions.

Habeas corpus petitions will be duplicative and an additional round of litigation under this bill if they are added, and there seems to be an assumption that habeas corpus will mean this specific set of procedures that will be used and this specific review mechanism, but I——

It seems to be an assumption that habeas corpus will mean this specific set of procedures that will be used and this specific review mechanism. But I don't think that that is a correct assumption.

The law on what habeas corpus review provides varies from one situation from another. It is a set system of rules when it is review in the criminal justice system. That is a very well-developed system. But habeas corpus review of a military decision to detain someone is not a well-developed system.

And what standard of review will be applied in those cases and what exactly that would provide is going to be determined by a big round of litigation. And the precedents are from World War II in Yamashita v. Styer and in the Kearing case that judicial review by habeas corpus of a decision of a military tribunal is very limited and does not inquire into the facts. It only inquires into the jurisdiction of the tribunal.

Mrs. DAVIS OF CALIFORNIA. Could I just say ask for a motion because I know our time is up?

The CHAIRMAN. Thank you.

Mrs. DAVIS OF CALIFORNIA. Would you all agree it is ill-defined, it would be ill-defined under the military?

Mr. OLESKEY. That what would be ill-defined? Habeas?

Mrs. DAVIS OF CALIFORNIA. Yes.

Mr. OLESKEY. I don't think the military has any business in habeas. I don't think the military thinks it has any business in habeas. That is the business of the federal courts. And the genius that habeas is it is flexible. So where Mr. Philbin sees lemons, I see a sweeter fruit.

The CHAIRMAN. I thank the gentlelady.

Dr. Gingrey.

Dr. GINGREY. Mr. Chairman, thank you.

And, Mr. Oleskey, you have stated several times in your testimony that Secretary Wolfowitz literally threw this detention facility together and the legal policy. I think Mr. Philbin just stated that, in fact, that was not the case.

There was certainly a very careful judicial review with the Justice Department, and this was not something that was just thrown together. And I want to start out my questioning though and ask the panelists just in a show of hands how many of you who have actually been to Guantanamo Bay, to GTMO.

Okay, thank you.

And I see, in particular, Mr. Keene, that you have not been there. And I would like to point out that I have been there. I have been there twice. And when I was there back in 2004, early 2004, again in 2005, I saw the detention, the interrogation process. I saw the food service. I saw the exercise facility.

I saw detainees having an opportunity daily to meet privately with members of the International Committee of the Red Cross. This at the same time while some of our soldiers in Iraq were treated a little differently when they were detained.

And I could name several names that were very prominent in the news, but one in particular, a contract worker from my home town of Marietta, Georgia, Jack Hensley, was beheaded, cruelly beheaded without any right of habeas corpus.

So therefore, I don't feel, I certainly don't feel we need to take the additional unprecedented step of allowing foreign terrorists, not prisoners of war, but foreign terrorists, enemy combatants that were detained not because they were jaywalking or spitting on the sidewalk. Indeed, one of these terrorists that was released just last week, Abdullah Mehsud, was released after the review commission decided that maybe he was no longer a threat, but went back and rejoined the fight. And when he was cornered, he blew himself up.

So the difference between the way we treat our detainees and the way our enemy does could not be greater. Simply restoring habeas corpus privileges for terrorists or closing GTMO is not the answer. What it is is throwing the baby out with the bath water.

Back to allowing foreign terrorists access to our judicial system, let me point this out. Between July 2004 and early 2005, the Department of Defense conducted 528 CSRTs, combatant status review tribunals, resulting in 38 determinations of no longer enemy combatant. Further, the administrative review board process is conducted annually. It is done every year to consider whether an enemy combatant should remain detained.

After the first two cycles, there were 14 decisions to release. And there are now 83 more detainees approved for release. Does this not indicate—and this is my question—that there is a review process in place outside of habeas petitions for evaluating the status of detainees and their detention, which, by the way, goes beyond the Geneva Conventions, which do not bestow rights to challenge detention or the opportunity to be released as this thug was, Abdullah Mehsud prior to the end of hostilities?

Mr. KEENE. This was directed at me, I believe. And I think first of all I should point out, as I have said repeated here, I am not in favor of closing Guantanamo Bay. I don't think the question has anything to do with whether Guantanamo is open or closed or whether they have exercise facilities or whether they have good food. That is nice that they do.

We treat prisoners, prisoners of war, and our criminals better than do most nations. That is a different question.

The question is is there an independent way to determine whether or not people actually belong there. We refer to them all as terrorists. We refer to them all as hostile enemy combatants. Do we know that? And that is the question. That is the threshold question that these things have to answer.

Initially we didn't do much at all. The system that we have in place now was a response to the court's criticism of that and saying that you have got to do something. So the question is not whether we are doing anything. And obviously we are doing more than we did before. We are maybe doing more than some other country would do.

That is good. The question is is that the best way to make that determination. And the difference between habeas and the others is something that one of the other Members of Congress raised earlier. And that is that it is independent. It is not asking the person in charge of doing it whether they are doing the right thing.

So I think we can do it better. I think that the Administration and the people in charge of Guantanamo Bay have moved admirably. But the question is whether we are confident that that threshold question is being answered.

Do we know and is there a fair way to determine whether all the people there belong there? It is not a question of how they are treated once they are there. It is a question of whether they belong there because many of these people were not picked up on the battlefield.

The Defense Department itself——

Dr. GINGREY. Mr. Chairman, I thank you for your indulgence in the time for both me and the witness. I yield back.

The CHAIRMAN. Okay. Thank you so much.

Mr. Murphy from Pennsylvania.

Mr. MURPHY. Thank you, Mr. Chairman.

Gentlemen, thank you all for your testimony today and for being here. I am Patrick Murphy from the Eighth District of Pennsylvania. Before I came in Congress, I used to be a professor at West Point. And I used to teach constitutional law.

And in 2002, I was fortunate enough to lead the cadet team for the first ever law of war competition. It was all the military academies throughout the world. It was being held in San Remo, Italy.

And about the third day of the week-long course and competition, a cadet from Belgium grabbed me, and she pulled me aside. She said, "Captain Murphy, can I see you, talk to you in private?" I said, "Sure."

And she had this look on her face that I will never forget. And she said to me, she said, "Captain Murphy," she said, "why doesn't America give Article 5 hearings to those detainees in Guantanamo Bay?" And I had to look at her, and I had no real legitimate answer.

I said, "I don't know why. I don't know why." And it wasn't until 2004 until the United States Supreme Court stepped in that forced this Administration to allow detainees at Guantanamo Bay to at least look at and challenge their detainment. And since the combatant status review tribunal, the CSRT, was instituted, every detainee in Guantanamo Bay has been through the CSRT process.

And from the statistics that I have seen, in over 550 CSRTs conducted by the Department of Defense, the detainees' enemy combatant status is being reaffirmed 93 percent of the time. So my question is first to the panel, but first to Colonel Abraham.

And, sir, thank you for your service to our country and for standing up like you are. Do you think that the CSRT process is in line

with the letter and the spirit of Article 5 of the Geneva Convention?

Mr. ABRAHAM. Thank you very much, sir, for your comments. It is not.

Both in looking at the percentages, the 93 percent affirmed, the annual reviews, of the 38 non-enemy combatants and of the large number of individuals who have been alleged to have been released and then returned the battlefield, the one message that comes through with clear resonance is that the process achieved arbitrary results. By that I mean are there certain terrorists at Guantanamo.

Absolutely. I followed one of them for a year during my duties in the Pacific theater. I know about him. I know what he has done. And he should be there for the rest of his life.

Are there people who did nothing? Absolutely. But between those two extremes there is a chasm in which we have filled the bodies, in excess of 500 bodies. And that is all they are. What they have been reduced to are statistics.

They were processed through a system that was, as you rightly point out, not the Article 5 proceeding. Because the presumption was under Article 4 that they didn't need that level of protection, we didn't need that level of protection for them.

The annual review process does not deal with the same question, the validity of their detention. Rather it deals with the two questions that are completely different: are they any longer a threat to the United States and is there any more intelligence value or some other reason why we should keep them. We lost sight in all of that process of the first question that we as a part of OARDEC involved in the CSRT process were charged to answer to the best of our abilities: should they be there in the first place.

Mr. MURPHY. Thanks, Colonel.

Gentlemen, could you please respond as well?

Mr. KEENE. I think that he has pretty much nailed it.

Mr. MURPHY. I would agree.

Mr. OLESKEY. I agree.

Mr. PHILBIN. I will respond to a couple points. Article 5 tribunals were not required because al Qaeda is not a signatory GPW. So those who were detained who were al Qaeda were not entitled to that. And——

Mr. MURPHY. Well, actually, sir, it is actually the term whether or not someone is a lawful combatant or an unlawful combatant. I would agree with you that al Qaeda is an unlawful combatant because they don't adhere to the same rules that our professional soldiers do. But I would argue that that is exactly the premise behind the Article 5 hearing, to determine that.

Mr. PHILBIN. The Article 5 hearing is to determine POW status. And POW status can only be for those who are signatories.

Mr. MURPHY. Right. And the argument that you and I will probably have is that just because Secretary of Defense Rumsfeld or whoever it was in charge said they are all al Qaeda, they are all unlawful combatants, that is not for him to decide. That is not for him to decide. And that is exactly why we have the United States of America signing on to these international agreements, to lead the world, to show them that we believe in the rule of law.

Mr. PHILBIN. Well, I disagree with the representative on whether or not it can be determined. It was determined by the President himself that, given their tactics, their failure to use uniforms, that the Taliban generally were not entitled to POW status.

But in any event, as to the CSRTs, do they comply with Article 5? Again, I dealt when I was in the government at the policy level. I didn't sit on a CSRT. But in terms of the way the CSRTs are structured, they provide more process, they provide more protections than Army Regulation 190–8, which is what is used to comply with GPW Article 5. So as a matter of how the system is set up, it is set up to comply, more than comply with Article 5.

The CHAIRMAN. I thank the gentleman.

We have four members who have not asked questions. We have a second panel waiting. So let us proceed.

Ms. Castor.

Ms. CASTOR. Thank you, Mr. Chairman.

And thank the gentlemen.

And, Mr. Abraham, thank you for your 22 years of service as a military intelligence officer.

Mr. ABRAHAM. Thank you, ma'am.

Ms. CASTOR. Regardless of how folks feel about the closure of Guantanamo, we are out to find out the truth here. And I think that, regardless of your political stripes, that is the intention of this committee.

Mr. Abraham, in your testimony you state that these CSRTs and the whole process was designed not to ascertain the truth, but to legitimize the detention. The process was nothing more than an effort by the executive to ratify its exercise of power to detain anyone it pleases.

You say the system was designed to fail. The combatant status review tribunal panels were an effort to lend a veneer of legitimacy to the detentions, to launder decisions already made. The CSRTs were not provided with the information necessary to make any sound fact-based determinations. Instead, the Office for Administrative Review, the leadership there, exerted considerable pressure and was under considerable pressure itself to confirm prior determinations.

I would like you to go a step further than your answer to Chairman Skelton on where the pressure came from, explain the command influence in greater detail and how the chain of command—who was in the chain of command, and how far up did it go, in your experience.

Mr. ABRAHAM. I can't speak ultimately as to how far it went. My experiences stopped with Rear Admiral McGarrah. But above me and beside me were were commanders, two of them JAG officers with whom I consulted on a daily basis. We dealt with the issues of evidence and of the law applying it to the proceeding.

I asked them questions and got their feedback to my concerns. There were then two captains, Navy captains, the equivalent of an Army full colonel, above me in the leadership chain, one, the assistant to the deputy and one the deputy director. And these individuals were essentially the intermediate level of command between, so to speak, myself or—and I don't want to imply that I was in any position of command—but between me and Admiral McGarrah.

In terms of the specific pressure that was applied to this process and as it specifically applied to me, I was directly cast to gather information and to validate the existence or non-existence of exculpatory evidence. I went to one particular agency and said, "Where is the evidence?" They literally put a laptop in front of me and said, "This is all you get to look at. We did the search for you. Accept that what we have given you is all there is."

I went back and I said, "I cannot perform this mission." That is, specifically, I can tell you that I went to the agency. I can tell you they showed me things. And I can tell you what I said. But I can give you no independent basis for concluding, one, that there is or is not exculpatory evidence or that I have satisfied your charge to me. I was told, "That is fine. That is all you need to do."

That, however, was not my charge. But where it specifically came to bear was when I sat on a CSRT and I looked at the very same kind of evidence, so to speak, that I had seen for months. And not only I, but the other members of the panel said, "This is garbage."

And as a matter of fact, when we looked at direct statements that came from interrogators, where they said, "Our conclusion as to the facts is that this individual was involved in activities," and we said, one, "That is not even a rational conclusion that you could reach, but, two, we have no reason for presuming the validity of that," we were told, "You have to accept that as true."

The presumption is it is true, it is valid. And when we asked questions, we were told more time should be allowed for them to get the answers. And the answers didn't come.

And we concluded that the individual was not an enemy combatant. We were told, "Keep the hearings open so that they can come back." We were told, "Reconsider when there is other residents."

Ms. CASTOR. And then ultimately you were not asked to return to a tribunal panel.

Mr. ABRAHAM. That is correct. What I found—in fact, I didn't even know that the individual received another panel's—was involved in another hearing.

Ms. CASTOR. Did they have similar interest when there was a determination that they qualified as an enemy combatant?

Mr. ABRAHAM. Absolutely not, Madam Representative.

Ms. CASTOR. And who did Captain Sweigart and Admiral McGarrah report to?

Mr. ABRAHAM. My understanding is that—and, again, I may be off as to the number of steps. But Secretary England was within that chain of command.

The CHAIRMAN. I thank the gentlelady.

Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. I just want to follow up that line of questions.

When panel 23 reached its conclusion, and then was told to look again, and then panel 32 was convened and just overruled or contradicted your findings, how did OARDEC do that? I mean, did they reconvene the second panel because of their guidelines that you mentioned in earlier testimony? I mean, what is the authority they have to just reconstitute a second panel?

The CHAIRMAN. Would the gentleman suspend for just a moment?

As I understand it, Mr. Philbin has a prior commitment and must leave. Am I correct?

Mr. PHILBIN. Yes, sir.

The CHAIRMAN. We appreciate your being with us this long.

Mr. PHILBIN. Thank you.

The CHAIRMAN. Thank you so much.

Mr. PHILBIN. Thank you, Mr. Chairman.

The CHAIRMAN. Please proceed.

Mr. ABRAHAM. If I may, sir, I knew of no authority for holding a second CSRT or what has been referred to as a redo. I do know, my understanding based upon my reading of the procedures and as they were applied, was that each individual got a CSRT. The statement being no matter what happens as to that outcome, that is, if they continue to be detained, if they are identified as enemy combatants or an unlawful enemy combatant, in the ARB process we will smooth over any problems.

I had never heard of a redo. I was not only shocked much later to have learned of it, but surprised as to its results because the information that we were given I had known from my experience working with it, and not just working with it through OARDEC, but in the years that I have worked with information from various agencies, very detailed and specific information contrasting that to what I saw, there was no way that our board could reach any other conclusion.

It wasn't a close call. And we weren't giving the benefit of the doubt to small holes in the evidence. It simply didn't even rise to the level of evidence.

So I didn't understand from two aspects how this happened. One, procedurally, I had never heard of it and never saw a basis for it. And two, the evidence simply was not there when that CSRT was scheduled.

It is important to note, however, because I think one of the things you touch upon in your question is the fact that in many respects, the CSRT panel is merely advisory because the rules that instituted the CSRT procedures give the director of OARDEC the absolute authority to disregard the findings and recommendations. Essentially the judgment of the tribunal becomes little more than the findings and recommendations that a magistrate that a judge can accept or reject.

Mr. COURTNEY. I am sorry Mr. Philbin had to leave because he actually just finished praising the structure of CSRTs. And it is hard to see how a structure that basically says the whole process can just get trumped by someone who is not even within that tribunal process or an independent magistrate just doesn't comport with any structure of any kind of independent judicial review that I have ever heard of.

Mr. ABRAHAM. If I may, there is a saying in the military repeated by everybody. I think they are born knowing it: "It is the doctrine, not reality." It is a recognition of the dichotomy between what we are taught in class and what is applied on the field.

In the instance of the CSRTs, there was no such dichotomy. It wasn't as if there was a procedure that anyone in the trenches disobeyed. And that much should be made very, very clear.

Talking about the qualifications, the personal representative only had to be a major, no other qualifications. That was it. The recorder only had to be a captain equivalent, an O-3. And that was it.

They were required to faithfully discharge their duties. And to the best of their abilities, I think they did.

The fundamental flaw was in the fact that OARDEC was not an embedded consumer of intelligence or information. It was a stranger to most of these agencies making requests when it could, giving very little time to get meaningful responses from them, and physically constrained by the necessary limitations that involved the use of sensitive intelligence products.

In other words, when they were handed a diluted, watered down, summarized statement that might or might not even apply to the individual, it was the best they got. It was all they had.

In the case of our board, we said, "That is not to justify holding somebody perhaps for the rest of their life." To our mind, to reach any other conclusion would have validated what we would then have had to have regarded as an arbitrary process, a game of spin the wheel.

Mr. COURTNEY. All right.

I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Ms. Giffords.

Ms. GIFFORDS. Thank you, Mr. Chairman. I appreciate the opportunity to have such a distinguished group of panelists. And I find the discussion absolutely fascinating.

When you think about whether or not the people that are being held at Guantanamo Bay should be issued habeas corpus, it really cuts to the core of who we are as a nation and our status internationally. I think that it is a difficult discussion. But I also think it is tempting to think about restricting detainees' rights just because of the fact of who they are, and the fact that we have military expediency, that always seems to take over and to take command of the situation.

I mean, after all, I look at the attorneys who are representing these individuals. And many of these individuals who are currently being held don't believe in the very legal or justice system that we have here in this country. And perhaps, if given the opportunity, they would destroy it or have attempted to destroy the values that we think are so important here in this Nation.

But I also think that the lack of appropriate habeas corpus really undermines our standing internationally. And I think about how we are going to fight this global war against radical idealism, whether they are Jihadists or Muslim extremists or other types of extremists. And I think our reputation as a nation in terms of justice, and our commitment to freedom, is really important.

The more we have discussions like this, and the more that people are internationally concerned about what is happening, I think that we drive away potential allies. And for those radical individuals that may be on the fence, I think that we are losing people.

So my question is to Colonel Abraham. Giving fair trials to 360 detainees at Guantanamo, I don't believe, could possibly be more dangerous to our national security than to the thousands of indi-

viduals, perhaps young Muslims, who are aspiring to hate us based on what they see happening. In your opinion, based on your experience with the CSRT and the intelligence community, do you believe that the situation in Guantanamo currently is reducing or increasing the overall violence and hatred toward the United States?

Mr. ABRAHAM. Although this is purely my personal opinion, I think it makes tremendously difficult both the military and political aspects of what we do. One of the assignments that I had long before I came to work, either at Pacific Command or with OARDEC, was as a member of a psychological operations unit and military organization specifically designed to go out and, as we like to remind ourselves, win the hearts and minds of individuals, both in wartime and in peace.

Most of those individuals are reservists. It is largely a Reserve function, the way that it is constructed.

It has been tremendously difficult as I have seen it to get across a message. And it is a message based on an interesting paradox. On the battlefield when an enemy faces us with his gun, we can kill him. Yet the moment he raises his hand and drops his gun, we have to protect him.

He may not understand the distinction between those two moments. But it is important enough that we do.

As we sat at OARDEC dealing with these questions, it wasn't important that somebody else know the difference between the rule of law and lawlessness, the difference between those who would destroy our country and those that support our country. The question was whether we understood the difference.

I think most of the people at OARDEC did. But I think the system in which they worked made it impossible to find a meaningful distinction between those two sides of the line.

Ms. GIFFORDS. And, Colonel, given just what you said, how would you personally recommend implementing habeas corpus or another appellate system to reduce the rate at which we have this conflict and perhaps a misconception, reduce the ability to radicalize our enemies, but also not provide for these folks to basically be able to talk their way out of prison?

Mr. ABRAHAM. I can't speak ultimately for the effect of habeas or some other proceeding. There are eminent experts surrounding me to my left, my right, my front, even my rear that know better about that. But I think we begin when we do what the CSRTs and OARDEC were charged to do, find the truth, find the truth as to these individuals.

When you take away the generalizations and the claims and the categorizations and the ease with which you can put somebody in a broad, sweeping stroke into one category or another, decide they are terrorists and keep them in Guantanamo for the rest of their lives—when you stop that by first examining the truth as we were charged to do, I think you take away the fertilizer from that tree of which you speak.

The CHAIRMAN. I thank you.

Ms. GIFFORDS. Thank you.

The CHAIRMAN. The gentlelady. I have remaining Ms. Shea-Porter and Mr. Cummings who have not asked questions. And when they have finished, we will then go to the second panel.

Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you, Mr. Chairman. I think we have heard some people who have confused safety with this Nation with habeas corpus. I, too, worry about the danger this Nation faces. But that does not mean that we can't have habeas corpus.

John Adams said that we were a nation of laws, not men. And I am afraid that we have gotten that confused.

But what really concerns me are the statements coming from our friends. And so, I would like to quote a BBC news security correspondent talking about the report that came out and was on BBC News yesterday about the U.S./U.K. relationship: Dilemmas Revealed in U.S./U.K. Relationship. Intelligence and security committee report had this to say.

The IST report reveals aspects of the usually close Anglo-American intelligence relationship that are surprising and concerning. These tensions have centered on the evolving U.S. policy of rendition, the transferring detainees from one country to another, in some cases to stand trial, in other cases to U.S. military detention or even to third countries for interrogation and to alleged mistreatment.

This policy has meant that for British intelligence, ethical dilemmas are not confined to countries with poor track records on human rights. The United Kingdom now has an ethical dilemmas with our closest allies because of very different legal guidelines and ethical approaches.

This should horrify all of us, all of us good Americans who understand what our role has been in this world, to be embarrassed that the United Kingdom is concerned about some of our practices. We are supposed to be the beacon of light and freedom in this world.

Mr. Oleskey, I would like to ask you a couple of questions. You were talking about your client 24/7 in his cell.

Mr. OLESKEY. Yes.

Ms. SHEA-PORTER. Okay. That is against everything we understand about human rights. That is the kind of stuff that we read about in newspapers or in books and they talk about some other government, not ours. Would you like to talk a moment about that? And then I have a couple of other questions to ask.

Mr. OLESKEY. Yes. It is a man named Saber Lahmar, who is one of my six clients from Bosnia. I can't tell you why he is there because no one in the system will tell me. I have written letters. I have asked that he be released from solitary. The last time I was able to see him last fall he told me he was hearing voices.

I have tried to get him medical attention. I have tried to, in every way I can. But without access to habeas, there is no way for anybody to pass upon why he is there at all, much less why he should be punished in this fashion.

But I am very concerned about because I think he is—I am losing him. And I can't even talk to him about it because he seems to have lost the ability to leave his cell and talk to anyone.

Ms. SHEA-PORTER. I don't think any American would approve of somebody being kept 24/7 in darkness like that, especially without hearing what the story was.

Mr. OLESKEY. Actually, it is worse than darkness. He has a light on 24 hours a day, so he never knows when it is day and when it is night.

Ms. SHEA-PORTER. These are the kinds of stories that my father told me about why our Constitution was so wonderful, because we were protected from this kind of activity.

I wanted to ask you a couple of questions.

And I had one to ask Mr. Philbin, and I hope that he will answer in writing to me.

Some of these people were not picked up on a battlefield.

Mr. OLESKEY. Yes, in fact, it appears that it is not disputed that the majority was not picked up on a battlefield as it would be defined by anybody, unless we define the whole world as a battlefield.

Ms. SHEA-PORTER. Yes. Right. So they are not technically enemy combatants.

Mr. OLESKEY. Not as I would view it.

Ms. SHEA-PORTER. Okay. They can't see all the evidence. Some is classified.

Mr. OLESKEY. They can't see most of the evidence because most of what the panels are shown, in my experience, is classified, not unclassified. And I am sure Colonel Abraham from what he said would agree.

Ms. SHEA-PORTER. Who determines what is classified and what is not?

Mr. OLESKEY. People in the military, people in civilian intelligence.

Ms. SHEA-PORTER. So we don't know who really determines that. And we don't know what evidence is——

Mr. OLESKEY. That is correct. And I can't tell you what evidence—I can't even discuss classified evidence, much less whether I have seen at all.

Ms. SHEA-PORTER. How is a personal representative chosen?

Mr. OLESKEY. As I understand it, the personal representatives were not to be lawyers. And so, they were chosen by the command structure as non-lawyers, as Colonel Abraham said, relatively low rank in the officer corps. In my experience, they did not function as advocates at all.

Ms. SHEA-PORTER. And one last question. How did they go from combatant to no longer an enemy combatant? Whatever happened to innocent or guilty?

Mr. OLESKEY. That is a very good question. I would note that in the first Gulf War when this Article 5 process was used on the battlefield, the numbers of people who were screened out as not military, civilian, you go home was 70 percent.

At Guantanamo, as you have heard this morning, it was 10 percent. That is because, in my view, the process was applied three years after the battlefield, and it is a battlefield process. It is not a process designed to be used after the fact, especially long years after the fact.

Ms. SHEA-PORTER. Thank you.

The CHAIRMAN. I thank the gentlelady.

Mr. Cummings.

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

I want to thank our witnesses for being here. I am the last questioner. All of you, I thank you for standing up for what you believe in.

And, Mr. Abraham, as I listened to your testimony, I could not help but say to myself that this is truly a brave man.

And all of you, standing up for what you believe in.

And I also thought about the fact that I heard a number of concerns about inconvenience. You know, if it were for the inconvenience of the courts, I wouldn't be sitting here today. I mean, when you think about all the cases that have been brought by Thurgood Marshall and so many others, if inconvenience was the standard for not doing something, not hearing cases, I wouldn't be here today.

But one of the things that concern me, Mr. Abraham, was something that you said that. I am having trouble as a lawyer dealing with this enemy combatant status. And perhaps the other two witnesses can talk about this, too.

When I heard what you said about what happens from the beginning, that is, that exculpatory evidence—I mean, what you witnessed, what you said you witnessed, it seems like some of these folks should have never been picked up from the beginning. And that seems to taint almost everything down the line.

And then when I hear you, Mr. Oleskey, say that you don't have to be picked up on the battlefield, that makes me wonder, too. And then I wondered about this so-called war on terror. Does that then give every single inch of the world—I mean, anybody can be picked up, considered an enemy combatant wherever they may be found, anywhere in the world? Because when we say war on terror, that is pretty broad.

And I am just wondering, would you all comment on those things?

Mr. ABRAHAM. I can, if I may, sir. One of the problems is that we think of war in the traditional sense, and we say we know where the battlefield is. Well, let us take a very specific example of an individual who is in Guantanamo. He is identified by the name Haballi. He was the head of Gamaz Lamyia.

We had been watching him for years. The South Pacific was his battlefield from Indonesia up the peninsula to Thailand. He gave little regard to the notions of even what was going on in the Middle East.

In that sense, he created his battlefield. The battlefield itself is not the problem and has never been a problem for the intelligence community in dealing with its relationship with the legal questions, the Article 4 and Article 5 questions.

That was never a concern. When I go to an intelligence agency, and I ask it the question, "What are the circumstances of this individual's capture, what are the circumstances of his activities, do you have any evidence relating to the question of whether or not—he didn't do any of those things?"

They don't come to me and say, "Gee, Colonel Abraham, he wasn't really found on a battlefield." It is not a meaningful question. So that was never a problem of where the individual came from.

In my mind, the question squarely before us was what evidence do you have of what he did, whether he moved money, whether he fired a gun, whether he trained terrorists, or whether he was sent by his wife to get a gallon of milk. The answer to that question was the most important piece of information in this process. And whether it came from a highly classified source or somebody saying, "Yes, I sent him, and between that chore, he had other chores," those are probative pieces of evidence.

Mr. CUMMINGS. And assuming that kind of information was lacking, Mr. Oleskey, I guess, they would almost have to let your client go, is that right, under habeas?

Mr. OLESKEY. They would have to let my client go, in my view, if they looked at all the evidence. As the colonel is pointing out, they didn't see much of the evidence.

And we filed with the military, as a result of doing our own review, a lengthy document, 128 pages, where we pointed out that these 6 men, who are said to be commonly linked in a conspiracy, had in one of their CSRTs somebody sent in after a CSRT in the system, somebody in the system, something they said was exculpatory. And that panel said, "No, we have already closed the books."

And nobody in the chain of command said, well, if these men were all supposed to be part of a common plot and somebody in the military thinks that whatever this information is could be exculpatory, it must relate to all of them potentially, not just to this one. But it wasn't shown to any of the other five panels.

And you talk about the expansion of this doctrine under the Military Commission Act of withdrawing habeas corpus. Mr. al-Marri was a student at Bradley University. Mr. Padilla stepped off a plane in Chicago.

So this doctrine that if you label anyone a combatant you can take them anywhere in the world, not just off a battlefield in Bosnia, but in the United States, has been greatly expanded by this Administration. I think that the muscle the chairman's bill puts back in this to circle around to where we were would help stop what many people regard as some of those excesses.

Mr. CUMMINGS. Thank you all very much.

The CHAIRMAN. Thank you. I thank the gentleman from Maryland.

And again, thanks to this panel. It has just been excellent. We appreciate your expertise.

We will now go to our second panel. We will give them time to enter the room.

Again, thank you, gentlemen.

The gentlelady from New Hampshire is to submit some additional questions for the last panel. And without objection, that will be so ordered. Just submit them in. We will make sure that they receive those. Thank you very much.

The second panel, Mr. Daniel Dell'Orto, principal deputy general counsel for the Department of Defense; Mr. Gregory Katsas, principal deputy associate attorney general of the United States. And with us also is Rear Admiral James McGarrah, retired, director of the Office for Administrative Review of the detention of enemy

combatants from 2004 to 2006. And he is here to answer questions as well.

As I understand, Mr. Dell'Orto and Mr. Katsas will make presentations.

And, Admiral, you will just be available. Am I correct in that?

Mr. MCGARRAH. Yes, sir.

The CHAIRMAN. Well, thank you very, very much.

Mr. Dell'Orto.

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

The CHAIRMAN. First, let me say that any prepared remarks will be placed into the record en toto. And if you could condense your comments, that would help us. Thank you.

Mr. Dell'Orto.

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

Mr. DELL'ORTO. Again, thank you, Mr. Chairman, members of the committee for the opportunity to testify before you today regarding individuals detained by the Department of Defense as unlawful enemy combatants.

The United States is in a state of armed conflict with al Qaeda, the Taliban, and its associated forces. During this conflict, persons have been captured by the United States and its allies. And some of those persons have been detained as enemy combatants.

The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principle purpose of this detention is to prevent the persons, those persons, from returning to the battlefield, as some have done when released.

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

In Hamdi v. Rumsfeld, the Supreme Court confirmed this principle of international law and held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the necessary and appropriate force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11th, 2001, terrorist attacks.

The U.S. relies on commanders in the field to make the initial determination of whether persons detained by United States forces qualify as enemy combatants. And we have done this throughout our history.

Since the war in Afghanistan began, the United States has captured, screened, and released approximately 10,000 individuals. Initial screening has resulted in only a small percentage of those captured being transferred to Guantanamo. The United States only wishes to hold those who are enemy combatants and who pose a continuing threat to the United States and its allies.

In addition to the screening procedures used initially to screen detainees at the point of capture, the Department of Defense created two administrative review processes at Guantanamo in the wake of the Hamdi and Rasul cases: Combatant Status Review Tribunals, CSRTs, and Administrative Review Boards, ARBs. The CSRT and ARB processes provide detainees with a measure of process significantly beyond that which is required by international law.

The CSRT is a formal review process created by the Department of Defense, and incorporated into the Detainee Treatment Act of 2005 that provides the detainee with the opportunity to have his status considered by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections, building upon procedures found in Army Regulation 190–8.

The Supreme Court specifically cited these Army procedures and that regulation as sufficient for U.S. citizen-detainees entitled to due process under the United States Constitution. The CSRT guarantees the detainee rights notable beyond those provided by an Article 5 tribunal.

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

Furthermore, a CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification.

Every decision by a tribunal is subject to review by a higher authority, empowered to return the record to the tribunal for further proceedings. In addition, if new evidence comes to light relating to a detainee's enemy combatant status, a CSRT can be reconvened to reevaluate that status.

In addition to the CSRT, an ARB conducts an annual review to determine the need to continue the detention of those enemy combatants not charged by military commission. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention, intelligence value, as an example.

Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released, or be transferred. The ARB process also is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

In Rasul v. Bush, the Supreme Court ruled that the federal habeas corpus statute applied to Guantanamo and therefore, federal courts have jurisdiction to consider habeas challenges to the legal-

ity of the detention of foreign nationals at Guantanamo. The court accordingly held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants could invoke the habeas jurisdiction of a district court. Of course, there is not and has never been a constitutional habeas right that attaches in this setting.

In the Detainee Treatment Act of 2005, Congress established additional procedural protections for future CSRTs and provided for judicial review of final CSRT decisions regarding enemy-combatant status in the U.S. Court of Appeals for the District of Columbia Circuit. At the same time, Congress foreclosed the Guantanamo detainees from pursuing alternative avenues of judicial review, including through statutory habeas corpus. The Military Commissions Act of 2006 made the provisions providing for judicial review of final CSRT decision and foreclosing statutory habeas expressly applicable to pending cases.

The DTA and the Military Commissions Act permit the D.C. Circuit to review CSRT determinations of detainees at Guantanamo. Traditional habeas review in alien-specific contexts involved, in general, review of questions of law, but other than the question of whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the executive.

However, under the Detainee Treatment Act, or DTA, to the extent an alien-petitioner has concerns about the legal adequacy of the CSRT standards and procedures used to make an enemy combatant determination, he may squarely raise those concerns and have them adjudicated in the court of appeals. Further, the court of appeals' review involves an assessment by that court of whether the CSRT, in reaching its decision, complied with the requirement that the conclusion of the tribunal be supported by a preponderance of the evidence. Providing review of an enemy combatant determination in a nation's own domestic courts is an unprecedented process in the history of war.

As some of you know, the Department has filed motions to dismiss all habeas cases brought by detainees at Guantanamo Bay. Under the MCA, and as affirmed by the D.C. Circuit in Boumediene, the appropriate venue for detainee challenges to the lawfulness of their detention is in the D.C. Circuit. As you also may be aware, the Supreme Court recently granted certiorari to review the Boumediene decision. We look forward to presenting our argument to the court in the fall and are confident in our legal position, as upheld by the D.C. Circuit.

Extending statutory habeas to aliens held at Guantanamo Bay is both unnecessary and unwise. Together, Congress and the President developed the Detainee Treatment Act and the Military Commissions Act. Those statutes, which were passed with bipartisan majorities, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, the Congress, and numerous military and civilian personnel, applied to the Nation's accumulated experience in fighting an entirely new kind of war.

They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and

experience. And doing so would do a disservice to the American public.

Thank you, Mr. Chairman. And I await your questions.

[The prepared statement of Mr. Dell'Orto can be found in the Appendix on page 176.]

The CHAIRMAN. Thank you, sir, for being with us.

Mr. Katsas.

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

Mr. KATSAS. Mr. Chairman, members of the subcommittee, 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 Qaeda and its affiliates possess both the intention and the ability to inflict catastrophic harm on this Nation. But unlike past enemies, al Qaeda forces show no respect for the law of war as they direct attacks primarily against civilians.

In one 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 selected members of al Qaeda and the Taliban at a military base leased by the United States at Guantanamo Bay, Cuba. Each of those detainees has received a hearing before a 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 American 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 recently provided the detainees with even greater protections than that. In the Detainee Treatment Act, Congress prohibited the government from subjecting detainees to inhumane and degrading treatment, established additional protections for future CSRTs, and guaranteed judicial review of final CSRT decisions and final criminal convictions before military commissions.

At the same time, Congress barred the detainees from seeking judicial review through habeas 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 a military commission. 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 international war crimes prosecutions like those conducted at Nuremberg.

Like the DTA, the MCA provides for judicial review, but just not through habeas. Extending habeas to aliens abroad is 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. In the words of Justice Jackson, the

same country lawyer mentioned by the chairman and others, wartime habeas trial would bring aid and comfort to the enemy, and it would be, in Justice Jackson's words, 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.

The Supreme Court's decision in Rasul, which addressed only the scope of the habeas statute, does not undermine this constitutional holding of Eisentrager. Habeas restrictions are important for national security as explained in Eisentrager and borne out by recent Guantanamo experience.

During the last few years, more than 200 habeas actions were filed on behalf of more than 300 detainees. The litigation imposed substantial burdens on the operation of a military base in time of war.

It prevented military commission prosecutions from even beginning. And it impeded interrogations critical to preventing further attacks. These burdens would be even greater if habeas were made available in larger conflicts such as World War II when the United States detained not hundreds of enemy combatants, but more than two million enemy combatants.

Habeas review is also unnecessary. As I have noted, the CSRT and military commission procedures give detainees unprecedented wartime protections. Moreover, detainees may challenge those procedures in court and may raise any constitutional or statutory claim of their choosing. That alone would make this scheme an adequate substitute for habeas.

But Congress went even further and allowed detainees to challenge both the sufficiency of evidence underlying the tribunal's decision and the tribunal's compliance with its own procedures. Even where habeas had been available, prior law would have barred those claims.

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 should not be upset. Thank you.

[The prepared statement of Mr. Katsas can be found in the Appendix on page 180.]

The CHAIRMAN. Thank you very much.

Mr. Katsas, before I ask Mr. Saxton, under the statute passed by Congress regarding the review process, who has the burden of proof in that process?

Mr. KATSAS. In the combatant status review tribunal?

The CHAIRMAN. Yes.

Mr. KATSAS. I think initially the government has the burden of proving enemy combatants.

The CHAIRMAN. Wait. What do you mean "initially"?

Mr. KATSAS. In the combatant status review?

The CHAIRMAN. Yes, sir.

Mr. KATSAS. Well, the government has the burden of proving enemy combatant status by a preponderance of the evidence. There is a provision in the CSRT procedures affording to government evidence a presumption of regularity that comes straight out of the Supreme Court's opinion in Hamdi where the Supreme Court said

that a presumption like that would be appropriate even where you are talking about the detention of an American citizen.

The CHAIRMAN. Who has the presumption of proof in a habeas corpus case?

Mr. KATSAS. In a habeas? I think similarly the government has the burden of justifying detention. The structures are analytically similar, Mr. Chairman, in that we are not talking about——

The CHAIRMAN. I am not talking about structures. I am talking about who has the burden of proof. You understand what burden of proof is?

Mr. KATSAS. I do, sir. The government——

The CHAIRMAN. You have tried a few cases, I take it?

Mr. KATSAS. I am sorry.

The CHAIRMAN. You have tried a few cases?

Mr. KATSAS. I have argued a few appeals.

The CHAIRMAN. All right. Well, you understand.

Mr. KATSAS. The government——

The CHAIRMAN. Are they exactly the same, the review process that is set forth in the statute and the habeas corpus? Is the burden of proof exactly the same?

Mr. KATSAS. I think it is. There is a——

The CHAIRMAN. Now, wait a minute.

Mr. KATSAS. May I?

The CHAIRMAN. In your opinion, yes, sir, it is.

Mr. KATSAS. Yes. But——

The CHAIRMAN. The answer is yes.

Mr. KATSAS. Well, yes. But may I explain?

The CHAIRMAN. Sure.

Mr. KATSAS. The one respect in which the combatant status review tribunal procedures is arguably distinctive in terms of presumptions and burdens from normal procedures is the presumption that the government's evidence is true and accurate. Now, the Supreme Court in the Hamdi case made clear that that kind of presumption in favor of the government's evidence, which is not found in habeas corpus generally, would be appropriate in habeas corpus proceedings to address status determinations for Americans held in this country. So if you compare habeas under Hamdi to combatant status review tribunal procedures at GTMO, I think the burdens are essentially the same.

The CHAIRMAN. Thank you very much.

Mr. Saxton.

Mr. SAXTON. Mr. Chairman, thank you.

Mr. Dell'Orto and Mr. Katsas, for purposes of clarification for members who are here or for anyone who may be listening, I suspect this is a fairly complicated conversation that we are having, particularly for those of us who haven't practiced law or are not lawyers.

So I would just kind of like to walk through this for purposes of clarification and walk through what is current law or what I perceive is current law and what I perceive as the main provisions of what has been proposed in the way of new law, a bill to be passed, which is the subject of this hearing.

Under current law, an individual is apprehended as being suspected of being an illegal enemy combatant. Under the proposal,

that doesn't change obviously. Somewhere on the "battlefield" in this new kind of warfare, an individual is apprehended and is suspected of being an enemy combatant. No difference.

Under current law, there is a process that has come to be known as the combatant status review tribunal. And that is where the status of the individual is reviewed and, my word, confirmed, if that is what it is. He is an enemy combatant or he is not.

Under new law, there is something called habeas corpus, which I interpret from a layman's point of view as going to court to make the same kind of determination. Now, from there on in this process, under current law we go to appeals court. And under the chairman's proposal, or whoever's bill this is, we go to federal appeals court.

The only difference being that we specify under current law the D.C. appeals court. And under the new proposal, it could be one of 12 circuit courts. Does that follow along? Okay. So no difference there, except that there is a broader set of choices, if you will, for the individual to choose a court.

Mr. KATSAS. Presumably, it would be one of 93 or 94 different United States district courts under habeas then.

Mr. SAXTON. Okay. But the point that I am trying to make is that it is a federal appeals court, which is the next step beyond either CSRT or habeas corpus. Right? And finally, the last step, of course, would be to appeal, that if the enemy combatant was not satisfied with the result of the appeals court, he would go to the Supreme Court in both cases. No difference there.

Mr. KATSAS. Right.

Mr. SAXTON. So the real difference in this is whether we subscribe to the concept in current law of a combat status review tribunal or the habeas corpus process.

Mr. KATSAS. I agree with that.

Mr. DELL'ORTO. I agree as well.

Mr. SAXTON. Okay. Why then do we think that the CSRT, combat status review tribunal, is the way we ought to go rather than habeas corpus?

Mr. KATSAS. I think for some of the reasons that Mr. Philbin explained, in terms of the legal uncertainty about how habeas plays out for some practical reasons, in terms of the burdens habeas imposes, and for some security reasons. And let me try to spell all of those out for you.

We had experience with habeas corpus at Guantanamo in the period between 2004 when Rasul was decided, and 2006 when this Congress said no, we want you to go seek review by other means. The experience in that interval is exactly what Justice Jackson predicted in terms of the tremendous burdens imposed on military operations with the hundreds of cases, with the Defense Department having to accommodate essentially full-time visits to a military base.

We had problems with information slipping into Guantanamo getting to detainees, sensitive information that risked security. The D.C. Circuit averred to that in Bismullah.

We had problems with frustrating interrogations, as one of the detainee lawyers has publicly boasted. We have under habeas questions about whether discovery will be available so that detainees

and their counsel could rifle through government files. We would oppose that. But as Mr. Philbin explained, the standards are unclear, and we might or might not win.

We would have uncertainty about trial procedures. Possibly there would be strict evidentiary rules. If there were strict evidentiary rules, we would have to summon military commanders back from half a world away to avoid hearsay evidence, to establish chain of custody. We would impose on those people evidence gathering requirements.

Habeas corpus literally means "produce the body." We would face arguments about having to bring someone like Khalid Sheikh Mohammed into New York or Washington for a habeas trial. Presumably we are trying to keep people like that out of our major cities. We might well have to bring them into court to present testimony at a habeas hearing.

Obviously that creates huge security risks. The district court judge in New York who tried the World Trade Center I bombings required security, personal security escort 24 hours a day, 7 days a week for over a decade based on his presiding at that trial. Imagine the spectacle of dozens of folks like Khalid Sheikh Mohammed coming before a United States district court judge in this country.

Habeas also enables detainees to raise collateral claims about treatment, about conditions of confinement, about transfer. In our view, that is not proper because habeas is only about detention. But the standards are unclear, and we have to litigate out of all of those issues.

Finally, if you have the enemy combatant determination being done by a court in this country, there would be stronger arguments on the other side for the application of full constitutional protections. And then we would be in the nightmare world of arguing about Miranda warnings or Mr. Mohammed before his interrogation and knock and announce rules before we go into caves in Afghanistan.

I am not saying we would necessarily end up there. But those are all the risks attendant with habeas.

And finally, if you create habeas across the board, you are doing so not only for the conflict at Guantanamo where things might arguably look manageable because we are talking about 300 some odd detainees. You are changing the rules across the board. And God forbid we should ever find ourselves in a larger conflict.

But we have historic precedent where this Nation detained two million enemy combatants in World War II. If you apply the litigation standards that prevailed at Guantanamo between 2004 and 2006 to a conflict like World War II where we are talking not hundreds, but millions, that system is not remotely sustainable.

Mr. SAXTON. Thank you.

Mr. Dell'Orto.

Mr. DELL'ORTO. Congressman, I would only add a very small postscript to what Mr. Katsas has eloquently stated. We should not fool ourselves into thinking that this conflict that we are now engaged in is the only one we will fight against an enemy that doesn't want to follow traditional rules about conventional war fighting.

If you pick most any potential adversary out there right now, I suspect that if we were to engage that adversary in battle today,

we would be fighting the conflict the way we have been fighting it in Afghanistan and in Iraq, where the enemy is not lining up as an armed force in uniform, so that we know who we have.

We would potentially have tens of thousands, maybe more, captured combatants on the battlefield who are unlawful in the way they conduct their operations. And thus we would clearly overwhelm any system that we have in the United States court system or Article III system for dealing with this. And even if we didn't overwhelm them in pure numbers, the burdens on commanders, soldiers in the field would completely disrupt our ability to conduct our operations on the ground.

Mr. SAXTON. Okay, thank you. Let me ask this now. There is a difference between wartime activities that threaten a people and criminal activities that exist in society. Would you agree?

Mr. DELL'ORTO. Yes.

Mr. SAXTON. In this case, these detainees have been accused of wartime activities that threaten a people. And I believe our court system was essentially designed and carries out a mission of taking care of problems that relate to criminal activity. Would you speak to those two concepts and say why they are different?

Mr. DELL'ORTO. Let me begin. Military commissions are not a new concept. Military detentions of combatants on the battlefield or taken away from the battlefield is not a new concept.

When our forefathers penned the Constitution and created the rights that are our baseline rights for this Nation, we had been at war with Britain at the time. We chose and in the many years since, the centuries since, to maintain a system of justice focused on criminal behavior, a system of laws dealing with civil issues, but also recognize and by design did not incorporate into those structures—that is for dealing with criminal processes and civil judicial processes—the military commission process, because the drafters of the Constitution understood that what happens in a wartime setting is going to be different.

And traditionally over the years, over the decades, there has been no change in that philosophy. Military commissions starting during the Revolutionary War and have proceeded ever since through the most recent wars that this Nation has fought.

And so, I would assert that we as a Nation and those who built the foundation for this Nation understood that difference and maintained that difference. And there is no reason why that difference should be changed at this particular point and have those systems blended because we are engaged in combat.

I would ask anyone to admit for discussion a criminal enterprise that has ever in our Nation's history had the effect and the purpose that we saw on September 11, 2001, which went to the very core of our Nation's economic well-being and its governance.

Mr. KATSAS. I think the rules are different because the stakes are different. In the criminal context, if a guilty person is turned loose, a bad act goes unpunished. In the wartime context, if an enemy combatant is wrongly turned loose, that is someone who is trying to kill us. And I think you need look no farther than the example of Mr. Mehsud, the guy who was on the front page of yesterday's *Washington Post.*

He is someone who was mistakenly let go from Guantanamo who, in fact, had been an enemy combatant, one person. He was let go. He rose to become one of the Taliban's leading commanders in Pakistan, orchestrated the kidnapping of various Chinese civilians and because a big part of the Taliban resurgency in that country. Those are the stakes from even one erroneous decision to release someone who should have been kept at Guantanamo.

Mr. SAXTON. Mr. Chairman, if I could just ask one short question to Admiral McGarrah?

Admiral, I am sure that you were within earshot of the testimony that was offered by the previous panel and particularly Mr. Abraham. I would just like to give you an opportunity to describe the activities that you oversaw and perhaps respond to some of Mr. Abraham's statements.

Mr. MCGARRAH. Thank you, Representative Saxton. I came to work directly for Gordon England, who was then secretary of the Navy in July of 2004. When he initially interviewed me, I was coming to the position of director of the Office of the Administrative Review of the Detention of Enemy Combatants. And we were going to implement the ARB process. And Mr. Dell'Orto just mentioned the annual review.

Between the time of my interview and the time of my reporting, the Supreme Court on June 28th issued three decisions. Based on those decisions, we stopped what we were doing on the ARB process and started to structure the CSRT process based on Army Regulation 190–8, which is the regulation that outlines the competent tribunal portion designed to meet the requirements of Geneva Article 5.

I had over 200 people assigned to me from all 4 services for various periods. We were one of what was called then "individual augment organization," which meant the services were tasked with providing staffing for us for various, generally temporary, periods of time, usually three to six months each. Although I had some that were detailed to me for longer, one to two years.

We started to avail ourselves of the training that was available from organizations and intelligence agencies that had been involved in the detention business from the start because one of our requirements was that anybody detailed to my process should not have been involved in any prior way in the apprehension, detention or interrogation of detained enemy combatants. We didn't want to create any possibility of a conflict or a bias on the part of the people that were assigned to us.

We began the CSRT hearings at the end of July 2004. We had the last hearing in January of 2005 and the last decision that I signed the final paperwork on for the CSRT as the convening authority in March of 2005.

Let me talk a little bit about the processes that we had. And let me clarify one thing that came up in the earlier panel. As the convening authority, I only had two options when a decision came to me. The tribunal members, who were three senior military officers, the senior of which was an O-6, a Navy captain or an Army, Air Force colonel. Those were the decision makers in this process.

As the convening authority, I could either concur in their decision, or if something didn't look right to me, I could send it back

for further deliberations. I did not have the authority to reverse that decision. That was by design. And we did not want to put in place a single individual who had the capability to make those decisions.

We solicited input from the intelligence agencies per our procedures. They were tasked with looking at their files and identifying information that was relevant to enemy combatant status determination.

We then collected and reviewed that information, including reviewing on the site of some of the intelligence agencies. And we culled from that information the information that we felt was directly applicable to a status review. And we provided that to the tribunal.

The CHAIRMAN. I thank the gentleman from New Jersey.

Mr. SAXTON. Thank you very much.

The CHAIRMAN. Mr. Katsas, in your opinion, you told us a few moments ago that there was no difference in the burden of proof between the CSRT's procedure and the procedure of habeas corpus.

In the Rogers dissent, Judge Rogers dissent and what is known as the Boumediene case, D.C. Circuit, under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. It goes on to say the CSRT works quite differently. The detainee bears the burden of coming forward with evidence explaining why he should not be detained.

Mr. Loebsack.

Mr. LOEBSACK. Thank you, Mr. Chair.

I just want to follow up on some issues that I raised in the earlier panel. I know you folks were not here. But one of my big concerns as a new Member of Congress, as somebody who follows international politics, taught it at a small college for 24 years also at a small college in Iowa, is the reputation of the United States in the world community.

And there have been a number of folks who have talked about—academics primarily, and I will admit not practitioners so much, unfortunately—but who have talked about so-called soft power. And I am sure you are familiar with what that means, our values, what we represent to the rest of the world and how the rest of the world looks at those values and our system and all the rest.

One of my big concerns with respect to this particular issue is that our soft power, if you will, around the world has declined dramatically over the course of the last five years, in particular with respect to this issue that we are talking about today. I would never make the argument; I don't want anyone to mistake what I am going to say. I would never make the argument that we should extend habeas corpus everywhere around the world to all folks we have detained all over the world. But I do support what the chairman's bill is attempting to do.

But I am just wondering. You know, I have got in front of me here a letter that 34 former members of the diplomatic corps, including former Secretary of State William Rogers and former National Security Advisor Anthony Lake, wrote in September of 2006. They wrote it to Members of the Senate, to Members of the House and the Senate, urging us—not me at the time, but Members—not

to go along essentially with the legislation that was adopted having to do with detainees.

And I just want to mention, one part of it here where they say that, "Judicial relief from arbitrary detention should be preserved here, else our personnel serving abroad will suffer the consequences. To deny habeas corpus to our detainees can be seen as a prescription for how the captured members of our own military, diplomatic, and NGO personnel stationed abroad may be treated."

And I mentioned our values and our soft power. I am very concerned, obviously, as I think a lot of people are, and no doubt you folks as well, that when we begin to sacrifice our own values at home, that other nations around the world will begin to treat our personnel around the world as they believe we are treating these detainees at GTMO in particular.

When you folks were considering some of these, you know, the new regulations, I mean, did you think about, I guess, the broader context, the role of America in the world and our reputation and what that may, in fact, do to our national interests? Because I would argue that our reputation is part of our national interest.

We have to have allies in this war on terror. We have to have allies to help us protect our national interests. Did that factor into the discussion at all? Anybody?

Mr. DELL'ORTO. Congressman, let me try to address that in a more indirect way. As a government lawyer, my principle role is to advise the decision maker about the law. That is what by statute the general counsel of the Department of Defense is obligated to do. And I as the principal deputy obviously follow that lead.

And I think a lawyer does a disservice if he or she in advising a client says, you should do this or you shouldn't do that, without making it clear that the law permits you to do something or prohibits you from doing something. So your first charge is to give your best advice as a lawyer about the law.

Now, lawyers in government service have, I think, a secondary aspect to their job. And it is probably not defined in statute anywhere. But we do have a vantage point, as we look over an organization to which we provide legal advice, that because the scope of our legal responsibilities generally runs through the breadth of that organization, we are in a position to supplement that legal advice, again, if the client desires that, with our views as to policy.

Mr. LOEBSACK. Right.

Mr. DELL'ORTO. But one of the problems, I think, lawyers have today is too often they don't distinguish between those two roles. And so, they do say, you shouldn't do this or you shouldn't do that. And the decision maker walks away from that thinking the law has told him or her that he can't do something or she can't do something.

With respect to these issues, certainly our principal focus was on the law and what the risks of taking certain actions were under the law. I think all of us were mindful of broader policy concerns.

And you try to take those into account. But you have to be careful in doing so that you deal with the law first, and then the policy piece later, because you don't ever want to co-opt all those other people who are standing at the side of the decision maker and pro-

viding the policy advice that they are charged to do by statute and their assigned responsibilities by the decision maker.

Mr. LOEBSACK. Thank you.

Mr. DELL'ORTO. So I think certainly aspects of this were taken into account by lawyers. But I think they were also taken into account by those other people who were providing advice.

Mr. LOEBSACK. Right.

Mr. DELL'ORTO. And this was and is new, unique, and novel under many aspects of the law, but even many more aspects from a policy standpoint. And in the face of what we had suffered on September 11th, 2001, what we knew about what had transpired prior to September 11th, 2001, the attacks we had suffered overseas prior to that date going back to the bombing in Lebanon at the Marine barracks, going back to Office of the Program Manager–Saudi Arabian National Guard (OPM–SANG) and Saudi Arabia, going back to Cobar Towers, going back to the *Cole,* going back to the embassy bombings.

I mean, you could see a trend line of greater and greater vulnerability to this Nation on its home soil. And so, that becomes your principal policy focus. How do we stop this from happening again?

Mr. LOEBSACK. Right.

Mr. DELL'ORTO. And it remains our principal policy focus.

Now, I mean, clearly, other people around the world disagree with the notion that we are at war. They view this as a criminal law enterprise. We respectfully disagree.

When 3,000 people, more than Pearl Harbor, more than died on the beaches of Normandy on D-Day in one single event, and innocent civilians pay that price, then I think it is incumbent upon us to provide the decision maker with the broadest possible latitude under the law to make the calls he or she needs to make to defend the country. And I think that is the perspective we brought to the decisions that stem from that horrific day on September 11th.

Mr. LOEBSACK. Okay.

The CHAIRMAN. I thank the gentleman.

You know, I just can't let it go, Mr. Katsas.

Mr. KATSAS. Mr. Chairman, may I respond?

The CHAIRMAN. Just a minute. Just a minute. I think you are leading us to believe that under the review commission, the CSRT, is a substitute for habeas corpus. Truth in fact, it isn't, and it can't be.

Though you said in your opinion, Mr. Katsas, that the burden of proof was the same, according to the Rogers dissent, it is not the same. And for us to have the opinion from anyone that the burden of proof is the same under the statute as opposed to the common law habeas corpus is incorrect.

Mr. KATSAS. I respectfully disagree with that.

The CHAIRMAN. You would disagree with the court dissent, is that correct?

Mr. KATSAS. I——

The CHAIRMAN. Are you familiar with it?

Mr. KATSAS. I argued the case and won the case and agree with the views of the majority, not the views of Judge Rogers in dissent.

The CHAIRMAN. Thank you very much.

Mr. KATSAS. May I respond to your question about standards?

The CHAIRMAN. How many cases have you tried, Mr. Katsas?

Mr. KATSAS. Tried?

The CHAIRMAN. Yes, sir.

Mr. KATSAS. Zero. I have argued some 40 appeals. I am an appellate lawyer by training, sir.

The CHAIRMAN. I see. Okay. Go ahead. You want to say something. Go ahead.

Mr. KATSAS. Yes. You made reference to the rules that would apply generally in habeas corpus.

The CHAIRMAN. That is correct.

Mr. KATSAS. The more specific focus has to be, though, on the rules that apply to status determinations made by habeas courts. And on that point, the Supreme Court spoke in the Hamdi case and said that even in habeas corpus, and even where the detainee was an American, and even where the detention was in this country, it would be appropriate because of the nature of war to apply a presumption in favor of the government's evidence.

And that holding of the Supreme Court in the Hamdi case is the very basis for the combatant status review tribunal provision that I think we are discussing. So if you compare CSRTs to habeas in Hamdi, the principles are analogous.

The CHAIRMAN. Okay. I appreciate your comments. And I am pleased to know you won that case. That is good.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

Mr. Chairman, again my compliments to you for providing this forum today. As you know better than anybody in the room, once this process begins up here it takes a life of its own. I might observe that it is unfortunate, or at least to me, that we spent three and a half hours, constructive though it may be, on the other side of this issue.

And now, again because of things that happened here and the business of the place we have a very, by comparison, small group of folks who are able to hear—I am not sure if it is the rest of the story, but a very important part of what is going on here.

Admiral, Colonel Abraham made a very eloquent and obviously informed and well-researched presentation, which led me to believe that the review process was deeply flawed, that even reviewed by the appeals court that really didn't count for much. I tend to disagree very much with what he had to say.

Could you elaborate on your earlier comment and again expand on the idea that the review process and the appeals process, if not in theory a substitute for—is this not, given the nature of the enemy who are not only combatants—they are assassins. Would you comment on the process from your perspective?

And is this something that we need to go back—again, I totally disagree with granting habeas corpus. In spite of all the good legal arguments here, I think it is not appropriate.

Having said that, how do you see the process in context of what Colonel Abraham said over and over again?

Mr. MCGARRAH. Sir, I will confine my comments to the CSRT process and defer to the lawyers at the table for discussion of the appellate process.

Mr. HAYES. Perfect.

Mr. MCGARRAH. My personal view is the CSRT process was an extremely robust process. Keep in mind that the 558 CSRT hearings that were conducted when I was the director of OARDEC—all of those at Guantanamo that went through those hearings had had at least one, and many times multiple prior determinations of enemy combatant status because combatant status determinations are, in fact, typically done by the military commander on the field.

Regardless of that, we went and did a search through the records of government agencies, both within DOD and outside DOD seeking all the information that was relevant to that status determination, including a specific request to government agencies for anything that might tend to indicate that an individual should not be an enemy combatant. I shy away from using the word exculpatory because that connotes a legal process. My direction in the procedures was to look for anything and everything that might tend to indicate that an individual should not be classified as an enemy combatant.

We expended hundreds of hours working with the interagency. We talked to them early on, even before the start of the formal process.

They understood the importance of the process. They had a wealth of information that dated back to the point of capture, which was included in my charge to try to seek information on the conditions of capture, through the time at which we conducted the hearings.

We had a process in place where we added resources, significant resources to supplement the positions that were identified in our procedures to collect that information. We added dozens of people to supplement that because of the importance and because of the thousands and thousands of pages and documents that we found were available and relevant, or potentially relevant to these determinations.

We had a process that we invoked, or that we implemented, called a request for information process where anybody in the CSRT process if they had a doubt as to the sufficiency of the information or if they had a question of the information that was collected and being considered, could request additional information or clarification. We had those requests that were initiated by our dedicated intelligence section.

Those requests were initiated by recorders, by personal representatives. And some personal representatives actually brought requests that originated with detainees who asked questions about specific information. And we had information requests that came from our panel members, hundreds of those requests. And in some cases we put in recess the CSRT panels until we were able to provide the panel members with answers for that information.

So we had dozens of people working on the information collection. And my personal view is it was a very robust process.

Mr. HAYES. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Andrews.

Mr. ANDREWS. Thank you.

I thank the panels for their testimony this afternoon.

Let me start by saying I think there is unanimity on the committee, close to unanimity in the country, that if someone is a terrorist that wants to kill Americans, the last thing in the world we want them to do is be released from anywhere under any circumstance.

Second, it is my strongly held view that you gentlemen and your colleagues are doing your job with integrity as well as you can do it under very difficult circumstances. And I don't doubt for one moment your veracity or your commitment to justice, not for one moment.

I do have a grave concern about a process where the first time at which an innocent detainee or any detainee is in front of a fact finder who is independent of the executive branch, is in the court of appeals. That is my concern.

I do not in any way mean to impugn the integrity of those in the executive branch that are conducting these processes, not at all. But this is my concern.

Let me ask you this question. From a practical point of view toward the twin goals, the complementary goals of holding people for whom there is good cause to hold while not holding those for whom there is no such good cause. If we were to institute habeas, how would things be different from a practical point of view for the work that you are doing?

Let us say we pick somebody up on the streets of Beirut and determine that the person was a threat to the country and incarcerated him in Guantanamo. And he files an application for a habeas proceeding, and it is heard in a federal district court in Miami. How would it be different the way you do your job, different than what we have now?

Mr. KATSAS. I would just repeat my earlier answer about the practical and security harms that we faced at Guantanamo.

Mr. ANDREWS. What are they?

Mr. KATSAS. Under habeas.

Mr. ANDREWS. Let us be specific.

Mr. KATSAS. Okay. Well, as I said, the burden of having hundreds of cases, hundreds of lawyers visiting a foreign military base in time of war, the security risks coming from information slippage from the outside world to the detainees, the harm——

Mr. ANDREWS. Let us take these one at a time.

Mr. KATSAS. Okay.

Mr. ANDREWS. Is it that big of a deal to have attorneys under supervision of military police visit their clients in a jail?

Mr. KATSAS. When in a foreign military base in time of war when there are hundreds of cases, yes, it can be. And we have documented instances of detainees getting information that caused security problems. We have concern that——

Mr. ANDREWS. If there is a situation where a detainee is getting information that causes a security problem and the attorney who conveyed that information has done so knowingly or intentionally, I think they have committed a federal crime. And I think the remedy would be to prosecute that attorney, not to have a procedure that is totally devoid of an independent review before you get to the court of appeal.

Mr. KATSAS. I would agree there might well be a federal crime there. I am just saying we have experience at Guantanamo for a few years of what habeas is like even with respect to what one might call the pre-trial skirmishing.

Mr. ANDREWS. Have there been any security breaches when habeas was in effect? Were there any security breaches that involved conversations between attorneys and detainees?

Mr. KATSAS. There were numerous instances. They were referred to in an affidavit filed by, I believe it is, Commander McCarthy, that we filed in the D.C. Circuit explaining all of this and that are summarized in the majority's opinion in Bismullah.

Mr. ANDREWS. If the government in making its proofs in the habeas proceedings says, "Look, this guy is here because informant X said he is a terrorist," wouldn't that take place in in camera proceeding before a judge? What is the security problem with that happening in an in camera proceeding in a habeas proceeding?

Mr. KATSAS. It might or it might not if we have a habeas trial in the United States. As I said, the detainees' arguments were full-blown, constitutionally based, trial-like procedures would be much stronger than they are in the context of a military proceeding outside the United States.

And we faced these arguments, sir. We had habeas proceedings for two years in which the detainees said, "Of course, we are entitled to see the evidence against us."

Mr. ANDREWS. And they were dealt with in the normal regular order of the law, weren't they?

Mr. KATSAS. Well, they were suspended because we prevailed on our broad legal argument that the Constitution doesn't apply at Guantanamo. If the habeas trials are in Washington, D.C., we might or might not win that argument.

Mr. ANDREWS. I understand.

I see my time is up. Thank you.

The CHAIRMAN. Thank you.

Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman.

And, gentlemen, I had some other business to attend to so I didn't get to hear your testimony and see the questions. I hope I am not repeating what has gone on already.

We have historically given the President broad latitude to establish policy and procedures for the detention and the reparation of the enemy POWs in traditional conflicts. I believe, however, that our concerns about habeas in the present campaign against international terrorist organizations is justified for two primary considerations: one, the problem of indefinite detention of the enemy detainees in a war that may last indefinitely, and, two, the ambiguous status of many of the detainees who were not captured by soldiers on the battlefield but may have been apprehended by intelligence or law enforcement officers far away from the battlefield.

I believe that the Congress should restore a limited statutory right of habeas for detainees in the present conflict. And I actually have a bill that I have dropped into the Congress that has proposed a limited right. And under my proposal, detained alien enemy combatants can petition for writ if they haven't had a CSRT, if they

haven't been charged with a crime, or if they have been in detention for at least two years.

And the compromise acknowledges, I think, the concern given the unprecedented habeas access to war prisoners, giving them something that traditionally we really haven't ever given as a country and the need to give the executive his Article 2 power to conduct military and intelligence operations free from judicial interference.

And I believe that given the gravity of the interests involved, especially when we heard the colonel on panel one, that the combat status review tribunals are not sufficient to ensure confidence in executive decisions about detention of individuals for indefinite periods of time under conditions that look more like punitive incarceration rather than administrative wartime internment.

So my proposal would be to grant a habeas right that is triggered after a certain period of time has elapsed. My question is, would you support a statutory right to habeas if it contained some limitation of that sort?

Mr. DELL'ORTO. Congresswoman, from the standpoint of the Department of Defense I think where we are right now, given the posture of current litigation, it would be preferable to allow the courts as they are undertaking their review to complete their review of what we believe is a very robust assessment of the basis for detention for the detainees we currently have.

We have taken—between the Department and certainly Congress and the President in the various Detainee Treatment Act and the Military Commissions Act—we have taken the process for review of detention far beyond what it either has historically been or what we believe either international law or our domestic law requires.

Ms. SANCHEZ. I would agree with that comment, by the way. But you still are detaining people indefinitely.

Mr. DELL'ORTO. Well, again——

Ms. SANCHEZ. And the court has just ruled that they have constitutional rights.

Mr. DELL'ORTO. I am not sure that the court has given us that ruling yet.

Mr. KATSAS. The court has ruled exactly the opposite.

Mr. DELL'ORTO. But in either event, I mean, this conflict, although it is not likely to, could end tomorrow and we would be perhaps faced with the prospect of what are we going to do with some of these folks who clearly are dangerous. And it may not be that a review process does that.

And I think the secretary has indicated this. We may need to look at some statutory fixes for indefinite detention beyond the notion of detention pursuant to the hostilities as they exist right now. But with respect to the people we currently have, while hostilities are currently underway, we believe that the process that is in place right now and the review that is being undertaken in the courts should be allowed to run its course before we entertain a further level of statutory changes into what we are attempting to do on a day-to-day basis in the Department of Defense.

Ms. SANCHEZ. Let me ask you just one other question. It is my information that the detainees that we have at GTMO are not just from the Iraqi War, but maybe from Afghanistan and other countries. Is that true?

Mr. DELL'ORTO. We have, to the best of my knowledge, no one in Guantanamo who has been brought there from Iraq.

Ms. SANCHEZ. Okay.

Mr. DELL'ORTO. There are several detainees in Guantanamo who are Iraqis, but who were apprehended prior to the initiation of combat activities on the ground in Iraq. So they were part of the war on terror in advance of the invasion of Iraq in March of 2003.

Ms. SANCHEZ. Great. Thank you for that clarification.

The CHAIRMAN. Thank you very much.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

Would the gentlelady yield for a question?

Ms. SANCHEZ. Certainly.

The CHAIRMAN. You have the floor, she doesn't.

Ms. SANCHEZ. I will entertain a question.

Mr. HAYES. Thank you. Were you here when I asked Admiral McGarrah about the process from his perspective? I couldn't remember whether you were in the room or not.

Ms. SANCHEZ. I don't believe that I was.

Mr. HAYES. Okay, I don't think so, either. But, I mean, the questions that you asked a moment ago really go to the heart of what we are talking about here.

And picking up on her question about how the detainees are questioned and how you determine keeping them, in the context of our conversation, Admiral McGarrah, which was a very robust process of finding out where they came from, how they got there, what the circumstances are, would you elaborate and expand on your answer so that it directly addresses the very good questions that Congresswoman Sanchez just asked?

Mr. MCGARRAH. Yes, sir. What I tried to describe pursuant to the prior question was what I think is a very robust process, the CSRT process. Keep in mind that the 558 that we ran when I was the director or OARDEC, all 558 came to us with at least one prior determination, typically by the military commander, which is traditionally how this is done, but at least one prior status determination of enemy combatant.

We work closely with over 200 people in my organization. We work closely with the intelligence agencies, both inside the Department of Defense and outside Department of Defense and with other groups that might have relevant information to collect thousands of pages and thousands of documents of that information.

Those documents were then provided through the process ultimately into the CSRT record. And that was what was before the three-person panel.

The officers on the panels were senior military officers, no more junior than O-4, the senior of which was an O-6, which is a colonel or captain. We had resources that I dedicated to supplement the recorders in the gathering of information because it became such a huge task. So I added a couple of dozen people to assist in the gathering of information.

And we had a process by which if there was any question about the information or any apparent gap in the information, anybody in that process, the intel section, the case writer, the recorder, the personal representative or even tribunal members. In some cases,

we had requests from detainees that came to us through the personal representative. We could stop that process and pursue answers to those questions.

Mr. HAYES. Thank you very much.

Ms. SANCHEZ. Would the gentleman yield just for a second?

Mr. HAYES. Yes, ma'am.

Ms. SANCHEZ. May I ask why is that in such stark contrast to what the colonel testified on panel one, do you think?

Mr. MCGARRAH. Colonel Abraham was assigned to us for six months from September of 2004 until March of 2005. The role that he functioned primarily in for me was utilizing some pretty strong information technology skills to build a database that we use to track every step of this process.

We tracked our contacts with the source agencies of information. We tracked when we had drafted, for instance, the unclassified summary of evidence that was shared with the detainees in advance of the hearing. We tracked the scheduling of the hearing.

We tracked things like the requests for information. So the vast majority of his time was spent in helping us to build the database and the mechanics of that database structure to do that tracking.

He did a little bit of intelligence information gathering, as he alluded to before, but only about two weeks of the time that he was assigned to me. So he had a much narrower view of the process than I had or my deputy or some of our other staff that was involved in dozens and hundreds of those cases.

I do know that he made a point in the earlier hearing of saying that he was not assigned to another panel after his panel made a determination of no longer an enemy combatant. That was actually at his request. That panel was in early December. He did write a letter to me in December where he expressed concern about his serving on the administrative review board process versus his obligations as an attorney.

When we discussed that with him, my deputy met with him directly about that. And the issue that was the genesis of his concern was an issue that is referred to as a "professional responsibility" issue. That is, one lawyer can not deal with a client of another lawyer without that other lawyer's permission. That issue had come up from habeas counsel back in August that actually caused us to suspend for several weeks anything in the CSRT process while we resolved that issue.

So the bottom line is that while he had a personal involvement in this, his view was to a very narrow piece of the total process.

Ms. SANCHEZ. I thank the gentleman for yielding.

The CHAIRMAN. Mr. Hayes.

Mr. HAYES. Thank you.

And I thank the gentlelady again for a very thoughtful question.

It would be appropriate, Mr. Chairman, and I think it would be helpful to this committee for the admiral to give us that or submit that letter for the record as it relates to the hearing today.

The CHAIRMAN. Excellent.

Do you have it, Admiral?

Mr. MCGARRAH. Yes, sir, I have a copy with me. I would be glad to.

The CHAIRMAN. Well, then, it is so entered, without objection.

[The information referred to can be found in the appendix on page 267.]

Mr. HAYES. Okay. In summation, one of the incredible wonders and the beauty of the process that people have witnessed here today, people can come before the U.S. Congress, civilians, military, Members of Congress. They can say what they believe. They can defend passionately their position. They can ask questions.

They have the right to be heard. And the "blame America first" crowd, whether they be foreign or domestic, I hope, as they seek to sometimes point the finger at America for not being fair would look at this process today, where people from varying opinions, varying points of view have brought the facts to the table, where their right to express them was protected. And the facts stand on their own.

So, Mr. Chairman, again, I think you have done a wonderful job of putting the process out for people to see. And you all and others have made a very strong case that we treat people right. We don't torture them. But habeas corpus is not where we need to go with these terrorists.

And I thank you and yield back.

The CHAIRMAN. Well, thank you very much.

It looks like that Shea-Porter is the only one—just a moment. Does Mr. Saxton have a question? No.

Ms. Shea-Porter, please.

Ms. SHEA-PORTER. Thank you. And I do think we have a wonderful system of government that we are able to have this conversation. But we are also interested in other human beings being protected, not being held without the evidence. And that is why we are here. This is a pretty important conversation.

I would like to just confirm that habeas would only be for land that is under U.S. jurisdiction. Is that so? I mean, that is how they are looking at Guantanamo, right, that it would be under our jurisdiction? The United States has that right to put habeas there.

Mr. KATSAS. It would depend on how you write the bill, of course. If you simply restore——

Ms. SHEA-PORTER. Okay, I understand. So in other words, all that argument that you have put forth about having it everywhere around the world, that is not even the issue on the table.

Mr. KATSAS. I am not sure that is right. If you simply restore habeas corpus, there would be credible arguments against us if habeas runs worldwide.

Ms. SHEA-PORTER. I think I read the language to talk about—I read the language. And it is——

Mr. KATSAS. Subject to the one exception of zones of conflict, which I think Mr. Philbin discussed.

Ms. SHEA-PORTER. Okay. Well, I read the language. But we will move on.

And it is very possible we use habeas corpus in this Nation. And we still have vigorous prosecutions and sentencing, including the death penalty. So if we had people committing crimes against this Nation, habeas corpus would not strike any of that. So when we

talk about worried about punishing, we certainly would be capable of doing that, we just would ask for the evidence first.

Mr. Dell'Orto, I would like to ask you the first question. You talked about the administrative review board in your writing. And you said it was created to ensure that we detain individuals no longer than necessary. Are you saying that before that board we did keep people longer than necessary? When was that board created?

Mr. DELL'ORTO. The board was created—I think Admiral McGarrah has indicated we were in the process of putting that together in 2004. But even before the formalized process, or that formalized process was put in place, we had fairly early on in the conflict determined that we did not just want to hold these people, all of these people, indefinitely.

Ms. SHEA-PORTER. Okay. Let us——

Mr. DELL'ORTO. And so, we were actively through an interagency process screening individuals for return to their countries of origin, and had moved some number of people, certainly in the tens at that point, maybe dozens, back to their countries under various conditions of transfer. So we had already undertaken to do that.

Ms. SHEA-PORTER. Right. And we do know that we have been holding people. But let us go on about these questions, please.

You also wrote about Detainee Treatment Act and Military Commissions. And you said in your writings they seek to provide justice fairly and lawfully administered while safeguarding the security of the American people. And I wanted to ask you does it trouble you that not all of the people that are being held right now came from a battlefield, when you talk about enemy combatants and battlefield.

Mr. DELL'ORTO. Well, I think given the way this conflict has unfolded and the fact that the individual operators, the combatants, the cells in which many of them operate, their ability to move across international boundaries and put themselves beyond the reach of our armed forces who are respecting those international boundaries creates——

Ms. SHEA-PORTER. Again, if I may answer that.

Mr. DELL'ORTO [continuing]. A necessity for being able to reach out and have others capture them for us and bring them to us.

Ms. SHEA-PORTER. Thank you. But what I am concerned about, and I think we should all be concerned about, is that some of these were picked up as a punishment. They got caught in some tribal feud. Do you acknowledge that there are people there who were not supposed to be there, that never intended any harm to the United States? They were picked up and turned over by a possible tribal feud or other issues.

Mr. DELL'ORTO. Well, as I said, we looked at over 10,000 individuals who were provided to us either as a result of our own captures, the captures by our allies or who may have been provided to us by others who were reacting to rewards that were put out. But they were screened in Afghanistan before being sent to Guantanamo.

Ms. SHEA-PORTER. So bounties were paid? There was some incentive for somebody who had a feud with somebody else?

Mr. DELL'ORTO. We have a public rewards program that is sponsored both by the Department of Defense and the Department of State for the capture of individuals.

Ms. SHEA-PORTER. And, you know, Mr. Dell'Orto, these things happen. But that is why you have to have a thing to bring evidence so that we can figure out who is there lawfully, who committed crimes, and who did not. They can't see the classified evidence. Is that correct?

Mr. DELL'ORTO. The detainee himself or his representative?

Ms. SHEA-PORTER. The detainee cannot see classified evidence.

Mr. DELL'ORTO. Correct. I mean——

Ms. SHEA-PORTER. Okay. Who determines whether the evidence is classified or not?

Mr. DELL'ORTO. The original classification authority who would be the source of the information, whether it be one of the intelligence agencies or the commanders on the battlefield themselves.

Ms. SHEA-PORTER. Okay. And the personal representative, again, is not a lawyer?

Mr. DELL'ORTO. Correct.

Ms. SHEA-PORTER. Okay. So they may or may not know how to interpret whether that should be classified evidence or not?

Mr. DELL'ORTO. Well——

Ms. SHEA-PORTER. As a matter of fact, I believe I heard they don't even see the classified evidence.

Mr. DELL'ORTO. No, they have access to the classified evidence. But I will tell you——

Ms. SHEA-PORTER. Am I wrong when the attorney who sat in your seat earlier said that he doesn't even really know why his client is there, that he has not seen the classified evidence?

Mr. DELL'ORTO. No, I think we are talking about the personal representative. He does get an opportunity to see the classified evidence. And the notion of classified evidence is a military connotation. These are military officers. They know what the standards are for classification of information.

Ms. SHEA-PORTER. Mr. Chairman, if I could just ask one last question.

How come when you determine they are no longer enemies—what standard do you use? You don't say guilty or not guilty. When did they shift from that to "no longer" instead of not an enemy combatant?

Mr. DELL'ORTO. The process at Guantanamo envisions continuing gathering of information. If their circumstances change because new information has become available that changes the original determination——

Ms. SHEA-PORTER. So it is not no longer. It is simply not an enemy combatant.

Mr. DELL'ORTO. They are considered no longer to be an enemy combatant because new information may have surfaced to change that original determination or to update that original determination.

Ms. SHEA-PORTER. Okay, so not an enemy combatant as in innocent?

Mr. DELL'ORTO. No, we are not talking about guilt or innocence here, ma'am. This is no longer an enemy combatant, an adminis-

trative determination based on the laws of armed conflict, not a judicial or criminal determination.

Ms. SHEA-PORTER. Okay. But you understand the phrasing there, "no longer an enemy combatant"? It would be clearer, I think, and am I correct when I am saying it turned out they were not an enemy combatant?

Mr. DELL'ORTO. Well, again, a commander has made a call on the ground. He has, as commanders traditionally do throughout our history based upon the circumstances and factors that are available to them on the ground in the heat of battle, you know, in a dusty hut somewhere as this individual is presented to him by his soldiers. This is who we picked up. This is what we found in his pockets. This is what people have told us about him.

Ms. SHEA-PORTER. Okay.

Mr. DELL'ORTO. The commander has made that call.

Ms. SHEA-PORTER. Right. Again, let me state that I certainly want to catch anybody who has any harm. But we should not catch those who did not intend us harm.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady.

I note the presence of the gentleman from Texas, Mr. Conaway.

I understand you have no questions, however. Is that correct?

Mr. CONAWAY. That is correct, Mr. Chairman. Thank you very much.

The CHAIRMAN. All right. Thank you.

Gentlemen, thank you. You have been excellent witnesses. We appreciate your being with us and your expertise.

Mr. Katsas, your expertise on the preponderance of evidence, we thank you very much.

Mr. DELL'ORTO. Mr. Chairman, could I address that for a second to perhaps help?

The CHAIRMAN. You know, I have been wanting to ask you that all afternoon since Mr. Katsas and I disagreed on it. Please go right ahead.

Mr. DELL'ORTO. And let me give you my background. As a——

The CHAIRMAN. But now you must understand he is the expert since he actually argued the case itself. But you must yield to him as being the expert.

Mr. DELL'ORTO. I do in all matters of the law, Mr. Chairman.

The CHAIRMAN. Go ahead.

Mr. DELL'ORTO. But let me at least from my more simplistic view of things offer this. If we conducted a combatant status review tribunal of an individual and the recorder introduced no evidence about that individual's situation, none, and the detainee, as it is his right to do under this system, said nothing, didn't object, said nothing, the government would not have carried its burden and he would be declared not to be or no longer an enemy combatant. And he would be released.

I mean, that is what all burden is all about. If the government produced no evidence, he would win without saying a word of his own. That is my more simplistic view based upon my years as a prosecutor, defense counsel, trial and appellate judge.

The CHAIRMAN. Thank you. Thank you very much.

Gentlemen, thank you. This has been an excellent hearing. And we are most appreciative.

And to the members, thank you.

[Whereupon, at 2:06 p.m., the committee was adjourned.]

A P P E N D I X

JULY 26, 2007

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 26, 2007

TESTIMONY OF STEPHEN H. OLESKEY
OF WILMER CUTLER PICKERING HALE AND DORR LLP,
COUNSEL FOR SIX GUANTANAMO DETAINEES

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

JULY 26, 2007

Introduction

Thank you Chairman Skelton, Ranking Member Hunter, and Members of the House Armed Services Committee for inviting me to speak to you today on this important issue. All habeas counsel are grateful for the time, energy and thought which this Committee is devoting to consideration of habeas restoration for our clients, many of whom have now been detained at Guantanamo Bay for more than five and a half years.

My name is Stephen H. Oleskey and I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr. I have been a member of the Massachusetts Bar since 1968 and am also admitted in New York and New Hampshire. I previously also served as Massachusetts Deputy Attorney General and Chief of that office's Public Protection Bureau. My practice generally focuses on complex civil litigation.

By way of background to today's testimony, my experience in the critical matter before this Committee arises from my role as lead counsel and pro bono advocate for six Guantanamo detainees in the period since July 2004, following the decisions of the United States Supreme Court in the *Rasul* and *Hamdi* cases.

Briefly, our representation has been as follows. Our clients, Algerians by birth, were working and living with their wives and children in Bosnia and Herzegovina—an American ally—when, at the demand of the United States, they were arrested by Bosnian police in October 2001. Based on statements by representatives of the United States that our clients were suspected of planning terrorist acts in Bosnia, these men's homes and offices were thoroughly searched and examined. After a ninety day investigation, and based on the recommendation of the Bosnian prosecutor, the Bosnian Supreme Court ordered in January 2002 that all six men be released for lack of evidence. At the insistence of the United States, however, as our clients were about to leave the Central Jail in Sarajevo, the Bosnian executive instead turned them over to the U.S. military forces resident in Bosnia as part of the international peace-keeping mission. The men were immediately flown to the just-opened Camp Delta facility at Guantanamo Bay Naval Station, where they have been held since January 20, 2002.

Along with colleagues from WilmerHale, I have gone to Guantanamo Bay on nine occasions to meet and counsel our clients since my first visit in December 2004. (Before visits by pro bono counsel to Guantanamo began in the wake of the Supreme Court's June 2004 decision in *Rasul v. Bush*, no detainee had met with or spoken to an attorney, although many—including our clients—had been imprisoned in Guantanamo for almost three years.) I represented the men in habeas corpus proceedings in the United States District Court for the District of Columbia, where our suit, *Boumediene v. Bush,* was dismissed in January 2005. I also represented them in the resulting appeal to the United States Court of Appeals for the District of Columbia, where between the spring of 2005 and the fall of 2006 we briefed our clients' appeal on four separate occasions and had two separate oral arguments. In February 2007, after almost two years of deliberation, the Court of Appeals denied our clients' appeal by a vote of 2-1. We then filed a petition for a writ of certiorari to the Supreme Court, which was initially denied (with three dissents) in April 2007, and then granted on our petition for rehearing on June 29, 2007. That appeal is now being briefed with the consolidated Al Odah appeal. Both cases are to be heard in the Supreme Court's upcoming October 2007 Term.

Separately, we also filed petitions for each of our clients pursuant to the Detainee Treatment Act of 2005 ("DTA"). Those appeals are now pending at a preliminary stage in the District of Columbia Court of Appeals.

Our clients, like approximately 365 other detainees at Guantanamo, have never been charged with or indicted for any alleged criminal activity by the United States, and have never been allowed to stand trial for any asserted wrongdoing. Each of them was put before a Combat Status Review Tribunal in the fall of 2004 and determined through that process to be an "Enemy Combatant." Subsequently, each has had his status considered by two Annual Review Boards at Guantanamo; none of them have been recommended for release. None of them have been referred for criminal proceedings before a Military Commission pursuant to the provisions of the Military Commissions Act of 2006 ("MCA") or otherwise.

I. The Central Role of the Great Writ of Habeas Corpus Since 1789

The Great Writ of Habeas Corpus traces its roots to 1215 and the Magna Charta. Long before the establishment of the American Colonies, the Writ had evolved through court decisions in

England as the critical procedural bulwark protecting those detained by the King and facing indefinite detention without trial or charge. Of course, in cases involving a potential death sentence, being able to compel the King's officers to demonstrate the grounds for imprisonment before a neutral judge was literally a matter of life or death.

The protection of the writ of Habeas Corpus was available in the original American Colonies from their earliest days to the time of the Revolution.[1] Hamilton called habeas a "bulwark" of individual liberty, and referred to secret imprisonment as that "dangerous engine of arbitrary government," where a prisoner's "sufferings are unknown or forgotten."[2] At its historical core, the writ serves as a check against arbitrary and indefinite executive detention without trial and it is in this context that its protections have traditionally been considered strongest.[3]

As has often been observed, in the immediate aftermath of the American Revolution, when the Founders gathered in Philadelphia at the Constitutional Convention of 1789, habeas corpus was considered so central a right to secure liberty in the new republic that it was enshrined directly in the body of the Constitution, in Article I, Section 9, Clause 2, as a limitation on the power of Congress:

> 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.

Immediately thereafter, the First Congress codified this constitutional protection in the Judiciary Act of 1789.[4] This made the writ immediately available to any individual held by the United States who challenged the lawfulness of his detention.

In keeping with the importance of this Constitutional command, the writ has been legally suspended during only four periods in the almost 220 years of our Republic. The first suspension occurred during the Civil War, when the District of Columbia was dramatically imperiled by Confederate forces. Later, the writ was suspended during Reconstruction, when turmoil in areas of the South challenged the functioning of the federal courts; then again in the

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[1] William F. Duker, *A Constitutional History of Habeas Corpus.*, 98, 115 (1980).
[2] *The Federalist*, No. 84 (Alexander Hamilton) (George W. Carey & James McClellan, eds. 2001) (quoting Blackstone)
[3] *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).
[4] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified in 28 U.S.C. § 2241).

early 1900s in the then American colony of the Philippines; and finally once more in Hawaii in 1941 in the aftermath of the bombing of Pearl Harbor.[5] In each instance, faithful to the command of the Suspension Clause, suspension has been explicitly limited to the duration of the emergency requiring it, and each time with an express determination the public safety required this drastic action—consistent with Supreme Court rulings requiring that, even during these undisputable instances of "Rebellion or Invasion," congressional suspension must be limited in scope and duration.[6]

In assessing the constitutionally protected scope of the Great Writ, the Supreme Court has stated that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'"[7] Congress must tailor any suspension of the writ geographically to those jurisdictions undergoing rebellion or facing imminent invasion.[8] To avoid substantial constitutional questions as to whether a suspension is constitutionally legitimate, the Supreme Court also requires that Congress "articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction.[9] And if Congress seeks to avoid invoking the Suspension Clause by replacing habeas jurisdiction with a substitute remedy, the Supreme Court will carefully scrutinize the substitute remedy to determine whether it is "inadequate [or] ineffective to test the legality of a person's detention," in which case the elimination of habeas will be deemed unconstitutional.[10]

Habeas allows—indeed requires—meaningful judicial review of the legal and factual basis for detentions by an Article III federal judge. In contrast, in Guantanamo, the "enemy combatant" determinations are made by military panels in a command structure setting. This review is particularly important for the Guantanamo detainees because of the Administration's failure to distinguish between innocent civilians and combatants;[11] the Administration's decision to seize

[5] *Hamdi v. Rumsfeld*, 542 U.S. 507, 563 (Scalia, J., dissenting); William F. Duker, *A Constitutional History of Habeas Corpus.*, 98, 115 (1980); 149, 178 n.190.
[6] See, *e.g.*, *Ex parte Milligan*, 71 U.S. 2, 126 (1866), where the Court reached this conclusion even though Congress had authorized a broader suspension of the writ.
[7] *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518. U.S. 651, 663-664 (1996)) (emphasis added).
[8] Milligan, a resident of Indiana, a state not in rebellion, was therefore found by the Supreme Court to have his right to habeas protected despite the statute enacted by Congress which Milligan challenged by seeking habeas relief. *Id.*
[9] *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).
[10] *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (internal quotation marks omitted); see also *St. Cyr*, 533 U.S. at 305.
[11] A confidential CIA report developed in the summer of 2002 stated that most of the Guantanamo detainees "didn't belong there." Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, The New Yorker (July 3, 2006).

people in locations far from any battlefield and even (like our clients) in allied nations; and the fact that, as highlighted by the recent court declaration of reserve Army intelligence officer Lieutenant Colonel Stephen Abraham, the CSRTs are "largely a tool for commanders to rubber-stamp decisions they had already made."[12]

In sharp contrast to the limited appellate review provided by the Detainee Treatment Act, habeas corpus mandates factual review of the claimed basis of a Guantanamo prisoner's indefinite detention. By ensuring that the detainee is given meaningful notice of the allegations claimed to support his "enemy combatant" status and a meaningful opportunity (through counsel in a real adversarial proceeding) to contest those allegations, habeas can ensure that only those who should be correctly categorized as enemy combatants will continue to be held. In the case of my clients, for example, we would expect a federal judge in a habeas trial not only to hear evidence regarding the thorough investigation and resulting order for their release by a competent Bosnian court, but also to consider what justifications are now proffered by the government for our clients' continuing imprisonment for the last five and one-half years. For as the Supreme Court stated in *Hamdi*: "[c]ertainly, we agree that the indefinite detention for the purpose of interrogation is not authorized."[13]

Habeas provides access to counsel, a vital resource in a proceeding where liberty is a stake, particularly where potential life time imprisonment is the outcome sought by the Government. Counsel access has long been a critical and unquestioned adjunct of habeas representation, but it is expressly prohibited in the Combat Status Review Tribunals created by the Defense Department in 2004. Its indispensability is all the more unquestioned here, where detainees like our clients are denied any access to the classified evidence compiled against them; had no ability to examine any adverse witnesses or sources relied on by their CSRTs; and were denied access to any favorable witnesses except fellow Guantanamo prisoners or to any documents bearing on their status as an enemy combatant. Notably, after the Military Commissions Act was passed, the Government made various attempts to limit counsel access visits, to limit attorney access to

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A former Guantanamo commander, Brigadier General Jay Hood, was even more candid: "Sometimes, we just didn't get the right folks." But, he said, prisoners remain held at Guantanamo because: "Nobody wants to be the one to sign the release papers. There's no muscle in the system." Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, Wall. St. J., A1 (Jan. 26, 2005).

[12] William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. Times, A1 (July 23, 2007). *See also* Declaration of Lt. Col. Stephen Abraham, Case No. 07-1134 (D.C. Cir. June 15, 2007).

[13] *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality).

classified evidence that would have been reviewable under the old habeas regime, and to violate attorney-client privilege by monitoring and reviewing legal communications.

Habeas allows review of Government decisions to transfers of prisoners necessary to prevent further protracted illegal detention in another country and often torture there. Following the *Rasul* decision in 2004, many federal court judges presiding over habeas petitions entered orders requiring the Government to give 30 days notice before transferring a detainee from Guantanamo to another country for follow-on imprisonment. [14] Since enactment of the Detainee Treatment Act, courts have held that they now lack the authority to enter such orders, no matter how severe the projected risk to a detainee from such rendition to a third country. Without the restoration of habeas, this very real risk remains wholly unconstrained and subject only to executive considerations.

Finally, habeas, but not the DTA process, can provide release as a remedy in those cases where a federal judge determines that the grounds on which a prisoner has been imprisoned have been found—independently of the military CSRT process—to "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[15] Consistent with the centuries-old practice of habeas here and in England, the federal habeas statute gives federal judges the broad power to do "as law and justice require," including the power to order a prisoner's release where the judge determines that the imprisonment is illegal.[16]

II. *Rasul*, *Hamdi*, and *Hamdan*: the Supreme Court Speaks Three Times in Two Years on Guantanamo but the Detainees Continue to Be Denied Access to Habeas

Against this backdrop of the Great Writ as a fundamental bulwark against arbitrary indefinite imprisonment, and the internationally controversial creation of Guantanamo Bay prison by the Administration in an undisputed attempt to create a legal black hole,[17] Congress adopted the DTA and the MCA.

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[14] See Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 (2006) (summarizing decisions).
[15] *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (citing 28 U.S.C. § 2241(c)(3)).
[16] 28 U.S.C. § 2243.
[17] See Patrick F. Philbin and John C. Yoo, Memorandum for William J. Haynes, II, General Counsel, Department of Defense (Dec. 28, 2001), *available at* http://www.library.law.pace.edu/research/011228_philbinmemo.pdf.

These statutes cannot be understood without a brief review of Congress' earlier enactment of the Authorization for Use of Military Force resolution ("AUMF") in September 2001, in the immediate aftermath of the terrible events of September 11.[18]

The AUMF authorized the President to

> use all necessary and appropriate force against the those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[19]

Congress in the AUMF thus empowered the President to act against two limited classes of nations, organizations, and persons: those involved in the planning and execution of the September 11 attacks, and those who harbored such persons or organizations. Three years later in the *Hamdi* decision, discussed below, the Supreme Court plurality confirmed, accordingly and narrowly, only that the AUMF "authorizes the President to use 'all necessary and appropriate force ' against 'nations, organizations, or persons' *associated with the September 11, 2001, terrorist attacks*.[20]

In *Rasul v. Bush*,[21] a decision that arose out of a habeas action filed by Guantanamo detainees in 2002, the Supreme Court held that foreign nationals imprisoned by the United States at Guantanamo, a "territory over which the United States exercises exclusive jurisdiction and control," could challenge their confinement through the ancient writ of habeas corpus.[22] This conclusion was "consistent with the historical reach of the writ of habeas corpus," which extended not only to "sovereign territory" but also to "all other dominions under the sovereign's control."[23] In a justifiably famous footnote, the Court also noted that the petitioners had "unquestionably describe[d] 'custody in violation of the Constitution or laws or treaties of the

[18] Pub. L. 107-40, 115 Stat. 224 (2001)
[19] *Id.* §2.
[20] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (citations omitted and emphasis added).
[21] *Rasul v. Bush*, 542 U.S. 466 (2004).
[22] *Rasul*, 542 U.S. at 476.
[23] *Rasul*, 542 U.S. at 481-482.

United States,"[24] and it remanded the cases for "*the District Court to consider in the first instance the merits of petitioners' claims.*"[25]

Nine days after *Rasul* and the companion case of *Hamdi v. Rumsfeld*[26] were decided in late June 2004, the Defense Department acted to undercut the effect of the two rulings. In an order issued by then Deputy Defense Security Paul Wolfowitz, a summary military proceeding called a Combat Status Review Tribunal ("CSRT") was established in an open attempt to avoid habeas review by federal courts. The CSRT "review" took place before three commissioned officers. The prisoner was allowed no counsel and had no right to view any classified evidence offered to the CSRT to support his designation as an "enemy combatant." While the CSRT procedures allowed detainees to offer documents and witness, this opportunity was limited to evidence that the CSRT concluded was "reasonably available"—a standard that, in practice, excluded much readily accessible evidence, including available witnesses and documents that were actually in the government's physical possession.

In the case of two of our clients, the publicly filed Bosnian court order that they be released for lack of evidence—an order specifically referenced in our federal habeas petition filed only three months earlier—was found not to be "reasonably available." In another instance, a client's superior in his Red Crescent office in Sarajevo was found by his CSRT to be not "reasonably available" as a witness to testify that the client was duly employed as a social worker by that organization in October 2001 when he was arrested. I readily located this individual by calling the Red Crescent office at the number listed in the Sarajevo phone book and asking to speak with him. Our client Mustafa Ait Idir told his CSRT that documents showing he previously resided in Croatia would be useful, but the Tribunal President responded only that "I do not know what the procedure is, but you should really take the opportunity to get that information. Mr. Ait Idir responded, sensibly enough, "How, when I am at GTMO?" This information was never provided.

As Lieutenant Colonel Abraham makes plain today from his separate perspective as an intelligence officer intimately involved with the CSRT process in Guantanamo, the Tribunals

[24] *Rasul*, 542 U.S. at 483 n.15.
[25] *Rasul*, 542 U.S. at 485 ((quoting 28 U.S.C. § 2241(c)(3), the federal habeas statute)(emphasis added)
[26] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reviewing habeas petition brought by a U.S. citizen initially detained in Guantanamo and then transferred to naval brigs in the United States as an "enemy combatant")

were biased against the detainees, and based their conclusions on grossly incomplete information. While our clients were ordered arrested in Bosnia by the U.S. for an alleged plot to bomb the U.S. Embassy, no evidence was found in the investigation that followed in Bosnia that linked them to such a plot. There was no evidence located that any possessed maps, sketches, bombs, or bomb-making components, weapons or any other tangible evidence demonstrating involvement in such a plot. Indeed, Mr. Ait Idir's CSRT determined that that there was no such plot. When the CSRT pressed the "Recorder" for more information on the plot and Ait Idir's claimed link to it, the reply was that there was only a "suspected" plot. Nonetheless, despite his CSRT's conclusion that the alleged plot (which was the urgent reason advanced by the United States government to demand that the Bosnians arrest him) did not exist, his panel affirmed his "enemy combatant" status.

Colonel Abraham observes in his testimony that he saw no attempts to obtain and provide to the CSRTs evidence that might exonerate a detainee, even though the CSRT Implementation Procedures promulgated by then Secretary of the Navy Gordon England on July 29, 2004 expressly provide: "*In the event the Government information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.*"[27] As an illustration of the total failure of the CSRT system to follow this elemental principle codified in its own Implementation Procedures, the CSRT for our client Saber Lahmar is particularly telling. Mr. Lahmar was charged at his CSRT with being a leader of a Bosnian cell of the GIA terrorist group(the "Algerian Armed Islamic Front"). Our other clients were implicated in this supposed "cell" on the basis of their connections—whether professional or social—to Mr. Lahmar, the alleged leader and hub of the cell. With Mr. Lahmar as the crucial centerpiece of the government's cell theory, Commander James Crisfield (Legal Adviser, CSRT) in October 2004 forwarded to his superior Colonel David Taylor (OARDEC Forward Commander) an email entitled "POSSIBLE EXCULPATORY INFORMATION ON ... [SABER LAHMAR]." But the OARDEC Command provided this exculpatory evidence about Mr. Lahmar to only two members of his CSRT—and then only *after* that Tribunal had made its decision. And the exculpatory information was never provided to any of our five other clients' CSRT panels, despite the fact that their alleged "association" with Mr.

[27] Gordon England, Memorandum regarding Implementation of Combatant Status Review Tribunals for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), Enc. 1, ¶ H(4).

Lahmar (the supposed cell leader) was an important element of their respective enemy combatant determinations.

In deciding enemy combatant status, the CSRT was permitted to "consider any information it deem[ed] relevant to a resolution of the issue before it," including hearsay and evidence procured by torture or coercion. The Wolfowitz order also applied a "rebuttable presumption in favor of the government's evidence." And it employed a sweeping and greatly expanded definition of an "enemy combatant," including "an individual who was part of *or supporting* Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or it coalition partners [and] ...*includes* any person who as committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[28]

In January 2005, two federal judges in Washington reached diametrically opposite conclusions on the question of whether federal courts could consider the merits of Guantanamo petitioners' claims.[29] One, Judge Leon, dismissed our case, holding that detainees have no rights that are enforceable in federal court.[30] The other, Judge Green, who was coordinating the balance of the cases filed at that time, held that federal courts did have jurisdiction, that "all detainees possess Fifth Amendment due process rights," and that their cases should go forward to trial on the merits.[31] Both cases were appealed and it is these appeals which are now before the Supreme Court for briefing and hearing this fall, almost three years after the district court made these preliminary rulings on their habeas claims.

In the fall of 2005, at the urging of the Administration, the Congress passed the Detainee Treatment Act, which the Administration contended was intended to eliminate jurisdiction over petitions filed by or on behalf Guantanamo detainees.[32] To replace habeas, the DTA also created an alternative process where detainees could seek review of final CSRT decisions in the District of Columbia Court of Appeals. That procedure, however, is inherently flawed, as it effectively

[28] Notably, when the Administration asked the Supreme Court to approve its detention of "enemy combatants" in the *Hamdi* appeal, it carefully limited the term to an "individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (plurality) (internal quotation marks omitted). Hamdi had in fact been seized in Afghanistan.
[29] These two cases were, respectively, our clients' *Boumediene v. Bush* petition and the parallel case of *Al Odah v. United States*.
[30] *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).
[31] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).
[32] Pub, L. 109-148, 119 Stat. 2680, 2739 (2005).

insulates the lopsided and hastily drawn-up CSRT process I have described. Moreover, the DTA's judicial review mechanism promises-indeed invites- endless rounds of administrative litigation as detainee cases potentially bounce back and forth between the Court of Appeals and new CSRT panels, while international condemnation of Guantanamo continues to sully the image of this great nation, and the years of detention for most men stretch on indefinitely.

Six months later, in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA's purported repeal of habeas jurisdiction for Guantanamo detainees did not apply to pending habeas petitions.[33] The Court also struck down as not authorized by Congress the few military commissions established by a 2001 Presidential order to try detainees actually charged with crimes.[34] It also held that all Guantanamo detainees are protected, at a minimum, by Common Article 3 of the Geneva Conventions which requires basic protections for military commission trials and prohibits torture, cruel treatment, and other abuse.[35]

With strong encouragement from the Administration, Congress responded in the Fall of 2006 by enacting the Military Commissions Act of 2006.[36] This statute not only provided Congressional authorization for the military commissions struck down in *Hamdan* as lacking such authorization but also in Section 7(a) purported to strip federal court jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus filed by or on behalf of an alien. . . who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," and (2) "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien described in the first category.[37] The Military Commissions Act was not limited to Guantanamo detainees but was extended to encompass any foreign nationals detained by the United States as "enemy combatants." In the June 2007 *Al-Marri* decision, the federal Fourth

[33] 126 S. Ct. 2749, 2764-2765 (2006)
[34] *Hamdan* at 2797-2798.
[35] *Hamdan* at 2795.
[36] Pub. L. 109-366, 120 Stat. 2600 (2006)
[37] *Id.* at § 241(e)(2).

Circuit court of appeals rejected the Administration's argument that the MCA applies to lawful resident aliens held in the United States, but the Administration is appealing that decision. [38]

Four months earlier, however, in the *Boumediene* and *Al Odah* appeals, the District of Columbia Court of Appeals issued a divided 2-1 decision rejecting the detainees' efforts—by that time more than five years old—to obtain habeas hearings. The majority concluded that the Military Commissions Act of 2006, enacted during the pendency of these appeals, operated to strip federal jurisdiction over habeas appeals. The majority also concluded that the MCA's jurisdiction-stripping provision did not violate the Suspension Clause because, in its view, habeas corpus would not have been available as of 1789 to persons "without presence or property in the United States.[39] The panel reached this conclusion notwithstanding the majority's statement in *Rasul* that the ability of Guantanamo prisoners to invoke habeas corpus was consistent with the "historical reach of the writ."[40] Finally, although the majority recognized that although Guantanamo detainees are not "enemy aliens" like the convicted German soldiers in *Johnson v. Eisentrager*,[41] it nonetheless treated *Eisentrager* as controlling. The majority stated that the distinctions between the century old U.S. Naval Station at Guantanamo where the U.S. exercises full authority and the allied prison in Germany post World War II where the Eisentrager petitioners were held, are "immaterial to the application of the Suspension Clause."[42] Judge Rogers dissented, agreeing that while the Military Commissions Act did act to repeal federal habeas jurisdiction for Guantanamo detainees, such a repeal was unconstitutional in light of the *Rasul* decision and the Congress failure in the MCA to replace habeas with a "commensurate procedure."[43]

Judge Rogers rested her conclusion on two factors. First, far from adhering to the Supreme Court's requirement of "careful consideration and plenary processing of . . . claims including full opportunity for presentation of the relevant facts,"[44] many aspects of the CSRT proceedings—

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[38] *See Al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007). Mr. Al-Marri, a Qatari national, arrived in the United States with his wife and five children on a student visa to study at Bradley University in Peoria, Illinois. He was first arrested on fraud charges but those charges were dropped shortly before trial when he was declared by the President to be an "enemy combatant."
[39] *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007)
[40] 543 U.S. at 481-482
[41] 339 U.S. 763 (1950)
[42] 543 U.S. at 992.
[43] 543 U.S. at 1004 (Rogers, J., dissenting).
[44] *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

evidentiary presumptions against the detainee, lack of access to the government's extensive classified evidence provided to the CSRT but not the detainee, the many obstacles to presenting rebuttal evidence, and the detainees' inability to have the assistance of counsel at the CSRT—are "inimical to the nature of habeas review."[45] Second, she found that the judicial review of the CSRT process provided by Congress in the DTA, "is not designed to cure these inadequacies."[46] The DTA prevents the detainee from offering evidence rebutting the government's case; it "implicitly endorses" detention on the basis of evidence obtained through torture; and if the court were to find a particular detention unjustified, neither the DTA nor the MCA authorizes the court of appeals to order the prisoner's release.[47] Indeed, in some cases where *CSRTs themselves* found detention to be unjustified, the government simply reconvened CSRTs seriatim until it obtained the desired results.[48] Colonel Abraham's testimony here today confirms this inexcusable practice.

III. The Need to Restore Habeas is Confirmed By the *Bismullah* Decision on July 20, 2007

On July 20, a three judge panel of the District of Columbia Court of Appeals issued a key decision in *Bismullah v. Gates* governing proceedings governing the CSRT review provisions of the Detainee Treatment Act.[49] This panel addressed for the first time "various procedural motions the parties have filed to govern our review of the merits of the detainees' petitions."[50] The decision did accept in several respects a broader view of detainee procedural rights than the Government advocated, notably in adopting a wider view of the "record on review" to be scrutinized by the court of appeals in each case. The court held that the record for review includes "all the information that a Tribunal is authorized to obtain and consider," which in turn is defined as "such reasonably available information in the possession of the U.S.Government bearing on the issue of whether the detainee meets the criteria to be designated as an "enemy combatant."[51] The court also adopted a presumption that DTA counsel for detainees have the

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[45] 543 U.S. at 1006 (Rogers, J., dissenting)
[46] 543 U.S. at 1006 (Rogers, J., dissenting).
[47] 543 U.S. at 1004 (Rogers, J., dissenting).
[48] Mark Denbeaux & Joshua Denbeaux, *No Hearing Hearings—CSRT: The Modern Habeas Corpus?* 37-39 (2006) (available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf)
[49] __ F.3d __, 2007 WL 2067938 (D.C. Cir. 2007).
[50] *Bismullah*, 2007 WL 2067938, *1.
[51] *Bismullah*, 2007 WL 2067938, *1.

"need to know" any classified information relating to their clients' case, subject to rebuttal by the government within narrow categories of highly sensitive information.52

But with a host of other issues, the court either resolved them adversely to DTA petitioners or left them unresolved for yet more procedural motions, litigation and delays. These issues include the DTA's rejection of the very heart of effective advocacy, attorney-client privileged communications, by allowing a screened DOJ team to review the substance and content of legal mail—something not allowed under the district court habeas protective order.[53] In light of the fact that no detainee counsel may communicate with their Guantanamo clients other than through infrequent personal visits (which must be scheduled well in advance with DOD) or more regularly through mail, this restriction is extremely serious.

Moreover, the court held that DTA counsel, unlike habeas counsel, may represent detainees only in their challenge to the CSRT itself, and may only correspond with detainees regarding events that occurred between the run-up to the detainees' capture and the conclusion of their eventual CSRT hearing.[54] In many cases, such as ours, where our clients had lived in Bosnia with their families for some time, had traveled outside the country on occasion for visits elsewhere, had employment in Algeria and elsewhere bearing on their classification as "enemy combatants," this limitation is a very serious handicap to an effective attack on the CSRT result.

The opinion also leaves unresolved several other key elements of the DTA's apparent inadequacy, including the lack of any explicit power for the court to order release; an uncertain definition of when information is "reasonably available" for production to detainees; the uncertain right of detainees to introduce evidence contradicting the case presented by the government; and the apparently foreclosed right of detainees to seek discovery about the results in other CSRTs—even when those CSRTs were reviewing factually parallel cases involving other alleged members of a single purported conspiracy.

The delays inevitable in seeking responses to each of these open questions, and others, with possible intervening appeals to the Supreme Court, contrast very unfavorably with the federal district courts' long-established standards governing evidentiary practice and procedure in

[52] *Bismullah*, 2007 WL 2067938, *8.
[53] *Bismullah*, 2007 WL 2067938, *11.
[54] *Bismullah*, 2007 WL 2067938, *10-11.

habeas trials. Moreover, it cannot seriously be disputed by anyone that the government has calculatedly taken maximum advantage of any claimed ambiguity to resist any steps likely to result in meaningful hearings for any detainees, beginning with its pre-DTA position that the *Rasul* decision did not mean that Guantanamo detainees have any rights that can be vindicated in a habeas proceeding—a contention that is now only likely to be resolved by the Supreme Court itself almost four years after Rasul. Assuming a favorable outcome to petitioners in the Supreme Court, the preliminary stages of habeas proceedings might begin in mid 2008—six years into many men's imprisonment.

IV. Conclusion

At issue before this Committee and Congress is nothing less than the question of this great nation's commitment to the rule of law. Hundreds of men, including our six clients, are facing potential lifelong imprisonment without any assurance that they will ever be tried on any criminal charges (where ironically they would actually have the assistance of counsel and be able to call witnesses and to offer documents) or given any fair opportunity to challenge the claimed basis of their apprehension and detention by our government.

This Congress faces a unique challenge to our fundamental assurance in the fundamental core of habeas corpus as a time-tested mechanism to allow a prisoner held without charge by the executive to challenge the basis for that imprisonment. As Justice O'Connor wrote for the *Hamdi* plurality in 2004, in light of the Government's position on the duration of the "war on terror, it was "not farfetched" that "Hamdi's detention could last for the rest of his life."[55] Justice's O'Connor's statement looks even more prescient in July 2007 than in it did in June 2004.

As a country we face an entirely new challenge to our view of who we are and how we wish to view ourselves and be viewed by the rest of the world. We have never before now claimed the power to deny such a basic right to prisoners permanently. And we have never claimed the power to suspend habeas lawfully absent a finding that public safety required this drastic resort as a temporary measure- as the Suspension Clause plainly requires.

[55] *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004) (plurality).

From the position of this now battle-tested trial lawyer, I respectfully suggest that deferring to the Supreme Court for full resolution of this critical issue is neither responsible policy nor effective law making. Moreover, it unnecessarily places the Supreme Court squarely on a collision course with this Branch. It is Congress's adoption of the MCA less than a year ago that underpinned the court of appeals decision in February in the *Boumediene* and *Al Odah* decisions that these 375 men have no habeas rights. Congress can right that result and let the habeas mechanism proceed, as it has for centuries, by adopting H.R. 2826. No amount of tinkering by the court of appeals can ever put right a system as broken as the hastily cobbled-together and thoroughly disgraced CSRT system. The sooner that reality is acknowledged, the sooner will this country begin to recover from the international criticism leveled at us publicly and privately for our decision to hold hundreds of men in Guantanamo indefinitely without recourse to a fundamentally fair process to test that imprisonment, a circumstance that legitimately appalls us when it happens to our citizens elsewhere in the world.

I welcome the Committee's questions.

Thank you.

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Stephen Oleskey is a partner in the Litigation and Real Estate Departments at WilmerHale. Mr. Oleskey focuses his practice on complex civil litigation and appellate argument, with an emphasis on real estate-related litigation.

Practice

Mr. Oleskey has twice argued before the US Supreme Court, as well as before the Massachusetts Appeals Court; the Massachusetts Supreme Judicial Court; the New Hampshire Supreme Court; and the First, Third, and Ninth Circuit US Courts of Appeals. Clients whom he has represented in significant litigation or related proceedings include: Thomas & Betts; BankBoston; Boston School Committee; Boston University; Boston Thermal Energy Corp.; Cabot, Cabot & Forbes; Carpenter and Co.; the City of Boston (electoral redistricting and school funding); the City of Lebanon, NH; the Commonwealth of Massachusetts; Equity Office Properties; The Gale Company; Global Petroleum Corp.; Gerald D. Hines Interests; John Hancock Mutual Life; Thomas H. Lee Co.; Lowes Home Centers, Inc.; Massachusetts Electric (National Grid); Massachusetts Institute of Technology; Mondev International; Monsanto Company; The New England (formerly New England Mutual Life Insurance Co.); Paine Webber Real Estate; Pepperell Power Associates; Sears, Roebuck; Spaulding & Slye Co.; Sterilite Corp.; Stockbridge Real Estate Fund, L.P.; Trigen-Boston Energy Corp.; Varian Semicondictor; and Wal-Mart Stores, Inc.

After 19 years at Hale and Dorr, the firm's predecessor, Mr. Oleskey left in 1987 to serve as Massachusetts deputy attorney general and chief of the Public Protection Bureau. In that capacity, he managed 140 attorneys, investigators, paralegals and support personnel in the Antitrust, Civil Rights, Consumer Protection, Environmental Protection, Insurance, Public Charities, Utilities, Nuclear Safety and Special Litigation (asbestos removal claims) Divisions. He was responsible for all civil litigation and enforcement proceedings in these divisions, and coordinated their activities with the Attorney General's Criminal Bureau.

Mr. Oleskey returned to Hale and Dorr in late 1988 and resumed his position as partner.

Professional Activities

Mr. Oleskey has a long-standing commitment to pro bono work. The Boston Bar Association awarded him the Thurgood Marshall Award "for exemplary commitment to public service and outstanding advocacy on behalf of low-income citizens of Massachusetts," and Greater Boston Legal Services has honored him with the Dow-Gardner-Landrum Award "for outstanding commitment to legal services for the poor."

Mr. Oleskey recently received the firm's 2004 John H. Pickering Award for Pro Bono Activities for his significant pro bono work with numerous organizations and individuals, including assisting the International Senior Lawyers Project in its implementation of legal reforms and advancement of the social and economic well-being of people in developing countries; working with Pact, Inc. in its mission to build stronger communities internationally; and playing an integral role in one of the firm's largest and most important pro bono cases, representing six Bosnian-Algerian men wrongfully detained at Guantanamo Bay, Cuba.

A past director and president of Greater Boston Legal Services, Mr. Oleskey is also a past director and chairman of the board of the Boston Bar Association's Volunteer Lawyers Project. He was appointed to the board of the Massachusetts Legal Assistance Corporation in 1995 by the Massachusetts Supreme Judicial Court, and was chair from 2003–2005. He currently serves as chairman of the Equal Justice Coalition and chair of the board of directors of Pact, an international development nonprofit organization.

Mr. Oleskey has also served on the national board and as general counsel to the NOW Legal Defense and Education Fund, the preeminent national legal advocacy and education entity for women's rights.

Mr. Oleskey is a member of the American, New York, New Hampshire, Massachusetts, and Boston Bar Associations. He is a fellow of the American and Boston Bar Foundations and has served as an elected council (board) member of the Boston Bar Association. A trained and certified mediator, he is also a member of the CPR Institute for Dispute Resolution, located in New York City.

Honors and Awards

- Recipient of the Boston Bar Association's 2007 President's Award for his continued representation of pro bono clients detained at Guantanamo Bay
- Recipient of the American Bar Association's 2007 Pro Bono Publico Award for his outstanding life long commitment to pro bono work, both in his individual practice and as an advocate for pro bono service at WilmerHale and throughout the legal community
- Recipient of the Massachusetts Correctional Legal Services' Distinguished Leadership Award for "his remarkable contributions to the legal profession, and most especially for his recent advocacy work on behalf of six clients...detained without charges for more than three years at Guantanamo Bay."
- Recipient of the firm's 2004 John H. Pickering Award for Pro Bono Activities
- Named as a "Massachusetts Super Lawyer" in civil litigation defense in the 2004, 2005 and 2006 issues of Boston Magazine
- Recipient of the Thurgood Marshall Award for "exemplary commitment to public service and outstanding advocacy on behalf of low-income citizens of Massachusetts" (Boston Bar Association)
- Recipient of the Dow-Gardner-Landrum Award for "outstanding commitment to legal services for the poor" (Greater Boston Legal Services)
- Named a "Distinguished Alumnus" for his professional and public service achievements (Wesleyan University)

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

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Witness name: Stephen H. Oleskey

Capacity in which appearing: (check one)

___Individual

_X__Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: Stephen Oleskey is a partner at the law firm of WilmerHale. He appears before this Committee as part of the firm's pro bono representation of Lakhdar Boumediene, Belkacem Bensayah, Saber Lahmar, Mohamed Nechla, Mustafa Ait Idir, Hadj Boudella, six detainees being held by the U.S. Government in Guantanamo Bay.

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007): None;

Fiscal year 2006: None;
Fiscal year 2005: None.

Federal agencies with which federal contracts are held:

Current fiscal year (2007): None;
Fiscal year 2006: None;
Fiscal year 2005: None.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007): None;
Fiscal year 2006: None;
Fiscal year 2005: None.

Aggregate dollar value of federal contracts held:

Current fiscal year (2007): N/A;
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Fiscal year 2005: None.

Aggregate dollar value of federal grants held:

Current fiscal year (2007): N/A;
Fiscal year 2006: N/A;
Fiscal year 2005: N/A.

TESTIMONY OF DAVID A. KEENE, CO-CHAIR OF THE CONSTITUTION PROJECT'S LIBERTY & SECURITY INITIATIVE

HEARING ON HABEAS CORPUS AND GUANTANAMO BAY

BEFORE THE
HOUSE ARMED SERVICES COMMITTEE

JULY 26, 2007

STATEMENT OF DAVID A. KEENE

My name is David A. Keene. I am currently serving both as Chairman of the American Conservative Union and Co-Chair of the Constitution Project's Liberty & Security Initiative. I am submitting this statement to urge your support for the restoration of the *habeas corpus* jurisdiction eliminated by the Military Commissions Act (MCA).

I am here today because as a conservative I believe that ours is the greatest and freest nation on the face of the earth and because I want to do what I can to make sure that my children and their children will be able to say the same.

I am here today because as a conservative, I believe we can defeat our enemies without compromising the values that have made this nation great.

As citizens, we owe it to ourselves to support realistic measures needed to protect our nation, but men and women of goodwill regardless of party or ideological orientation must work together to make certain that our rights survive the stresses of the war in which we are today engaged and the zeal of those who in fighting it sometimes forget that it is to preserve these very rights that our fighting men and women go to battle.

Since 9/11 Congress has granted the Executive Branch extraordinary powers to identify, pursue and eliminate threats to the safety of this country and her citizens. Data mining, controversial aspects of the USA Patriot Act, the establishment of Military Commissions and tremendous leeway in the treatment of terrorists and suspected terrorists have all been sought in the name of fighting the war on terror.

I am one who believes that Congress has been correct in granting much of the power sought because of the need to deal with a new kind of enemy in an age of technological advancements that might otherwise have given our enemies an advantage that we could not match. The foiling of numerous follow-up attempts by terrorist elements and the fact that we have successfully avoided another attack on our citizens within our borders is testimony to the effective way in which those charged with our protection have pursued their mission using the traditional and newly granted powers available to them.

On the other hand, I believe it is wise at all times to look at any request for more governmental power critically if not cynically. Those charged with protecting us naturally want all the power and flexibility they can get to pursue their mission and forget that in

protecting us there always exists the danger that they and we will forget or damage the essence of what we are and what they are trying so desperately to protect.

Throughout our history, there have been those who in times of danger have been all too willing to trade some of the freedoms that make up the core of the American experiment for just a little more security and those charged with providing that security have always been ready and willing to broker the exchange. They are willing because they believe in their mission and want to do all that is humanly possible to accomplish that mission and there is little doubt that traditional, constitutional and legal strictures designed to protect the rights of the innocent and guilty alike make their job a little harder than might be the case if they didn't have to observe those limits. But it is those guarantees and those limits on the power of government that make this country unique in world history. It is that uniqueness that they are charged with protecting.

A few days after the terrorist attacks in New York and here, then Defense Secretary Don Rumsfeld said that if we changed the way we live as a result of the terrorist threat we face, the terrorists will have won. The question we have to ask as we pursue victory over those who would destroy our way of life and the values that make our way of life possible is whether the steps we take to achieve victory risk the destruction of who we are. It is vital that we preserve the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

Earlier this year, I was pleased to join with a broad, bipartisan group of more than forty-five legal and policy experts in a statement urging restoration of the *habeas* jurisdiction stripped by the MCA. I would ask that the statement, signed by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances be included in the record of this hearing. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

Throughout our nation's history, the "Great Writ of *Habeas Corpus*" has served as a fundamental safeguard for individual liberty by enabling prisoners to challenge their detentions and to obtain meaningful judicial review by a neutral decision maker. *Habeas corpus* rights have been recognized for non-citizens as well as citizens. Thus, in 2004, in the case *Rasul v. Bush,* the United States Supreme Court upheld the jurisdiction of federal

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

I am here today not to question the validity of holding terrorist suspects at Guantanamo Bay, but to urge that those we do hold have the ability to seek an objective review of the legality of their incarceration.

Although I agree that our government must and does have the power to detain foreign terrorists to protect national security, repealing federal court jurisdiction over *habeas corpus* does not serve that goal. It is crucial that we maintain *habeas corpus* to ensure that we are detaining the right people and complying with the rule of law.

In fact, *habeas corpus* review is especially important now *because of* the particular nature of the current "war on terrorism." Studies of the Defense Department's own documents show that the majority of the Guantanamo detainees were not captured on the battlefield, and many were turned in by bounty hunters.

Those who argue against extending *habeas* rights to those held at Guantanamo like to describe those incarcerated there as among the most dangerous of our enemies and suggest that anything that might lead to the premature release of any of them would constitute a dire and immediate threat to our national security. I have no doubt that some of those held there are enemies who deserve to be where they are, but the purpose of a *habeas* hearing is not to release the guilty but to separate the innocent from the guilty.

The picture of the prisoners being held there one gets from a review of evidence available from official sources and the testimony of those responsible for running the prison at Guantanamo Bay contradicts this picture.

Many of those being held there were apprehended and shipped to Guantanamo without any proof whatever that they ever even intended to engage in actions against us or our allies. The Defense Department says that there is evidence that about 8% of them actually fought against us with Al Qaeda, but that fully 55% have never committed any hostile act against the United States. Many of these people have been in prison for five years or longer and under current plans may be held indefinitely without ever being brought to trial for anything at all and the CIA reported as long ago as October of 2002 that most of the prisoners we are holding at Guantanamo "don't belong there."

Moreover, this conflict has no foreseeable end, which means, quite simply, that our government is claiming the power to imprison people without charge indefinitely, potentially forever. *Habeas* review can help separate the "wheat" from the "chaff" and ensure that our government only detains people when it has a proper legal and factual basis for doing so. If we are to hold people indefinitely without charge, we should at the very least ensure there is a meaningful process to determine that we are holding the right people.

The executive branch argues that it has provided an adequate substitute for *habeas* review through the Combatant Status Review Tribunal ("CSRT") hearings and the limited review of these decisions by the U.S. Court of Appeals for the D.C. Circuit. This claim is absurd. The token review provided by the CSRT process does not even approach the meaningful judicial review that would be provided by restoration of *habeas corpus*. First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the basic right of the assistance of counsel. Second, the D.C. Circuit's review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing of a *habeas corpus* petition, the D.C. Circuit cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others. America's detention policy has undermined its reputation in the international community and weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy.

Having said this, however, I am concerned not so much by what others might think of us or do as a result of our policies, but of what the cavalier dismissal of fundamental rights says about who we are.

Therefore, I urge Congress to restore the *habeas corpus* jurisdiction that was eliminated by the Military Commissions Act because of who we are and what this great

nation represents. You can do that by supporting H.R. 2826 and urging your colleagues to support it when you report it out of committee. Congress should act to preserve our constitutional system of checks and balances, and restore this established and traditional avenue of judicial review.

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Witness name: DAVID A. KEENE

Capacity in which appearing: (check one)

✓ Individual

___ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented:_____

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A : 0			

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A : 0			

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
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N/A : 0

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N/A : 0

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N/A : 0

Aggregate dollar value of federal contracts held:

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N/A : 0

Aggregate dollar value of federal grants held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

N/A : 0

Hearing Before the House Committee on Armed Services

Re: Upholding the Principle of Habeas Corpus for Detainees.

July 26, 2007

Prepared Statement of Patrick F. Philbin, former Associate Deputy Attorney General, U.S. Department of Justice.

Chairman Skelton, Ranking Member Hunter, and Members of the Committee, I appreciate the opportunity to address the matters before the Committee today. Both the detention and trial of enemy combatants are critical functions for the Nation's conduct of the continuing armed conflict against al Qaeda and associated terrorist forces. The procedural rights that Congress grants to enemy combatants to challenge their detention and trial are vitally important both because they can critically affect the success of the military mission at hand and they also play a role in reflecting America's commitment to fairness and the rule of law.

I gained significant expertise with respect to both the legal aspects of the detention of enemy combatants and military commissions during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on many issues related to military commissions, the detention of enemy combatants at Guantanamo Bay, and the creation of the military's procedures for reviewing detentions through both Combatant Status Review Tribunals and annual Administrative Review Boards. Since my return to the private sector, I have continued to follow the developments in this area with interest.

Although almost six years have passed since the attack on the World Trade Center in 2001, al Qaeda continues to pose a grave threat to the Nation. The most recent National

Intelligence Estimate, released just this month, contains chilling details regarding the strength of al Qaeda even now:

> Al-Qa'ida is and will remain the most serious terrorist threat to the Homeland, as its central leadership continues to plan high-impact plots, while pushing others in extremist Sunni communities to mimic its efforts and to supplement its capabilities. We assess the group has protected or regenerated key elements of its Homeland attack capability, including: a safehaven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership. Although we have discovered only a handful of individuals in the United States with ties to al-Qa'ida senior leadership since 9/11, we judge that al-Qa'ida will intensify its efforts to put operatives here.[1]

These operatives, of course, will plan to wreak maximum destruction through tactics that utterly disregard the laws of war: they will operate disguised as noncombatant civilians and will deliberately attack civilian targets.

Even in the face of such a threat, the United States has exceeded its obligations toward detainees in the conflict with al Qaeda under both our Constitution and under international law. The political branches, through recent legislation, have crafted a system that provides unprecedented levels of review and access to civilian courts for combatants detained by the United States in the midst of an ongoing armed conflict. The courts are only now beginning to give shape to the scope of their review under that statutory system and to interpret the authority Congress has given them. Just last Friday, in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), the D.C. Circuit clarified the robust scope of its power to review the determinations of Combatant Status Review Tribunals (CSRTs) and confirmed that counsel for detainees would receive access to classified information that might assist them in their representation. As that

[1] National Intelligence Estimate, July 2007, *available at* http://media.npr.org/documents/2007/jul/20070717_nie.pdf.

decision shows, the system Congress has already crafted through the Detainee Treatment Act ("DTA") and the Military Commissions Act of 2006 ("MCA") will continue to be refined as it is applied by the courts. It is already clear, moreover, that by providing for judicial review of the sufficiency of evidence of CSRT determinations, Congress has provided for more expansive review than would have existed in the past even where habeas jurisdiction might have applied.

In this context of continued judicial development of a new statutory system that already exceeds the scope of review traditionally available in habeas for military decisions, I believe it is unnecessary and would be unwise to reintroduce a duplicative level of federal court review through writs of habeas corpus. And it would be particularly unwise to enact a statutory provision suggesting a special authority in habeas courts to hear challenges to decisions to transfer detainees — without any particular indication of the standards to govern such challenges — when transfers are inherently political affairs that require flexible and sensitive negotiation between the Executive Branch and foreign governments.

BACKGROUND

The current debate about amendments to the MCA can be fully understood only in the context of the history — including the series of Supreme Court decisions and congressional responses — that led to the passage of the MCA in 2006. A brief synopsis of that history is thus warranted.

In 2001, the President determined that the attacks of September 11 had created a state of armed conflict between the United States and al Qaeda and associated terrorist forces. As part of the military response to those attacks, the United States exercised the long-established right under the laws of war to detain combatants who are a part of enemy forces.

In November 2001, the President also determined that military commissions should be convened to try enemy combatants captured in the conflict with al Qaeda for violations of the laws of war. As administration officials explained to Congress at the time, multiple considerations made military commissions rather than our domestic criminal justice system the most appropriate forum for prosecuting enemy combatants. In part, using military commissions, which are the standard mechanism the Executive has always used for war crimes trials, acknowledged the fundamental fact that the struggle with al Qaeda was not simply a matter a of criminal law enforcement — it had risen to the level of an armed conflict to which the laws of war would apply.

In addition, the circumstances of war-fighting in which enemy combatants are captured and interrogated and in which documents and computers are seized are not remotely adapted to satisfying the strict requirements of the Constitution in later bringing a criminal prosecution in an Article III court. For example, enemy combatants are properly interrogated without a lawyer present, but would that mean that under *Miranda* their statements could not be used? Statements made by other enemy combatants might be useful in the trial of a different accused, but would a record of those statements be barred by hearsay rules? Soldiers raiding an al Qaeda hideout will seize for intelligence purposes materials that might later become "evidence," but they are not concerned (nor should they be) with establishing a chain of custody as FBI agents at a crime scene would. And there was a concern that classified information could not adequately be protected in regular criminal trials. Precisely because the circumstances in fighting a war are always different from those in investigating a crime in our domestic system, military commissions have always been the standard mechanism used for prosecuting war crimes. Thousands of commissions were convened in Europe and the Far East after World War II, and

(to give just one example) the orders convening those commissions routinely called for flexible evidentiary rules, permitting the admission of "such evidence as in [the commission's] opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man."[2] That practice reflected what the Supreme Court later acknowledged was one of the characteristics of military commissions; namely, that their procedure "has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

In early 2002, the Department of Defense began detaining enemy combatants seized overseas in operations in Afghanistan at the Naval Base at Guantanamo Bay, Cuba. In addition to the ideal attributes Guantanamo provided from a security perspective and other reasons, the decision to use Guantanamo was based, in part, on reliance on a clear-cut decision from the Supreme Court handed down shortly after World War II holding that aliens seized and detained outside the United States had no right to file habeas corpus petitions in United States courts. That decision was *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When detainees at Guantanamo began to file habeas petitions in federal court, therefore, the Government relied on *Eisentrager* to argue that no federal court had jurisdiction to entertain the petitions.

The Supreme Court ultimately disagreed with that position and in *Rasul v. Bush*, 542 U.S. 466 (2004), concluded that the habeas statute, 28 U.S.C. § 2441, extended jurisdiction to habeas petitions filed by detainees held at Guantanamo. The Court made clear, however, that its holding was based on an interpretation of the habeas statute – not upon the Constitution. *See, e.g.*, *Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear

[2] Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Forces, Pacific, 24 September 1945.

petitioners' habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base.").

At the same time the Court decided *Rasul*, it also decided *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a decision relevant here primarily for one thing: in it, the plurality outlined the type of procedures that, in keeping with the Due Process Clause of the Constitution, the military could employ to determine to detain an *American citizen* as an enemy combatant in the United States.

The Government responded to these decisions in several ways. The Department of Defense soon promulgated a new procedure – a Combatant Status Review Tribunal or "CSRT" – that would review the determination of enemy combatant status for every detainee at Guantanamo. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under the Geneva Conventions, which are conducted under Army Regulation ("AR") 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees." But they provided greater procedural protections than the existing army regulation. CSRTs were also designed to meet the procedural requirements that the Supreme Court in *Hamdi* had suggested would be sufficient to provide due process to a U.S. citizen held in the United States, even though such procedures were not required for the aliens held at Guantanamo. In addition, prior to these decisions, DOD had recently announced another mechanism for reviewing the detention of those at Guantanamo – the Administrative Review Board or "ARB." The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant.

Congress also responded to the *Rasul* decision by passing the Detainee Treatment Act of 2005 ("DTA"). In addition to defining standards for treatment of detainees, the DTA eliminated

habeas jurisdiction for petitions filed by detainees at Guantanamo. In its place, it provided for judicial review in the United States Court of Appeals for the District of Columbia Circuit for both the decisions of CSRTs and the decisions of military commissions.[3] Providing such review in regular civilian courts for the decisions of military tribunals was an unprecedented move. Particularly with respect to CSRTs it bears emphasis that the military's determination to detain an alien overseas as an enemy combatant in an armed conflict has never been reviewable in civilian court, and certainly not under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

Despite the elimination of habeas jurisdiction in the DTA, the Supreme Court concluded in 2006 that habeas jurisdiction still existed over cases pending when the DTA was passed, and in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), struck down the procedures the military had promulgated for conducting military commissions. Once again, the Court's decision was based on statutory, not constitutional grounds, and rested primarily on the conclusion that procedures for the military commissions violated provisions of the UCMJ.

In response, Congress passed the MCA of 2006. In it, Congress closed the jurisdictional loophole that had allowed the *Hamdan* case to proceed by making clear that the elimination of habeas jurisdiction for detainees at Guantanamo applied to *all* cases, including those pending on the date of enactment. In addition, Congress responded to problems the Supreme Court had

[3] Although the DTA originally made review in the D.C. Circuit of some military commission decisions discretionary, the MCA has since changed that provision and now makes all final military commission decisions reviewable in the D.C. Circuit as of right.

identified by establishing in statute a detailed procedural framework for the conduct of trials by military commission.

The latter was an extraordinary step, but probably a necessary one to ensure that military commissions would finally begin to dispense justice to some of the enemy combatants detained at Guantanamo. Although military commissions have been used almost since the Founding of the Republic, they have traditionally been created, and their procedures determined, wholly by the Executive. As the Supreme Court explained in *Madsen v Kinsella*, 343 U.S. 341, 346-48 (1952), "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war. They have been called our common law war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute," but instead, "it has been adapted in each instance to the need that called it forth." The creation of a detailed set of statutory procedures for the military commissions was thus a measure without precedent in the Nation's history.

Congress was also careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are "regularly constituted courts" for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.).

As a result of this whole series of events, the unlawful enemy combatants detained at Guantanamo Bay, Cuba currently have available to them an array of procedural protections unprecedented in the history of warfare. Each has his status as an enemy combatant reviewed by

a panel of officers in a CSRT according to procedures that were designed to meet the due process requirements that would be necessary for detaining a U.S. citizen as an enemy combatant in the United States. The detainee may appear before a board of officers; he may examine unclassified evidence to be considered by the board; he has the assistance of a Personal Representative to help him make his case; and he may call witnesses that are reasonably available. The CSRT's decision is then subject to review in the D.C. Circuit. The D.C. Circuit has just made clear, in *Bismullah*, that its review of the CSRT decision will include all information available to the Government, not just that presented to the CSRT, and that counsel for the detainees will be granted access to classified information. In addition, each detainee has his detention reviewed once a year by an ARB, which assesses the extent to which the detainee continues to pose a threat and should be detained. Detainees who are charged before a military commission have a complete set of statutory procedures for their trials that – again in an unprecedented departure from past practice – include review by an Article III court.

One fundamental point that I would like to make to the Committee today is that, given this unprecedented set of procedures, and the amount of time and delay it has already taken to get to this point, the wise choice for Congress now is to let the MCA work. Absent some compelling need for a change that is demanded by the Constitution or obligations under international law, there is no need to make further modifications to the Act. Changes at this point will only further postpone the day when military commissions can begin to deliver justice.

I. The Current Framework of Review Mechanisms for the Detention and Trial of Enemy Combatants Exceeds the United States' Obligations Under Our Constitution and International Law.

One possible justification for Congress to act now to add to the review mechanisms provided for enemy combatant detainees would be a need to remedy some legal infirmity in the

current procedures. But, as explained below, the procedures currently in place provide an unprecedented level of review (and, in particular, unprecedented access to the civilian courts) that actually provides unlawful enemy combatants fighting for al Qaeda *greater* procedural protections than would be provided for *lawful* combatants entitled to POW status under the Geneva Conventions. There is thus certainly no need to provide additional review mechanisms to remedy any legal defect in the current system. And in particular, there is no need, as a legal matter, to provide detainees the particular form of review allowed by the writ of habeas corpus.

A. Decisions to Detain: CSRT and ARB Process

The logical beginning of the inquiry is the Combatant Status Review Tribunal or "CSRT," a mechanism the Department of Defense created to review the determination of enemy combatant status for every detainee at Guantanamo. This procedure, which is unprecedented in the history of warfare, addresses the risk that a detainee might in fact have been erroneously detained. The CSRTs were modeled in part on the hearings used to determine POW status of captured combatants under Army Regulation (AR) 190-8, which the Army uses to comply with the requirement of Article 5 of the Third Geneva Convention that a detainee's status be determined by a "competent tribunal." In a CSRT, a board of three officers reviews evidence regarding the status of the detainee. These CSRT board members must be officers in no way involved in the detainee's prior apprehension or interrogation. The detainee is allowed to make a case concerning his status, and is given the right to call witnesses reasonably available.

In a number of key respects, the CSRTs grant detainees *more* protections than AR 190-8, and thus *exceed* the requirements that even the Geneva Conventions would demand for lawful combatants entitled to POW status. To begin with, each detainee is provided with a Personal Representative to assist him in presenting his case. The Personal Representative reviews the

evidence that will be presented to the CSRT Tribunal and meets with the detainee in advance to explain the CSRT process. The detainee is also given access in advance of the Tribunal to a written summary of the unclassified evidence that will be used against him. And, most significantly, the CSRT determination is subject to judicial review in a civilian court — the D.C. Circuit. Under normal circumstances, a detention and status decision made during wartime pursuant to a regulation such as AR 190-8 would not be reviewable in civilian court at all. And it certainly would not be reviewable under the scope of review provided by the DTA, which allows the D.C. Circuit to review whether the CSRT's determination was supported by a preponderance of the evidence and to hear all legal claims under the Constitution and laws of the United States. DTA § 1005(e)(2)(C).

In a decision issued just last Friday, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), the D.C. Circuit made clear that it is taking seriously its responsibility to review CSRT detention decisions. In *Bismullah*, the Court ruled that "[i]n order to review a Tribunal's determination that, based upon a preponderance of the evidence, a detainee is an enemy combatant, the court must have access to all the information *available* to the Tribunal," and not just to information on which the Tribunal actively relied. Slip Op. at 2-3 (emphasis added). The Court also held that even classified information must be shared with counsel representing the detainee, although the Court indicated that "certain highly sensitive information" could be withheld from counsel as long as it was provided to the Court ex parte and in camera.

In addition to judicial review, the Department of Defense has established a procedure by which a new CSRT can be held if new evidence bearing upon a detainee's enemy combatant status becomes available. Dept. of Defense, OARDEC Instruction 5421.1, May 7, 2007. Such evidence can be submitted in virtually any form, including "photographs, affidavits, videotaped

witness statements or other supporting exhibits," and may be submitted either by the detainee himself or by any person acting lawfully on his behalf. *Id.* ¶¶ 4-5.

Beyond the CSRTs, another safeguard in the detention process is provided by the Administrative Review Board or "ARB." The ARBs provide a yearly review of the detention of every enemy combatant and, by assessing the threat each continues to pose, provide a determination of whether continued detention is warranted for each combatant. The detainee again receives access to the unclassified information that will be used at the hearing and the assistance of a representative.

The elaborate process of CSRT and ARB hearings that the United States has established is not only unprecedented in the history of warfare, but was also designed specifically to satisfy the requirements of due process that the Supreme Court outlined in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in describing the process due to a *U.S. citizen* held as an enemy combatant *in the United States*. A plurality of the Court in *Hamdi* explained that the basic elements for such a process consisted of "notice of the factual basis for [the individual's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533. The plurality made clear, moreover, that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 538. Indeed, the Court specifically noted that AR 190-8 "already provide[s] for such process," *id.*, in the context of POW-status determinations. The CSRTs are thus tailor-made to comply with the dictates of due process that the Supreme Court outlined.

It is true that the CSRT is not a full-blown adversarial proceeding involving representation by counsel. But there is no need for such a process in the context of detention of

enemy combatants during an armed conflict. The touchstone for comparison here should not be the procedures we use as part of the criminal law in deciding upon the detention of an individual. That paradigm provides the wrong frame of reference. Adversarial hearings have never been required for detaining enemy combatants under the law of war until the end of a conflict. And as the Supreme Court itself pointed out in *Hamdi*, even where the detention of a U.S. citizen is concerned, "the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at the time of ongoing military conflict." 542 U.S. at 533 (plurality).

The record of CSRT and ARB hearings to date shows that they are more than mere formalities. CSRT hearings have resulted in over thirty determinations that the detainee in question should no longer be detained as an enemy combatant. Meanwhile, annual ARB determinations have resulted in the issuance of approval for release or transfer to another country of more than 150 detainees. These figures should be weighed against the criticisms many level against the current process. And while some urge Congress to make further modifications to the system to ensure the lowest possible risk of an erroneous detention, Congress also has a responsibility to weigh the risks that attend erroneously releasing dangerous combatants. Of those detainees who have been transferred or released from U.S. control, at least 30 have subsequently rejoined the fight and have been recaptured or killed on the battlefield. *See* http://www.defenselink.mil/news/d20070712formergtmo.pdf. Every such erroneous release places the lives of Americans — both servicemembers overseas and potentially civilians here at home — at risk.

B. Punitive Decisions: Review of Military Commission Decisions

The system Congress established in the MCA for trials by military commission also exceeds relevant constitutional and international law standards.

In the MCA, Congress crafted a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Indeed, Congress was careful in the MCA to remedy each of the defects identified by the Court (and even by justices not forming a majority) in *Hamdan*. By providing military commissions a statutory basis, the MCA ensures that the commissions are "regularly constituted courts" for purposes of Common Article 3 of the Geneva Conventions, *cf. Hamdan*, 126 S. Ct. at 2796-97, and, among other protections, it also ensures that the accused will have the right to be present at all proceedings and hear all evidence presented against him, *cf. Hamdan*, 126 S. Ct. at 2797-98 (Opinion of Stevens, J, joined by Souter, Ginsburg, and Breyer, JJ.). As a result, under the MCA, military commissions are finally poised to proceed more than five years after the President originally issued the order providing for their creation.

Again, Congress went far beyond what has traditionally been required under the law for military commissions by empowering a civilian court, the D.C. Circuit, to review judgments from the military commissions. One can expect that the D.C. Circuit will attend to this task with the same seriousness that it has already demonstrated in its role as reviewer of CSRT decisions.

C. The Constitution Does Not Require that Enemy Combatants Detained Outside the United States Be Provided Habeas Corpus Review.

One of the primary arguments advanced in favor of amending the DTA and MCA to add federal habeas corpus review to the unprecedented bundle of review rights already granted to detainees is the assertion that these statutes unconstitutionally stripped away a *right* to habeas

review. In my view, such arguments rest on a false premise. Granting federal courts habeas jurisdiction over claims brought by aliens held at Guantanamo Bay simply is not required by the Suspension Clause. That clause provides that "[t]he 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." U.S. Const., Art. I, sect. 9, cl. 2. That prohibition does not require any change to the MCA or the DTA for at least two reasons.

First, aliens detained outside the United States have no rights under the Constitution, including under the Suspension Clause. As the Supreme Court made clear more than fifty years ago in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), if the Constitution conferred rights on aliens detained overseas as enemy combatants, "enemy elements . . . could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable searches and seizures' as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." 339 U.S. at 784. The Court explained that "[s]uch extraterritorial application of organic law would have been so significant an innovation in the practice of governments . . . that it could scarcely have failed to excite contemporary comment." *Id.* But there is nothing in the records of the constitutional convention or contemporary practice to suggest that the Founders intended such a novel approach. Nothing in the Supreme Court's decisions since *Eisentrager* — including the recent decisions in *Rasul* and *Hamdan* — has disturbed these fundamental principles. To the contrary, in ruling in 1990 that the Fourth Amendment did not protect aliens outside our borders, the Court resoundingly reaffirmed the teaching of *Eisentrager*, stressing that in *Eisentrager* "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *United States v. Verdugo-*

Urquidez, 494 U.S. 259, 269 (1990); *see also Zadvydas v. Davis*, 553 U.S. 678, 693 (2001).[4] The same reasoning that the Supreme Court applied in *Eisentrager* (and reaffirmed in cases such as *Verdugo-Urquidez*) to conclude that aliens overseas do not have rights under the Fifth Amendment applies equally to the Suspension Clause. If it did not, and aliens overseas did have a constitutional right to habeas review, there is no immediately apparent reason why the same right would not apply to aliens held in Iraq or in Baghram, Afghanistan (or to aliens held anywhere in the world any future war). Congress should be reluctant to adopt such a novel and extraordinarily expansive notion of constitutional rights.

Second, even if aliens at Guantanamo had some rights under the Suspension Clause, the procedures provided in the DTA for judicial review of detentions (after a CSRT decision) fully satisfy any rights they may have. The purpose of the writ of habeas corpus is to provide judicial review for executive detention. As long as Congress provides some mechanism for securing that judicial review, the demands of the Suspension Clause are satisfied, whether or not the procedure is labeled a "habeas" proceeding. As the Supreme Court has explained, "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). Indeed, the Court has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001). Congress has provided precisely such an adequate

[4] The same rule, following the Supreme Court's teaching, has been consistently applied in the courts of appeal. *See, e.g.*, *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

substitute here by providing for review in the D.C. Circuit of both the determinations of CSRTs and the final decisions of military commissions.

In fact, the DTA and the MCA provide even greater review than what has been available historically upon habeas challenges to a military tribunal decision in cases where habeas was available. In cases involving military commissions in World War II, the Supreme Court made clear that the function of habeas corpus was simply to test the jurisdiction of the tribunal to issue a decision, not to examine the correctness of its decision. *See 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 disputed facts. Correction of their errors of decision is not for the courts, but for the military authorities which are alone authorized to review their decision."); *see also Ex parte Quirin*, 317 U.S. 1, 25 (1942). In providing for review of constitutional and other claims, including the legal claim of insufficiency of evidence, the DTA and MCA actually provide the detainees at Guantanamo with far more judicial review than has traditionally been provided through habeas to those convicted by a military commission. The MCA thus certainly provides an adequate substitute for any constitutional right to habeas that the detainees could be found to have.

Not surprisingly, given this precedent, the Court of Appeals for the District of Columbia Circuit has recently rejected the claim that the MCA's elimination of habeas review for Guantanamo violates any constitutional provision. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Following the longstanding precedent outlined above, the court ruled that the detainees have no constitutional rights under the Suspension Clause. *See id.* at 988-94. To be sure, the Supreme Court has now granted certiorari to review the D.C. Circuit's decision. But there is no need for Congress to intervene to amend the MCA now when the courts are still in the

midst of their review and the latest indication from the Court of Appeals is that the statute's habeas provisions suffer from no constitutional infirmity. Should the Supreme Court disagree with the Court of Appeals, its opinion will also likely indicate what further modifications would be necessary to convert the judicial review already provided for CSRT and military commission decisions into an adequate substitute for habeas corpus. Acting now, in an attempt to guess what the Supreme Court might say, would be premature.

II. Adding a Duplicative Layer of Habeas Review Would Give Rise to Major Policy Disadvantages with No Concrete Benefit.

Once one recognizes that there is no *legal defect* in the current mechanisms Congress has provided for reviewing the detention and trial of enemy combatants, it becomes clear that the amendments being proposed to the MCA and DTA must be evaluated solely as *policy* choices for Congress to make. For a number of reasons, it would make little sense to re-establish habeas jurisdiction over Guantanamo and to open the possibility for habeas review of decisions to detain enemy combatants at other bases as well.

In its current form, H.R. 2826 would clear the way for courts to assert jurisdiction over habeas corpus petitions from detainees held at Guantanamo Bay. It does this by creating a new exception to the DTA and MCA provisions which established that D.C. Circuit review of CSRT and military commission decisions would be the exclusive means of federal court review. On top of such D.C. Circuit review, H.R. 2826 also would permit jurisdiction over "application[s] for a writ of habeas corpus, including an application challenging transfer" or "any action solely for prospective injunctive relief against transfer." *See* H.R. 2826 § 1.

Re-establishing habeas jurisdiction over Guantanamo at this point would simply generate confusion and wasteful litigation by creating a parallel avenue for legal challenges, but without clear standards to govern them. The Supreme Court recognized long ago the practical dangers

that would be posed by permitting enemy combatants detained overseas free access to our courts to file petitions for habeas corpus. As the Court explained in *Eisentrager*, permitting such petitions "would hamper the war effort and bring aid and comfort to the enemy. . . . 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." 339 U.S. at 779. The initial rounds of habeas litigation on behalf of detainees at Guantanamo, culminating in the *Rasul* decision, proved that Justice Jackson's fears in *Eisentrager* were well founded. Detainees used habeas litigation to urge federal courts to dictate conditions at the Naval Base at Guantanamo ranging from the speed of Internet access to the extent of mail deliveries.

After *Rasul*, however, Congress wisely alleviated the worst of these problems by providing orderly judicial review mechanisms that would proceed only after military decisions had been completed through military processes. Thus, it made the enemy combatant status determination of a CSRT reviewable in the D.C. Circuit and the final decision of a military commission reviewable in the same court. Opening the field up once again to unrestricted challenges under the general habeas statute will only generate a flood of litigation that will unnecessarily divert the resources of the military and the Department of Justice and eliminate the very advantages of an orderly process that Congress sought to achieve through the DTA and MCA. It would do so, moreover, without providing any clear guidance as to any *substantive* change in detainees' rights. To the contrary, presumably no substantive change in rights would be intended. But it would take years of litigation to establish that result.

It is also unclear what effect the bill would have in expanding habeas jurisdiction beyond Guantanamo to bases in Afghanistan or elsewhere. Proponents of the bill undoubtedly will claim that it will not permit judicial interference in such areas because it expressly bars jurisdiction over an action brought by an alien "who is in the custody or under the effective control of the United States, *in a zone of active combat involving the United States Armed Forces*, and where the United States is implementing Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, United States Army Regulation 190-8 (1997), or any successor regulation, as determined by the President." H..R. 2826, § 7 (emphasis added). But that provision should hardly provide the military any peace of mind that it will not have to deal with a flood of increased litigation and potential judicial interference at additional bases overseas, because it is entirely unclear what areas would qualify under the undefined term "zone of active combat." The meaning of that phrase would likely be determined only through lengthy and contentious litigation.

There is a significant danger, moreover, that courts might ultimately find that phrase far less restrictive than its proponents may think, given the law-of-war backdrop in which it is used. Under the Third Geneva Convention, Prisoners of War must be "evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger." GPW, Art. 19. *See also* GPW, Art. 23 ("No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone . . . ."). Although that provision for POWs does not apply to unlawful combatants in the conflict with al Qaeda, a roughly comparable requirement could arguably be considered part of the customary laws of war — a detaining power is responsible for the safety of those whom it detains and for removing them from the danger of combat. It also makes practical sense for the detaining power

to move detainees to a more stable area — removed from combat — to detain them securely. Thus, it might be argued that, for customary law-of-war purposes, the United States has an obligation to move those whom it detains at least far enough from the "combat zone" "for them to be out of danger." But that in itself will provide clever lawyers with an argument that, if the United States is adhering to its obligations, the detainees are not in a "zone of active combat" for purposes of the restriction on habeas jurisdiction. In short, this provision promises nothing but endless litigation and little assurance that it will accomplish its apparent objective of preventing the expansion of habeas jurisdiction to areas like Afghanistan.

The practical disadvantages of re-establishing habeas jurisdiction over Guantanamo (and perhaps extending it elsewhere) must, of course, be weighed against any benefits habeas jurisdiction might bring. But those would be very small. To begin with, there is little reason to believe that re-establishing habeas review would mollify international critics of the United States. Such critics take issue not with the presence or absence of habeas review (which to most foreigners is even more arcane than to average American citizens), but rather with the entire policy of detaining al Qaeda combatants for the duration of hostilities. No amount of procedural rights would be sufficient to put an end to that criticism.

In addition, there is little reason to think that simply adding habeas review on top of the review mechanisms already provided would reduce the rate of erroneous detention in the present system. Habeas review of factual questions has traditionally been very deferential, and there is every reason to expect that the courts would apply the same deferential standards for habeas petitions resulting from CSRT or military commission decisions. *See Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979); *St. Cyr*, 533 U.S. at 27 (noting that the traditional rule on habeas corpus review of non-criminal executive detentions was that "the courts generally did not review the

factual determinations made by the executive"). In addition, as explained above, the present system has already demonstrated an ability to identify instances of erroneous detention, as well as to order release or transfer when a given individual's detention is no longer necessary.

Some will doubtless say there are flaws in the way the CSRTs and Military Commissions are structured. But simply adding undefined habeas review on top of the system Congress has already established is not a panacea for all ills. Indeed, it provides no specific solution to perceived shortcomings at all. In addition, it bears noting that the present statutory system has only recently become fully operational and will continue to evolve as the D.C. Circuit gains experience reviewing more cases. As the *Bismullah* decision shows, the D.C. Circuit's decisions shaping the statutory review process may provide answers to many criticisms. That process should be allowed to work before Congress rushes to pass additional legislation.

Beyond authorizing jurisdiction for habeas petitions from detainees at Guantanamo Bay, H.R. 2826 also clears the way for exercise of jurisdiction that would otherwise be proper over actions "for prospective injunctive relief against transfer." This step would be unprecedented and unwise because it would insert the confusion and uncertainty associated with judicial review into an Executive process that involves delicate negotiations with foreign powers.

Detainees are transferred from Guantanamo to other countries under a variety of circumstances. In some instances, continued detention is no longer deemed necessary; in others, the receiving country has a legitimate interest in possible detention, investigation, and prosecution and is willing to accept responsibility for ensuring that the detainee will no longer pose a threat to the United States. In all cases, transfer occurs only after the Department of Defense negotiates with the receiving government and obtains assurances appropriate for the specific case in question. In addition, if the Department of Defense deems a transfer to be in

order, it is customary for the Department of State also to contact the receiving government to obtain assurances regarding the detainees' treatment and in particular assurances that the detainees will not be subjected to torture.

As that description demonstrates, transfer decisions are inherently political affairs involving delicate, flexible negotiations between the United States and foreign governments. Such matters of prisoner transfers in armed conflict have always been matters entrusted wholly to the Executive. Especially given the need for confidentiality and high-level inter-government negotiations, inserting the courts into this process would be extremely disruptive. In the words of one of the Supreme Court's decisions regarding the separation of powers, such involvement would likely be marked by "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and by "the potentiality of embarrassment." *Baker v. Carr,* 369 U.S. 186, 217 (1962). In any event, departing from the standard terms of the habeas statute to insert additional language extending jurisdiction expressly to transfer decisions — without providing any guidance on the standards that courts are to apply to such decisions — does not make good policy sense. It will only introduce the confusion and delay attendant on litigation into a process that revolves around sensitive Executive negotiations.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions the Committee may have.

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Practice Areas
- Litigation

Professional Profile
Mr. Philbin has recently returned to Kirkland & Ellis after several years at the Department of Justice. His practice focuses on cases involving complex legal issues at both trial and appellate levels. He has represented clients in numerous cases in the federal courts of appeals and the Supreme Court and has argued before the International Court of Justice at The Hague. Before entering government service he served as Verizon Communications' primary outside counsel in challenging FCC rulemakings implementing the Telecommunications Act of 1996.

From 2001 to 2005, Mr. Philbin served at the Department of Justice. There, his responsibilities centered on national security, intelligence, and terrorism issues. As a Deputy Assistant Attorney General in the Office of Legal Counsel from 2001 to 2003, Mr. Philbin advised the Attorney General and the Counsel to the President on issues related to the War on Terrorism. As an Associate Deputy Attorney General from 2003 to 2005, Mr. Philbin oversaw and managed the national security functions of the Department, including espionage, counterterrorism, and counterintelligence investigations and applications for electronic surveillance under the Foreign Intelligence Surveillance Act. Based on his experience in government, he is regularly invited to speak on legal issues relating to war powers, national security, and the War on Terrorism.

Education
Cambridge University (Diploma in Legal Studies, 1995)
Publication: "The *Excepciones Contra Brevia*: A Late Thirteenth Century Teaching Tool," in *Learning the Law* (1999).

Harvard Law School (J.D., 1992) magna cum laude
Executive Editor, Harvard Law Review

Yale University (B.A., History, 1989) summa cum laude, Phi Beta Kappa

Clerk & Government Experience
Chambers of the Honorable Clarence Thomas, Associate Justice, United States Supreme Court; July 1993-July 1994

Chambers of the Honorable Laurence H. Silberman, U.S. Court of Appeals, D.C. Circuit; July 1992-July 1993

Representative Matters

Select Cases Argued

Verizon North Inc. v. Engler, 257 F.3d 587 (6th Cir. 2001), challenge to the Michigan Telecommunications Act;

NPR v. FCC, 254 F.3d 226 (D.C. Cir. 2001), challenge to FCC rulemaking;

GTE North Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000), defense of jurisdictional ruling in a challenge to the Michigan Telecommunications Act;

Verizon North Inc. v. Engler, No. 00-73208 (E.D. Mich), challenge to the Michigan Telecommunications Act;

GTE Florida, Inc. v. Clark, (N.D. Fla.), challenge to state action under the Telecommunications Act of 1996;

GTE North Inc. v. Strand, (W.D. Mich.), same;

GTE California, Inc. v. Conlon, (N.D. Cal.), same.

Select Cases Briefed

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002);

Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000);

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999);

Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999);

Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

Admissions & Qualifications
1995, Massachusetts
1997, District of Columbia

Other Distinctions

Honors
The Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security, June 2004.

Office of the Secretary of Defense, Exceptional Civilain Service Award for Support to the Secretary of Defense in the War on Terror, October 2002.

Seminars
Panelist, "Presidential Powers: An American Debate," Center for Law and Security, New York University Law School, April 2006.

Panelist, "King George or Commander-in-Chief? President Bush's Theory of Executive Power and the Constitution," American University Washington College of Law, March 2006.

Speaker, The Holmes Debates, "Enemy Combatants/Military Tribunals: Fair vs. Foul Means in the War Against Terrorism," June 2004.

Panelist, "Rights vs. Security: What is the Compromise?" Human Rights Watch Forum broadcast on WNYC, April 2002.

Prior Experience

U.S. Department of Justice
Associate Deputy Attorney General, June 2003-November 2005
Deputy Assistant Attorney General, Office of Legal Counsel, September 2001-June 2003

Kirkland & Ellis, Washington, D.C.
Partner, 1998-2001; **Associate**, 1995-1998

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Patrick Philbin

Capacity in which appearing: (check one)

X Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented:_____

FISCAL YEAR 2007 Because I am not appearing in a representative capacity, these provisions do not apply.

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information: N/A

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

N/A

Number of grants (including subgrants) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

In my law practice I do represent entities that have contracts with the federal government, but I am not appearing ~~to~~ before the committee to represent them. Therefore, as I understand it, no disclosures here are required.

STATEMENT OF

STEPHEN E. ABRAHAM
LIEUTENANT COLONEL, U.S. ARMY RESERVE

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

PRESENTED

THURSDAY, JULY 26, 2007

STATEMENT OF STEPHEN E. ABRAHAM
LIEUTENANT COLONEL, U.S. ARMY RESERVE

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
ARMED SERVICES COMMITTEE

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

THURSDAY, JULY 26, 2007

Mr. Chairman and Members of the Committee, it is my privilege to have the opportunity to testify today concerning my experiences as a participant in the Combatant Status Review Tribunal ("CSRT") process. I was assigned to the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") from September 11, 2004 to March 9, 2005, the period of time in which nearly all of the CSRTs for detainees in Guantanamo were performed. (Only a few detainees have been transferred to Guantanamo since). OARDEC is the organization within the Defense Department responsible for conducting CSRTs and other administrative reviews of detainees in Guantanamo. While at OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT panel, and had the opportunity to observe and participate in all aspects of the CSRT process.

I came to OARDEC as an Army Reserve lieutenant colonel with twenty-two years of experience as a military intelligence officer in the U.S. Army Reserve, both on and off active duty. I was mobilized for service in support of Operation Desert Storm, and twice served on active duty following the September 11th attack on this Nation. My latest mobilization before my assignment to OARDEC was as Lead Counterterrorism Analyst for the Joint Intelligence Center, Pacific Command, from November 13, 2001 through November 12, 2002, for which I received

the Defense Meritorious Service Medal. In that capacity, I became highly familiar with the wide variety of intelligence techniques and resources used in the fight against terrorism. My military resume is attached to my written testimony. I also came to OARDEC with more than ten years of experience as an attorney in private practice. I am a founding member of the law firm Fink & Abraham LLP in Newport Beach, California.

Firstly, Mr. Chairman, let me say that it is fitting that the Committee is considering the issues raised by the denial of habeas corpus rights of individuals held by the United States as enemy combatants. There is no question that individuals who have attacked the United States should be punished, and that those who are preparing to attack the United States must be stopped. I have devoted my military career to identifying such individuals and their organizations, and to helping our country counter such threats.

We cannot protect our security unless we identify those individuals who have harmed or are preparing to harm us. Just as importantly, incorrectly concluding that an individual fits one of these categories does nothing to help keep us secure. Detaining such an individual only misdirects our resources and causes damage to our reputation as a nation that may take decades to repair. Imprisoning the wrong man is also antithetical to the Constitutional values that commissioned officers swear to support and defend.

As I will explain, the process put in place by the Executive Branch to review its detention of the prisoners at Guantanamo was designed not to ascertain the truth, but to legitimize the detentions while appearing to satisfy the Supreme Court's mandate in *Rasul v. Bush* that the government be required to justify the detentions. The process was nothing more than an effort by the Executive to ratify its exercise of power to detain anyone it pleases in the war against terror.

The CSRT process was designed to rubber-stamp detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

The CSRT process was initially created in haste immediately following the Supreme Court's decision in *Rasul v. Bush* that federal courts had jurisdiction to hear habeas corpus actions brought by Guantanamo detainees requiring the government to justify the detentions. The Supreme Court decided *Rasul* on June 30, 2004, and the order establishing the CSRT process was issued eight days later on July 8, 2004.

Contemporaneous with the consideration of several cases relating to the Guantanamo detainees in the U.S. District Court for the District of Columbia, OARDEC established a goal of completing CSRTs for all of the more than 500 detainees then in Guantanamo by December, 2004. Although a small number of CSRTs were being conducted at about the time of my arrival at OARDEC in mid-September, 2004, almost all of the remaining tribunals were conducted during my assignment there.

In my observation, the system was designed to fail. This Committee should place no reliance on the procedures or the outcomes of those tribunals. The CSRT panels were an effort to lend a veneer of legitimacy to the detentions, to "launder" decisions already made. The CSRTs were not provided with the information necessary to make any sound, fact-based determinations as to whether detainees were enemy combatants. Instead, the OARDEC leadership exerted considerable pressure, and was under considerable pressure itself, to confirm prior determinations that the detainees in Guantanamo were enemy combatants and should not be released.

The CSRT process had two essential components: an information-gathering component, conducted almost entirely in Washington, and the panel proceedings, which took place either in

Guantanamo or in Washington, depending on whether the detainee decided to appear. The Recorders (military officers who presented the cases to the CSRT panels), personal representatives (who met with detainees briefly prior to the panel proceedings), and panel members had no role in the gathering of information to support an "enemy combatant" determination. Although the Recorders were required by DoD procedures to gather relevant information and present all exculpatory information to the CSRT panels, in practice they did not do so. Rather, the information was typically aggregated by individuals in Washington identified as "case writers." These case writers, in most instances, had only a limited degree of knowledge and experience relating to the intelligence community and evaluation of intelligence products. The case writers, and not the Recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for a detainee's designation as an enemy combatant.

These case writers depended entirely on government agencies to supply the information they used. The case writers and Recorders did not have access to the vast majority of information sources generally available within the intelligence community, all of which had been made available to me in my prior assignments.

The information used to prepare the files to be used by the Recorders frequently consisted of finished intelligence products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status. Beyond "generic" information, the case writers would frequently rely on information contained within the Joint Detainee Information Management System ("JDIMS"). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive

law enforcement information, highly classified information, or information not voluntarily released by the originating agency. Like the information provided by intelligence agencies, the information in JDIMS to which OARDEC case writers had access lacked information relating to the reliability of the source. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other databases available to the case writers were similarly deficient.

Beyond the physical and technological limitations that constrained the research teams, the content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. The scope of information *not* included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the persons preparing materials for use by the CSRT panel members did not know whether they had examined all available information or why they possessed some pieces of information but not others.

The limited information provided by intelligence agencies ordinarily consisted only of distilled summaries and conclusory statements. Team members were rarely provided any information about the source of the information. Often, the source was not identified at all. Other times, the source was identified, but with no information allowing us to assess the source's reliability. For example, a summarized document might say that a detainee "is a member of Al Qaeda," but would not include any information about who determined that the detainee is a member of Al Qaeda, the nationality or allegiance of the source, whether the source was paid for the information, whether the source was detained or subjected to coercive interrogation

techniques, or whether the source had given reliable information on other occasions. The only exception to the rule of withholding source material, in my experience, was that information was sometimes identified as having been provided by the detainee himself. In such cases, OARDEC would not be advised as to whether information had been provided under duress.

The importance of source information cannot be overemphasized. An integral part of the duties of intelligence officers is to assess the reliability of sources and the validity of information received. To be effective, the intelligence professional must be capable of distinguishing between instances where a source provides valid, reliable information and instances where the source intends to influence or even to deceive. Without such information about the reliability of the source or the information provided, it is impossible to evaluate the weight to be given the information. It was impossible to know whether the information to which I was permitted access was trustworthy. Yet the CSRT regulations required the panel members to presume that it was all "genuine and accurate."

Following "quality assurance review," a process that focused more on format and grammar than on substance, the unclassified summary and the information assembled by the case writer in support of the summary would then be forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a

statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.

During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit to the intelligence agencies. I was not permitted to request that further searches be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. Each time that I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the request was summarily denied.

For example, at one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information. The General Counsel's Office denied my request and refused even to confirm or deny the existence of information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to infer, from the absence of exculpatory information in the materials I was allowed to review, that no such information existed in materials I was not allowed to review.

Following that particular exchange, I communicated to the Director of OARDEC, Rear Admiral James McGarrah, and the Deputy Director of OARDEC, Captain Frank Sweigart, the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process. The responses by Captain Sweigart and Admiral McGarrah were dismissive and did nothing to address my concerns.

All CSRT panel members were assigned to OARDEC and reported ultimately to Rear Admiral McGarrah. Any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to justify their finding to the senior leadership, including Captain Sweigart and Admiral McGarrah. There would be intensive scrutiny of the finding that Rear Admiral McGarrah would, in turn, have to explain to his superiors, including the Under Secretary of the Navy. Similar scrutiny was not applied to a finding that a detainee was "properly" classified as an Enemy Combatant. In each of the meetings that I attended with OARDEC leadership following a NEC finding, the question asked by the leadership was, "What went wrong?"

There was a constant push by Rear Admiral McGarrah and Captain Sweigart to complete CSRT hearings quickly. Captain Sweigart routinely issued reports showing how many hearings had been completed, and he continually demanded that the hearings be conducted at a faster pace. The only thing that would slow down the process was a finding that a detainee was not an enemy combatant. Therefore, there was a strong incentive on the part of the panel members and other participants in the process to find the detainees to be enemy combatants.

On one occasion, I was assigned to a CSRT panel, Panel 23, with two other officers, an Air Force Colonel and an Air Force Reserve Major in the Judge Advocate General's Corps. We reviewed evidence presented to us regarding the recommended status of detainee ISN #654, Abdullah Al-Ghazawy, who was accused in the unclassified summary of being a member of the Libyan Islamic Fighting Group.

There was no credible evidence supporting the allegation. All of us found the information presented to lack substance. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized, indirect statements in the passive voice without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered surmises from which we were expected to draw conclusions favoring a finding of "enemy combatant." When we asked the Recorder the most limited questions about these statements, the only response the Recorder could give was, "We'll have to get back to you." He never did. The personal representative, the non-attorney assigned to assist the detainee through the process, did not participate in any meaningful way.

On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. OARDEC leadership, including Captain Sweigart, immediately questioned the validity of our findings and directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to leave the hearing open to allow the Recorder to present further argument as to why the detainee should be classified as an

enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant.

OARDEC's response to the outcome of our case was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. I was not assigned to another CSRT panel.

I subsequently learned, based on the government's factual return in Mr. Al-Ghazawy's habeas corpus case, that he was subjected, without his knowledge or participation, to a second CSRT panel two months later that reversed my panel's unanimous determination that he was not an enemy combatant. I also learned that this particular panel, Panel 32, also reconsidered and reversed the finding of Panel 18 that detainee ISN #250, Anwar Hassan, also known as "Ali" in his court filings, was not properly designated as an enemy combatant. So it appears that Panel 32 was convened precisely for the purpose of overturning prior findings that were favorable to the detainees.

In short, the CSRT process was not structured to yield reliable determinations as to whether the detainees held in Guantanamo were properly detained as enemy combatants. Rather, the Executive put in place a process to legitimize, without substantial corroborated evidence or any meaningful independent review, earlier determinations that were not the product of a thoughtful, deliberative process directed to the ascertainment of truth. The process ensured that panels would rubber-stamp decisions already made rather than applying independent judgment as to whether those decisions were correct. Under the guise of implementing the Supreme Court's decision in *Rasul*, the CSRT process completely frustrated it. In my opinion, it is time

for Congress to restore the judicial mechanism – habeas corpus – that will both honor our commitment to justice and keep America secure.

Mr. Chairman, thank you for the opportunity to testify today. I would be pleased to answer any questions the Committee may have.

STATEMENT OF

STEPHEN E. ABRAHAM
LIEUTENANT COLONEL, U.S. ARMY RESERVE

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES

PRESENTED

THURSDAY, JULY 26, 2007

ENCLOSURES

Military Resume

Citation Accompanying the Award of the
Defense Meritorious Service Medal

RESUME OF SERVICE CAREER

for

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel
Military Intelligence (USAR)

DATE AND PLACE OF BIRTH: 01 December 1960, Urbana, Illinois

YEARS OF COMMISSIONED SERVICE: 25 years

TOTAL YEARS OF SERVICE: 25 years

PRESENT ASSIGNMENT: Operations Officer, 3300 Det 1, Strategic Intelligence Group

CURRENT OCCUPATION: Attorney, Fink & Abraham LLP, Newport Beach, California

MILITARY SCHOOLS ATTENDED:
Airborne School
Air Assault School
NBC Defense Course (USAREUR)
Military Intelligence School - Basic and Advanced Courses
Military Intelligence School – Counterintelligence/HUMINT Course
United States Army Command and General Staff College
DAME-1

EDUCATIONAL DEGREES:
University of California at Davis – BA Degree – Anthropology
University of the Pacific, McGeorge School of Law – JD Degree with honors – Law

FOREIGN LANGUAGE:
None recorded

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR)

MAJOR DUTY ASSIGNMENTS

FROM	TO	ASSIGNMENT
Active Duty		
Jan 82	Nov 82	Student, Intelligence Center and School, Fort Huachuca, Arizona (Basic, SOTIOC, CI/HUMINT Courses)
Dec 82	Dec 83	Assistant S-3, Plans and Training, 527th Military Intelligence Battalion, Kaiserslautern, Germany
Jan 84	May 85	Chief, Intelligence Coordination Center, 66th Military Intelligence Group, Munich Germany
May 85	Dec 85	Case Control Officer, Defense Counterespionage Branch, 66th Military Intelligence Group, Munich Germany
Jan 86	Jul 86	Student, Intelligence Center and School, Fort Huachuca, Arizona (Advanced Course)
Aug 86		Student, Infantry School, Fort Benning, Georgia (Airborne Course)
Aug 86	Feb 87	S-4, 107th Military Intelligence Battalion (CEWI), Fort Ord, California
USAR – Not on Active Duty (Individual Ready Reserve)		
Feb 89		Counterintelligence Officer, G-2, 10th Infantry Division (Mountain), Fort Drum, New York
USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)		
Jul 90		Intelligence Officer, APG Detachment, 902d Military Intelligence Group, Aberdeen Proving Grounds, Maryland
Jan 91		Defense Counterespionage Office, 902d Military Intelligence Group, Fort Meade, Maryland
USAR – Mobilization (Desert Storm)		
Apr 91	Aug 91	Executive Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland
USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)		
Jul 92		Counterintelligence Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland
Jul 93		Intelligence Officer, J-2, Alaska Command, Elmendorf Airbase, Alaska

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR)

USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)

Aug 93	Mar 96	S-2, 7th Psychological Operations Group, Moffett Federal Air Field, California
Apr 96	Feb 98	Intelligence Officer, 478th Military Intelligence Detachment (Strategic), Camp Parks, California
Mar 98	Apr 99	Division Head, Detachment 2, Reserve Production Center Camp Parks, Joint Intelligence Center, Pacific Command, Camp Parks, California
May 99	Sep 00	Army Element Director and Production Team Chief, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
Sep 00	Oct 01	Army Element Director and Production Manager, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California

USAR – Mobilization (Operation Enduring Freedom)

Nov 01	Oct 02	Senior Counterterrorism Analyst, Counterterrorism Branch, Joint Intelligence Center, Pacific Command, Pearl Harbor, Hawaii

USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)

Nov 02	Aug 03	Army Element Director, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California
Sep 03	Sep 04	Joint Service Director, Joint Detachment San Diego, Joint Intelligence Center, Pacific Command, San Diego, California

USAR – Mobilization (Operation Enduring Freedom)

Sep 04	Mar 05	OARDEC, Washington D.C.

USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)

Jun 05	Present	Operations Officer, redesignated Sep 2006 as 3300 Det 1, Strategic Intelligence Group

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR)

PROMOTIONS

Rank	Component	Date
2LT	USAR	18 Dec 81
1LT	USAR	27 Jul 93
CPT	USAR	1 Sep 85
MAJ	USAR	17 Dec 93
LTC	USAR	2 Sep 00

US DECORATIONS AND BADGES:

Individual Decorations and Citations

Defense Meritorious Service Medal
Joint Services Commendation Medal
Army Commendation Medal (with 2 Oak Leaf Clusters)
Joint Services Achievement Medal
Army Achievement Medal
Army Reserve Components Achievement Medal (with 3 Bronze Oak Leaf Clusters)
Armed Forces Reserve Medal (with Silver Hourglass, "M" and "2" Devices)
Global War on Terrorism Service Medal
National Defense Service Medal (with 1 Bronze Service Star)
Overseas Ribbon
Army Service Ribbon

Unit Citations

Joint Meritorious Unit Award

Badges

Basic Parachutist Badge
Air Assault Badge
German Military Proficiency Badge

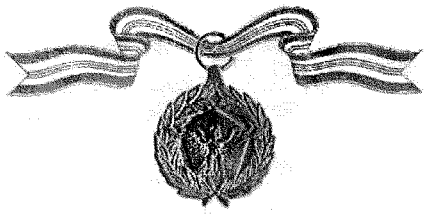
SOURCE OF COMMISSION: ROTC (December 1981)

ADDENDUM A TO RESUME OF SERVICE CAREER

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel
Military Intelligence (USAR)

CURRENT OCCUPATION: Attorney, Fink & Abraham LLP, Newport Beach, California

NATURE, SCOPE AND EXTENT OF RESPONSIBILITIES:
Founding partner and Attorney in firm specializing in real estate and general business law. Has direct responsibility for litigating cases involving real estate, general business, and environmental law in trial courts as well as the courts of appeal up to and including the United States Supreme Court. Position requires frequent contact with clients and opposing counsel in matters involving, collectively, in excess of $1 billion annually.



THE UNITED STATES OF AM]

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING

THIS IS TO CERTIFY THAT
THE SECRETARY OF DEFENSE
HAS AUTHORIZED THE AWARD OF THE

DEFENSE MERITORIOUS SERVICE ME

TO

LIEUTENTANT COLONEL STEPHEN E. ABRAHAM
UNITED STATES ARMY RESERVE

FOR

EXCEPTIONALLY MERITORIOUS SERVICE
FOR THE ARMED FORCES OF THE UNITED STATES
13 NOVEMBER 2001 TO 12 NOVEMBER 2002

GIVEN UNDER MY HAND THIS **23RD** DAY OF **OCTOBER**

DIRECTOR FOR INTELLIGENCE
COMMAND OR OFFICE

Permanent Order 189-02

SECRETARY
R. M. LEVITRE
Rear Admiral, U

DD FORM 2412, MAY 1959

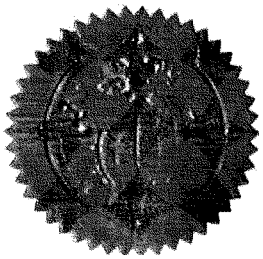
CITATION TO ACCOMPANY THE AWARD OF

THE DEFENSE MERITORIOUS SERVICE MEDAL

TO

STEPHEN E. ABRAHAM

Lieutenant Colonel Stephen E. Abraham, United States Army Reserve, dist by exceptionally meritorious service while serving as Lead Counterte Directorate of Operations, Joint Intelligence Center Pacific, Pearl Har 13 November 2001 to 12 November 2002. As Lead Counterterrorism Analyst developed an Actionable Intelligence program focused on identifying sign activities in the Pacific theater and potential counterterrorism operations to defeat those activities. This program resulted in a weekl Commander in Chief and Director for Operations, United States Pacific C pivotal in defining the intelligence support required to prosecute the He also developed and implemented the Joint Intelligence Center Pacific and Actionable Intelligence database, which was instrumental in shaping Defense terrorism database being implemented by the Defense Inte Colonel Abraham was personally selected to develop and lead the Joint In Pacific Special Studies Team for counterterrorism. His exceptional effor to mission accomplishment significantly enhanced current intelligenc support to the United States Pacific Command. Through his distinctive Colonel Abraham reflected great credit upon himself, the United States the Department of Defense.



DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 110th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: STEPHEN E. ABRAHAM

Capacity in which appearing: (check one)

X Individual

___ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: NA

FISCAL YEAR 2007

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
	NONE		

FISCAL YEAR 2006

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
	NONE		

FISCAL YEAR 2005

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
	NONE		

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information: **NONE AS TO ALL REQUESTS**

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2007):_____;
Fiscal year 2006:_____;
Fiscal year 2005:_____.

Statement of Daniel J. Dell'Orto
Principal Deputy General Counsel
Office of General Counsel
U.S. Department of Defense

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

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

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

In *Hamdi v. Rumsfeld,* the Supreme Court confirmed this principle of international law and held that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the "necessary and appropriate" force that Congress authorized the President to use against nations, organizations, or persons associated with the September 11 terrorist attacks.

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

In addition to the screening procedures used initially to screen detainees at the point of capture, the Department of Defense created two administrative review processes at Guantanamo in the wake of the *Hamdi* and *Rasul* cases: Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs). The CSRT and ARB processes provide detainees with a measure of process significantly beyond that which is required by international law.

The CSRT is a formal review process, created by the Department of Defense and incorporated into the Detainee Treatment Act of 2005 (DTA), that provides the detainee with the opportunity to have his status considered by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections, building upon procedures found in Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. The CSRT guarantees the detainee rights notable beyond those provided by an Article 5 tribunal. In addition to the opportunity to be heard in person and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process. This personal representative has the opportunity to review the government information relevant to the detainee. Furthermore, a CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority, empowered to return the record to the tribunal for further proceedings. In addition, if new evidence comes to light relating to a detainee's enemy combatant status, a CSRT can be reconvened to reevaluate that status.

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

In *Rasul v. Bush,* the Supreme Court ruled that the federal habeas corpus statute applied to Guantanamo and therefore federal courts have jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. The Court accordingly held that aliens apprehended abroad and detained at Guantanamo Bay, Cuba, as enemy combatants could invoke the habeas jurisdiction of a district court. Of course, there is not and has never been a constitutional habeas right that attaches in this setting.

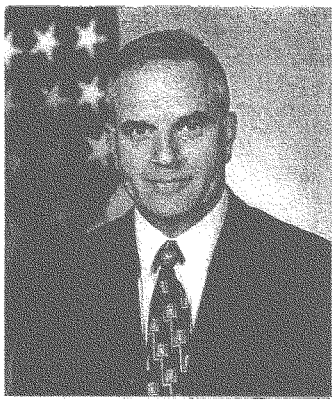
In the Detainee Treatment Act of 2005, Congress established additional procedural protections for future CSRTs and provided for judicial review of final CSRT decisions regarding enemy-combatant status in the U.S. Court of Appeals for the District of Columbia Circuit. At the same time, Congress foreclosed the Guantanamo detainees from pursuing alternative avenues of judicial review, including through statutory habeas corpus. The Military Commissions Act of 2006 (MCA) made the provisions providing

for judicial review of final CSRT decision and foreclosing statutory habeas expressly applicable to pending cases.

The DTA and the MCA permit the D.C. Circuit to review CSRT determinations of detainees at Guantanamo. Traditional *habeas* review in alien-specific contexts involved, in general, review of questions of law, but other than the question of whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive. However, under the DTA, to the extent an alien-petitioner has concerns about the legal adequacy of the CSRT standards and procedures used to make an "enemy combatant" determination, he may squarely raise those claims and have them adjudicated in the Court of Appeals. Further, the Court of Appeals' review involves an assessment by that Court of whether the CSRT, in reaching its decision, complied with the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence. Providing review of an enemy combatant determination in a nation's own domestic courts is an unprecedented process in the history of war.

As some of you know, the Department has filed motions to dismiss all habeas cases brought by detainees at Guantanamo Bay. Under the MCA, and as affirmed by the D.C. Circuit in *Boumediene*, the appropriate venue for detainee challenges to the lawfulness of their detention is in the D.C. Circuit. As you also may be aware, the Supreme Court recently granted certiorari to review the *Boumediene* decision. We look forward to presenting our argument to the Court in the Fall and are confident in our legal position, as upheld by the D.C. Circuit.

Extending statutory habeas to aliens held at Guantanamo Bay is both unnecessary and unwise. Together, Congress and the President developed the Detainee Treatment Act and the Military Commissions Act. Those statutes, which were passed with bipartisan majorities, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, the Congress, and numerous military and civilian personnel, applied to the nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and experience, and doing so would do a disservice to the American public.



DANIEL J. DELL'ORTO

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Daniel J. Dell'Orto is the Department's Principal Deputy General Counsel. He has served in this capacity since June 2000. He also served as the Acting General Counsel of the Department of Defense from January 19-May 23, 2001. He provides oversight, guidance, and direction regarding legal advice on all matters arising within the Department of Defense, including the Office of the Secretary of Defense.

Prior to joining the Department of Defense General Counsel's Office, Mr. Dell'Orto served as the Principal Deputy General Counsel of the Department of the Air Force, a position to which he was appointed in December 1998. Before that appointment, Mr. Dell'Orto served as an Army officer for more than 27 years. After his commissioning and initial assignments as a field artillery officer, he attended and completed law school under the provisions of the Army's Funded Legal Education Program. Thereafter, at assignments in the United States, Germany, and Korea, he served in a series of positions as a judge advocate, including prosecutor, defense counsel, appellate attorney, trial judge, appellate judge, and chief of the worldwide Army Trial Defense Service, culminating with his assignment as the Military Assistant to the Department of Defense General Counsel. He retired in the grade of colonel.

His civilian education includes a Bachelor of Science Degree in Aerospace Engineering from the University of Notre Dame, a Master of Business Administration Degree from Pepperdine University, a law degree from St. John's University School of Law, and a Master of Laws Degree from Georgetown University Law Center. His military education includes the Army Field Artillery and Judge Advocate Basic Courses, Airborne School, the Judge Advocate Officer Graduate Course, the Army Command and General Staff College, the Armed Forces Staff College and the Army War College.

While on active duty, Mr. Dell'Orto was awarded the Defense Distinguished Service Medal, the Legion of Merit (two awards), the Meritorious Service Medal (four awards), the Joint Service Commendation Medal, the Army Commendation Medal, and the Army Achievement Medal. In 1985, the American Bar Association honored him as the Outstanding Young Military Lawyer of the Army. In his civilian service, Mr. Dell'Orto has received the Department of Defense Medal for Distinguished Public Service and the Department of the Air Force Decoration for Exceptional Civilian Service.

Mr. Dell'Orto is a member of the Bar of the State of New York and has been admitted to practice before the Supreme Court of the United States, the United States Tax Court, the United States Court of Appeals for the Armed Forces and the United States Army Court of Criminal Appeals.

Department of Justice

STATEMENT OF

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

BEFORE THE

COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

HABEAS CORPUS AND
DETENTIONS AT GUANTANAMO BAY, CUBA

PRESENTED

JULY 26, 2007

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

BEFORE THE COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

HEARING ON HABEAS CORPUS AND
DETENTIONS AT GUANTANAMO BAY, CUBA

July 26, 2007

Thank you, Chairman Skelton, Ranking Member Hunter, and Members of the Committee. 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. However, 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 enemy combatants who include members of Al Qaeda, and of the Taliban militia that has harbored and aided Al Qaeda. 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 enemy combatants. About 775 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 775, over half have been released or transferred from Guantanamo Bay to other countries. The United States continues to hold about 360 detainees at Guantanamo Bay. Many of these detainees remain a threat to our country, but approximately 80 have been determined eligible for release or transfer. Departure of those detainees is subject to ongoing discussions with other nations. Moreover, the assessment process continues for other detainees not yet determined eligible for release or transfer.

In 2004, after having already released some 200 of the Guantanamo detainees, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review, 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. The CSRTs also afford greater protections than those used to make status determinations under Article 5 of the Third

Geneva Convention. 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. 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, the need for continuing the detention. The review includes an assessment of whether the detainee remains a continuing threat to the United States and its allies and whether there are other factors bearing on the need for continued detention. Before each ARB hearing, a designated military officer provides the Board with all reasonably available and relevant information. 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. 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.

Two recent statutes provide 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 flood of detainee 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 status determinations and military-commission convictions, 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 set forth 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 many international war-crimes tribunals.

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.), 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, and we will vigorously defend that decision in the Supreme Court.

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 greater protections than are required of Article 5 tribunals, to the statutory military-commission procedures, which afford greater protections than do international tribunals and previous military-commission procedures. 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 challenge to the standards or procedures used by these tribunals. *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 undermine military operations in 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.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 26, 2007

REPORT ON GUANTANAMO DETAINEES

A Profile of 517 Detainees through Analysis of Department of Defense Data

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THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY

Professor Mark Denbeaux* and Joshua Denbeaux*

An interim report

EXECUTIVE SUMMARY

The media and public fascination with who is detained at Guantanamo and why has been fueled in large measure by the refusal of the Government, on the grounds of national security, to provide much information about the individuals and the charges against them. The information available to date has been anecdotal and erratic, drawn largely from interviews with the few detainees who have been released or from statements or court filings by their attorneys in the pending *habeas corpus* proceedings that the Government has not declared "classified."

This Report is the first effort to provide a more detailed picture of who the Guantanamo detainees are, how they ended up there, and the purported bases for their enemy combatant designation. The data in this Report is based entirely upon the United States Government's own documents.[1] This Report provides a window into the Government's success detaining only those that the President has called "the worst of the worst."

Among the data revealed by this Report:

1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.

2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.

3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority – 60% -- are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.

4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody.

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* The authors are counsel for two detainees in Guantanamo.

[1] See, Combatant Status Review Board Letters, Release date January 2005, February 2005, March 2005, April 2005 and the Final Release available at the Seton Hall Law School library, Newark, NJ.

This 86% of the detainees captured by Pakistan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

5. Finally, the population of persons deemed not to be enemy combatants – mostly Uighers – are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.

INTRODUCTION

The United States Government detains over 500 individuals at Guantanamo Bay as so-called "enemy combatants." In attempting to defend the necessity of the Guantanamo detention camp, the Government has routinely referred this group as "the worst of the worst" of the Government's enemies.[2] The Government has detained most these individuals for more than four years; only approximately 10 have been charged with any crime related to violations of the laws of war. The rest remain detained based on the Government's own conclusions, without prospect of a trial or judicial hearing. During these lengthy detentions, the Government has had sufficient time for the Government to conclude whether, in fact, these men were enemy combatants and to document its rationale.

On March 28, 2002, in a Department of Defense briefing, Secretary of Defense Donald Rumsfeld said:

> As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.[3]

The Report concludes, however, that the large majority of detainees never participated in any combat against the United States on a battlefield. Therefore, while setting aside the significant legal and constitutional issues at stake in the Guantanamo litigation presently being considered in the federal courts, this Report merely addresses the factual basis underlying the public representations regarding the status of the Guantanamo detainees.

Part I of this Report describes the sources and limitations of the data analyzed here. Part II describes the "findings" the Government has made. The "findings" in this sense, constitutes the Government's determination that the individual in question is an enemy combatant, which is in turn based on the Government's classifications of terrorist groups, the asserted connection of the individual with the purported terrorist groups, as well as the commission of "hostile acts," if any, that the Government has determined an individual has committed. Part III then examines the evidence, including sources for such evidence, upon which the Government has relied in making these findings. Part IV addresses the continued detention of individuals deemed *not* to be enemy

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

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

combatants, comparing the Government's allegations against such persons to similar or more serious allegations against persons still deemed to be "enemy combatants."

I. THE DATA

The data in this Report are based on written determinations the Government has produced for detainees it has designated as enemy combatants.[4] These written determinations were prepared following military hearings commenced in 2004, called Combatant Status Review Tribunals, designed to ascertain whether a detainee should continue to be classified as an "enemy combatant." The data are obviously limited.[5] The data are framed in the Government's terms and therefore are no more precise than the Government's categories permit. Finally, the charges are anonymous in the sense that the summaries upon which this interim report relies are not identified by name or ISN for any of the prisoners. It is therefore not possible at this time to determine which summary applies to which prisoner.

Within these limitations, however, the data are very powerful because they set forth the best case for the status of the individuals the Government has processed. The data reviewed are the documents prepared by the Government containing the evidence upon which the Government relied in making its decision that these detainees were enemy combatants. The Report assumes that the information contained in the CSRT Summaries of Evidence is an accurate description of the evidence relied upon by the Government to conclude that each prisoner is an enemy combatant.

Such summaries were filed by the Government against each individual detainee's in advance of the Combatant Status Review Tribunal (CRST) hearing.

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[4] The files reviewed are available at the Seton Hall Law School library, Newark, NJ.

[5] There is other data currently being compiled based on different information. Each prisoner at Guantanamo who has had summaries of evidence filed against them has had an internal administrative evaluation of the charges. The process is that a Combatant Status Review Tribunal, or CSRT, has received the charges and considered them. Some of those enemy detainees who are represented by counsel in pending habeas corpus Federal District Courts have received (when so ordered by the Federal District Court Judge) the classified and declassified portion of the CSRT proceedings. The CSRT proceedings are described as CSRT returns. The declassified portion of those CSRT returns are being reviewed and placed into a companion data base.

II. THE GOVERNMENT'S FINDINGS OF ENEMY COMBATANT STATUS

A. Structure of the Government's Findings

As to each detainee, the Government provides what it denominates as a "summary of evidence." Each summary contains the following sentence:

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

[Emphasis supplied]

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

Each summary of evidence has four numbered paragraphs. The first[6] and fourth[7] are jurisdictional. The second[8] paragraph states the Government's definition of "enemy combatant" for the purpose of the CSRT proceedings.

The third paragraph summarizes the evidence that satisfied the Government that each detainee is an enemy combatant. Paragraph 3(a) is the Government's determination of the detainee relationship with a "defined terrorist organization."[9] Paragraph 3(b) is the place in which Government's finds that a detainee has or has not committed "hostile acts" against U.S. or coalition forces.

Forty five percent of the time the Government concluded that the detainee committed 3(b) hostile acts against United States or coalition forces. In those cases, there is a paragraph 3(b) ("¶3(b)") in the CSRT summary so stating. Fifty five percent of the time, the Government

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[6] Paragraph 1: "Under the provisions of the Department of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant."

[7] Paragraph 4: "The detainee has the opportunity to contest his determination as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses."

[8] Paragraph 2: "(A)n Enemy Combatant has been defined as: [A]n individual who was part of ***or*** supporting the Taliban ***or*** al Qaeda forces, ***or*** associated forces that are engaged in hostilities against the United States ***or*** its coalition partners. This includes any person who committed a belligerent act ***or*** has directly supported hostilities in aid of enemy forces." [Emphasis supplied]

[9] Many of the "defined terrorist organizations" referenced in the CSRT summaries of evidence are not considered terrorist organizations by the Department of Homeland Security. See *Infra*.

concluded that the detainee did not commit such an act and omitted the entire ¶3(b) section from the CSRT summary. For these detainees whose CSRT summaries include a finding under ¶3(b), the Government listed its specific findings 'proving' hostile acts in a brief series of sub-paragraphs. Of those CSRT summaries that contain a ¶3(b) "hostile acts" determination, the mean number of sub-paragraphs is two; that is, for the 55% of detainees the Government has found committed ¶3(b) "hostile acts" the Government lists, on average two pieces of evidence. Fewer than 2% of all 517 CSRT summaries contained more than five ¶3(b) sub-paragraphs; while the vast majority contained 1, 2 or 3 such 'proofs' of hostile acts.

B. The Definition of an 'Enemy Combatant'

For the purposes of the Combatant Status Review Tribunal, an "enemy combatant" has been defined as:

> [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces.[10]

This could be interpreted alternatively as requiring either a combatant be *both* a member of prohibited group *and* engaged in hostilities against the U.S. or coalition forces *or* only that a combatant be anyone *either* a member of prohibited group *or* engaged in hostilities to U.S. or coalition forces. Indeed, under this definition, one could be detained for an undefined level of "support of" groups considered hostile to the United States or its coalition partners.

C. Categories of Evidence Supporting Enemy Combatant Designation

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[10] The definition of "enemy combatants" for the purpose of the Guantanamo detainment has evolved over time. In January 2002, when the first detainees were sent from Pakistan and Afghanistan to Cuba they were termed, as were the detainees in *Ex Parte Quirin, (47 F.Supp. 431)* "unlawful belligerents." In *Hamdi v. Rumsfeld*, (542 U.S. 507) the Government defined "enemy combatant" far more narrowly as someone who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who 'engaged in an armed conflict against the United States' there." Later, in response to *Rasul v. Bush (542 U.S. 466)*, the detainees were called "enemy combatants." (Emphasis supplied)

In February 2004, Secretary Rumsfeld, said, "The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I'm sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothes, by carrying multiple identification documentations, by having three, six, eight, in one case 13 different ...aliases.... Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance."

In an August 13, 2004 News Briefing, Gordon England, Secretary of the Navy and Secretary Rumsfeld's designee for the tribunal process at Guantanamo stated that, "The definition of an enemy combatant is in the implementing orders, which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners."

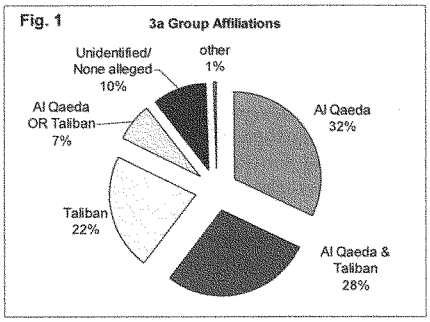
The Government divides the evidence against detainees into two sections: a ¶3(a) nexus with prohibited organizations and a ¶3(b) participation in military operations or commission of hostile acts. Paragraph 3 always begins with the allegations that each detainee met all the requirements contained in the definition of paragraph two. More often than not the Government finds that the detainees did not commit the hostile or belligerent acts.

1. ¶3(a): Enemy Combatant because of Nexus with Prohibited Organization

a. Definition of Prohibited Organizations

The data reveals that the Government divides a detainee's enemy combatant status into six distinct categories that describe the terrorist organization with whom the detainee is affiliated. Figure 1 illustrates the breakdown of each group's representation by the data:

1. al Qaeda (32%)
2. al Qaeda & Taliban (28%)
3. Taliban (22%)
4. al Qaeda OR Taliban (7%)
5. Unidentified Affiliation (10%)
6. Other (1%)



The CSRT Summary of Evidence provides no way to determine the difference between "unidentified/none alleged" and "other" and no explanation for why there are separate categories for both "al Qaeda *and* Taliban" and "al Qaeda *or* Taliban."

If, after four years of detention, the Government is unable to determine if a detainee is either al Qaeda or Taliban, then it is reasonable to conclude that the detainee is neither. Under this assumption, the data reveals that 40% of the detainees are not affiliated with al Qaeda and 18% percent of the detainees are not affiliated with either al Qaeda or the Taliban.

b. Nexus with the Identified Organization

The Government also describes each prisoner's nexus to the respective organization: "fighter for;" "member of;" and "associated with."
The data explain that there are three main degrees of connection between the detainee and the organization with which he is connected.[11] Detainees are either:

1. "Fighters for"
2. "Members of"
3. "Associated with"

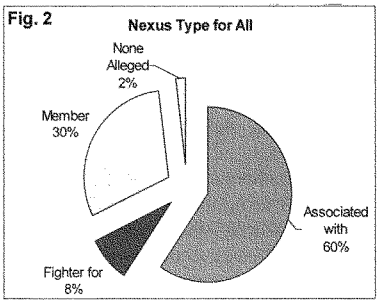


Figure 2 illustrates that of the nexus type for all the prisoners, regardless of the group to which they are "connected," by far the greatest number of prisoners are identified only as being "associated with" one group or another. A much smaller percentage – 30% – is identified as "members of." Only 8% are classified as "fighters for."

The definition of "fighters for" would seem to be obvious, while definitions of "members of" and "associated with" are less clear and could justify a very broad level of attenuation. According to the Government's expert on al Qaeda membership, Evan Kohlman, simply being told that one had been selected as a member would qualify one as a member:

> Al-Qaeda leaders could dispatch one of their own — someone who is not top tier...to recruit someone and to tell them, I have been given a mandate to do this on behalf of senior al-Qaeda leaders... even though perhaps this individual has never sworn an official oath and this person has never been to an al-Quaeda training camp, nor have they actually met, say, Osama bin Ladin.[12]

This expansive definition of membership in al Qaeda could thus be applied to anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.

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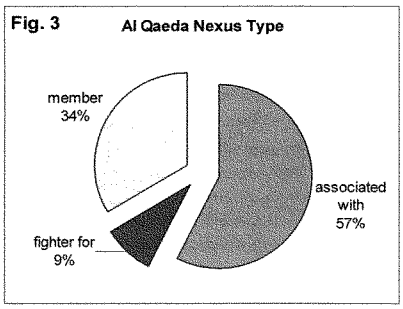
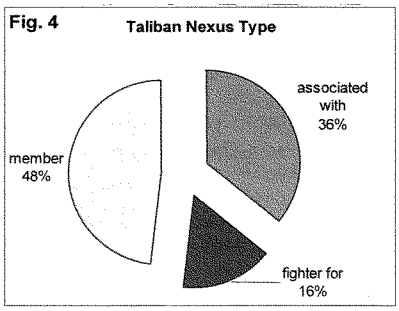
[11] While more than 95% of the summaries of the evidence used one of these three categories, approximately 4% used other nexus descriptions. Most notably, 2% used a "supported" descriptor which was re-categorized as "associated with." See Appendix C for a full account of re-categorizations of data.

[12] *US vs. Pachir*, Dkt. No., T113.

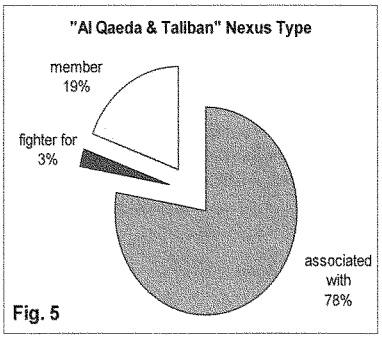
Membership in the Taliban is different and also not clearly defined. According to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant.

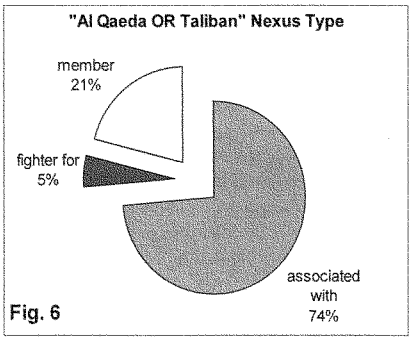
Figures 3 and 4 compare the nexus between enemy combatants with Al Qaeda and the Taliban. In contrast to the "al Qaeda only" category, the "Taliban only" category shows that a significantly higher percentage of the prisoners are designated "members of" and "fighters for" with a reduced number being "associated with."





Seventy eight percent of those prisoners who are identified as being both "al Qaeda and Taliban" are merely "associated with;" 19% are "members of;" and 3% are "fighters for." (Fig. 5) When the Government cannot specifically identify a detainee as a member of one or the other, al Qaeda or the Taliban, the degree of connection attributed to such detainees appears tenuous. (Fig. 6)





The Government's summary of evidence

recognizes that more often than not members of the Taliban are not members of al Qaeda. The Government categorizes as stand alone al Qaeda or stand alone Taliban more than 54% of the detainees, and only 28% of the detainees as members of both.

The data provides no explanation for the explicit distinction between those persons identified as being connected to "al Qaeda *and* the Taliban" as opposed to "al Qaeda *or* the Taliban". [Emphasis supplied]

2. ¶ 3(b): The Government's Findings on Detainees' 3(b) Hostile Acts against the United States or Coalition Forces

Although the Government's public position is that these detainees are "the worst of the worst," *see supra* note 2, the data demonstrates that the Government has already concluded that a majority of those who continue to be detained at Guantanamo have no history of any 3(b) hostile act against the United States or its allies.

According to the Government, fewer than half of the detainees engaged in 3(b) hostile acts against the United States or any members of its coalition. As figure 7 depicts, the Government has concluded that no more than 45% of the detainees have committed some 3(b) hostile act.

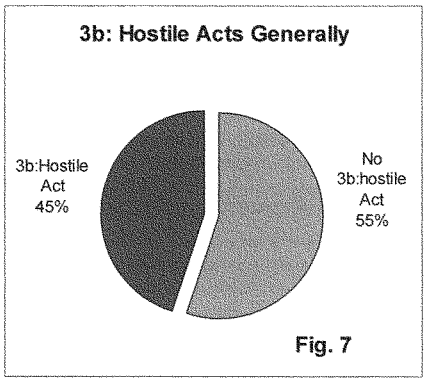
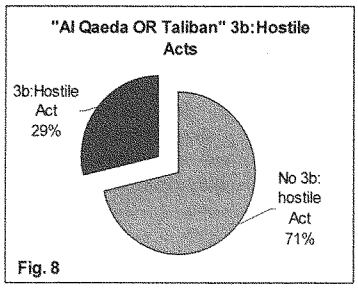


Fig. 7

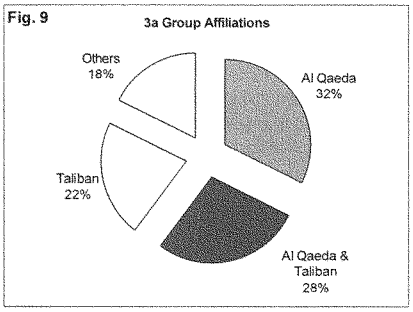
This is true even though the Government's definition of a 3(b) hostile act is not demanding. As an example, the following was the evidence that the Government determined was sufficient to constitute a 3(b) hostile act:

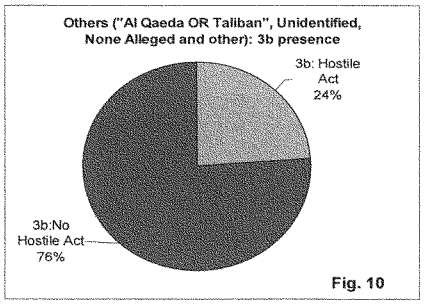
> The detainee participated in military operations against the United States and its coalition partners.
> 1. The detainee *fled*, along with others, when the United States forces bombed their camp.
> 2. The detainee was captured in Pakistan, along with other Uigher fighters.[13]



Cross-analyzing the ¶3(a) and ¶3(b) data, individuals in some groups are less likely to have committed hostile acts than those in others. In the group "al Qaeda *or* Taliban," for example, 71% of the detainees have not been found to have committed any hostile act. (See Fig. 8)

Of the "other" detainees in Figure 9, that is, the 18% whose 3(a) is either "Unidentified", "None alleged", "al Qaeda OR Taliban" or "other," only 24% have been determined to have committed a 3(b) hostile act. (See Fig 10)





[13] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ [Emphasis supplied].

Thus, the less clear the Government's characterization of a detainee's affiliation with a prohibited group is, the less likely the detainee is to have committed a hostile act. This is notable because the percentage of detainees with whom the Government cannot clearly connect with a prohibited group is so large.[14]

The same pattern holds true when the degree of connection between the detainee and the affiliated group lessens. Thirty-two percent of the detainees are stand alone al Qaeda. Fifty seven percent of those detainees have a nexus to al Qaeda described as "associated with." Of those 57% whom are merely associated with al Qaeda, 72% of them have not committed 3(b) hostile acts. (See Fig. 3 and 11) Thus, the data illustrates that not only are the majority of the al Qaeda detainees merely "associated with" al Qaeda, but the Government concludes that a substantial percentage of those detainees did not commit 3(b) hostile acts.

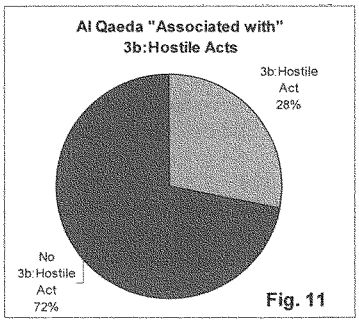


Fig. 11

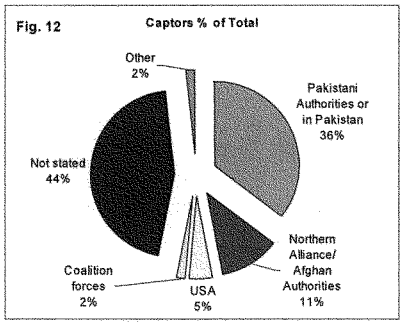
[14] See Fig 1: "3(a) Group Affiliations" supra, p. 7: the sum of "al Qaeda OR Taliban" (7%); Unidentified/"None alleged" (10%); and "Other" (1%) equals 18%. This is the 18% that is represented as "Others" in Fig. 9.

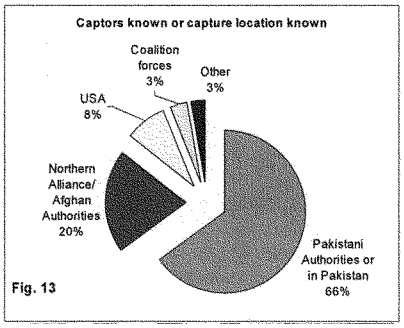
III. THE GOVERNMENT'S EVIDENCE THAT THE DETAINEES ARE ENEMY COMBATANTS

The data permit at least some answers to two questions: How was the evidence of their enemy combatant status obtained? What evidence does the Government have as to the detainees commission of 3(b) violations?

A. Sources of Detainees and Reliability of the Information about Them

Figure 12 explains who captured the detainees. Pakistan was the source of at least 36% of all detainees, and the Afghanistan Northern Alliance was the source of at least 11% more. The pervasiveness of Pakistani involvement is made clear in Figure 13 which shows that of the 56% whose captor is identified, 66% of those detainees were captured by Pakistani Authorities or in Pakistan. Thus, if 66% of the unknown 44% were derived from Pakistan, the total captured in Pakistan or by Pakistani Authorities is fully 66%.





Since the Government presumably knows which detainees were captured by United States forces, it is safe to assume that those whose providence is not known were captured by some third party. The conclusion to be drawn from the Government's evidence is that 93% of the detainees were not apprehended by the United States.[15] (See Fig. 12) Hopefully, in assessing the enemy combatant status of such detainees, the Government appropriately addressed the reliability of information provided by those turning over detainees although the data provides no assurances that any proper safeguards against mistaken identification existed or were followed.

[15] Presuming a fixed 7% of detainees were captured by US or coalition forces, the remaining detainees whose captor is unknown can be extrapolated to 68% "Pakistani Authorities or in Pakistan", 21% "Northern Alliance/Afghan Authorities", and 4% "other."

The United States promised (and apparently paid) large sums of money for the capture of persons identified as enemy combatants in Afghanistan and Pakistan. One representative flyer, distributed in Afghanistan, states:

> Get wealth and power beyond your dreams....You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.[16]

Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing;[17] as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual's detention in Guantanamo, there would be little ability either for the Government to corroborate or a detainee to refute such an allegation.

As shall be seen in consideration of the Uighers, the Government has found detainees to be enemy combatants based upon the information provided by the bounty hunters. As to the Uighers, at least, there is no doubt that bounties were paid for the capture and detainment of individuals who were not enemy combatants.[18] The Uigher have yet to be released.

The evidence satisfactory to the Government for some of the detainees is formidable. For this group, the Government's evidence portrays a detainee as a powerful, dangerous and knowledgeable man who enjoyed positions of considerable power within the prohibited organizations. The evidence against them is concrete and plausible. The evidence provided for most of the detainees, however, is far less impressive.

The summaries of evidence against a small number of detainees indicate that some of the prisoners played important roles in al Qaeda. This evidence, on its face, seems reliable. For instance, the Government found that 11% of the detainees met with Bin Laden. Other examples include:

- A detainee who is alleged to have driven a rocket launcher to combat against the Northern Alliance.
- A detainee who held a high ranking position in the Taliban and who tortured,

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[16] *See Infra.*, Appendix A.

17 *See, e.g.* Mahler, Jonathan, The Bush Administration versus Salim Hamdan (2006, Jan. 8), *New York Times*, p. 44.

[18] White, Josh and Robin Wright. Detainee Cleared for Release Is in Limbo at Guantanamo. (2005, December 15),*Washington Post,* p. A09.

maimed, and murdered Afghani nationals who were being held in Taliban jails

- A detainee who was present and participated in al Qaeda meetings discussing the September 11th attacks before they occurred.
- A detainee who produced al Qaeda propaganda, including the video commemorating the USS Cole attack.
- A detainee who was a senior al Qaeda lieutenant.
- 11 detainees who swore an oath to Osama Bin Laden.

The previous examples are atypical of the CSRT summaries. There are only a very few individuals who are actively engaged in any activities for al Qaeda and for the Taliban.

The 11 detainees who swore an oath to Osama Bin Laden are only a tiny fraction of the total number of the detainees at Guantanamo.

The Taliban is a different story.

The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation.[19] Under Mullah Omar, there were 11 governors and various ministers who dealt with such various issues as permission for journalists to travel, over-seeing the dealings between the Taliban and NGOs for UN aid projects and the like.[20] By 1997, all international "aid projects had to receive clearance not just from the relevant ministry, but also from the ministries of Interior, Public Health, Police, and the Department of the Promotion of Virtue and Prevention of Vice."[21] There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force.[22] Each city had a mayor, chief of police, and senior administrators.[23]

None of these individuals are at Guantanamo Bay.

The Taliban detainees seem to be people not responsible for actually running the country. Many of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise.

General conscription was the rule, not the exception, in Taliban controlled Afghanistan.[24] "All the warlords had used boy soldiers, some as young as 12 years old, and many were orphans with no hope of having a family, or education, or a job, except soldiering."[25]

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[19] *See generally* Rashid, A. (2001). *Taliban*. Yale University Press.
[20] *See Id.*, p. 99.
[21] *See Id., p.* 114.
[22] *See generally* Rashid, A. (2001). *Taliban*. Yale University Press.
[23] *Id.*
[24] *See Id.*, p100.
[25] *See Id.*, p109.

Just as strong evidence proves much, weak evidence suggests more. Examples of evidence that the Government cited as proof that the detainees were enemy combatants includes the following:

- Associations with unnamed and unidentified individuals and/or organizations;
- Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security;
- Possession of rifles;
- Use of a guest house;
- Possession of Casio watches; and
- Wearing of olive drab clothing.

The following is an example of the entire record for a detainee who was conscripted into the Taliban:

a. Detainee is associated with the Taliban
    i. The detainee indicates that he was conscripted into the Taliban.
b. Detainee engaged in hostilities against the US or its coalition partners.
    i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.
    ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.[26]

All declassified information supports the conclusion that this detainee remains at Guantanamo Bay to this date.

Other detainees have been classified as enemy combatants because of their association with unnamed individuals. A typical example of such evidence is the following:

> The detainee is associated with forces that are engaged in hostilities against the United States and its coalition partners:
> 1) The detainee voluntarily traveled from Saudi Arabia to Afghanistan in November 2001.
> 2) The detainee traveled and shared hotel rooms with an Afghani.
> 3) The Afghani the detainee traveled with is a member of the Taliban Government.
> 4) The detainee was captured on 10 December 2001 on the

[26] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

border of Pakistan and Afghanistan.[27]

Some of these detainees were found to be enemy combatants based on their association with identified organizations which themselves are not proscribed by the Department of Homeland Security from entering the United States. In analyzing the charges against the detainees, the Combatant Status Review Board identified 72 organizations that are used to evidence links between the detainees and al Qaeda or the Taliban.

These 72 organizations were compared to the list of Foreign Terrorist Organizations in the Terrorist Organization Reference Guide of the U.S. Department of Homeland Security, U.S. Customs and Border Protection and the Office of Border Patrol. This Reference Guide was published in January of 2004 which was the same year in which the charges were filed against the detainees.[28] According to the Reference Guide, the purpose of the list is "to provide the Field with a 'Who's Who' in terrorism."[29] Those 74 foreign terrorist organizations are classified in two groups: 36 "designated foreign terrorist organizations," as designated by the Secretary of State, and 38 "other terrorist groups," compiled from other sources.

Comparing the Combatant Status Review Board's list of 72 organizations that evidence the detainee's link to al Qaeda and/or the Taliban, only 22% of those organizations are included in the Terrorist Organization Reference Guide. Further, the Reference Guide describes each organization, quantifies its strength, locations or areas of operation, and sources of external aid. Based on these descriptions of the organizations, only 11% of all organizations listed by the Combatant Status Review Board as proof of links to al Qaeda or the Taliban are identified as having <u>any</u> links to Qaeda or the Taliban in the Terrorist Organization Reference Guide.

Only 8% of the organizations identified by the Combatant Status Review Board even target U.S. interests abroad.

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[27] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

[28] Terrorist Organization Reference Guide. Retrieved February 6, 2006 from http://www.mipt.org/pdf/TerroristOrganizationReferenceGuide.pdf

[29] It continues: "The main players and organizations are identified so the CBP [Customs and Border Protection] Officer and BP [Border Protection] Agent can associate what terror groups are from what countries, in order to better screen and identify potential terrorists." Unlike the many other compilations of terrorist organizations published by the Government since 9/11, including the list of the Office of Foreign Asset Control (OFAC) used to monitor or block international funds transfers to suspected and known terrorist organizations and their supporters, the Terrorist Organization Reference Guide identifies the 74 "main players and organizations" in terrorism.

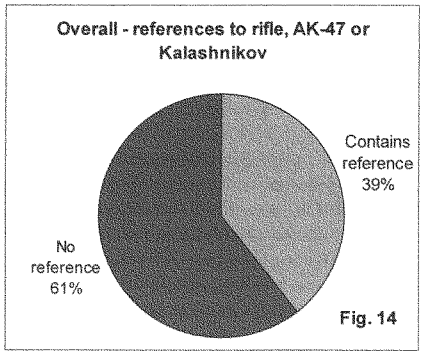

Fig. 14

The evidence against 39% of the detainees rests in part upon the possession of a Kalashnikov rifle.

Possession of a rifle in Afghanistan does not distinguish a peaceful civilian from any terrorist. The Kalashnikov culture permeates both Afghanistan and Pakistan.[30]

> Our economy has been suffering and continues to suffer because of the situation in Afghanistan. Rampant terrorism as well as the culture of drugs and guns – that we call the "Kalashnikov Culture" – tearing apart our social and political fabric – was also a direct legacy of the protracted conflict in Afghanistan.[31]

This is recognized not merely by the Pakistani Foreign minister but by American college students touring Afghanistan. "There is a big Kalashnikov-rifle culture in Afghanistan: ...I was somewhat bemused when I walked into a restaurant this afternoon to find Kalashnikovs hanging in the place of coats on the rack near the entrance, ..."[32]

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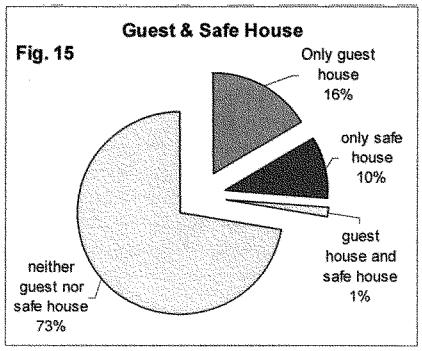
[30] Afghanistan is also the world's center for unaccounted weapons; thus, there is no exact count on the number of weapons in circulation. Arms experts have estimated that here are at least 10 million small arms in the country. The arms flow has included Soviet weapons funneled into the country during the 1979 invasion, arms from Pakistan supplied to the Taliban, and arms from Tajikistan that equipped the Northern Alliance. NEA's Statements on Afghanistan and the Taliban. Retrieved February 6, 2006 from http://neahin.org/programs/schoolsafety/september11/materials/nmneapos.htm.

[31] Pakistan Mission to the United Nations, New York. Retrieved February 6, 2006 from http://www.un.int/pakistan/12011220.html.

[32] Hall, B. (2002 Nov.-Dec.) Letters from Afghanistan. *Duke Magazine.* Retrieved February 6, 2006, from www.dukemagazine.duke.edu/dukemag/issues/111202/afghan1.html.

The Government treats the presence at a "guest house" as e evidence of being an enemy combatant. The evidence against 27% of the detainees included their residences while traveling through Afghanistan and Pakistan.



Stopping at such facilities is common for all people traveling in the area. In the region, the term guest house refers simply to a form of travel accommodation.[33] Numerous travel and tourism agencies, such as Worldview Tours, South Travels, and Adventure Travel include overnight stays at local guest houses and rest houses on their tour package itineraries and lists of accommodations, which are marketed to western tourists.[34] Guesthouses and rest houses typically offer budget rates and breakfast American travel agents advise American tourists to expect to stay in guest houses in either country.

In a handful of cases the detainee's possession of a Casio watch or the wearing olive drab clothing is cited as evidence that the detainee is an enemy combatant. No basis is given to explain why such evidence makes the detainee an enemy combatant.

[33] A June 7, 2005 article in Business Week referenced an Afghani woman named Mahboba who hopes to open a chain of women's guest houses, gaining assistance from participation in a program sponsored by the Business Council for Peace. In an article published September 25, 2005, New York Times travel reporter, Paul Tough, described the guest houses that he and his girlfriend stayed in while he explored the budding tourism industry in Afghanistan. Perman, Staci. Aiding Afghanistan with Style. (2005, June 7). *Business Week Online*. Retrieved January 11, 2006 from http://www.businessweek.com/smallbiz/content/jun2005/sb2005067_5111_sb013.htm. Tough, Paul. The Reawakening. (2005, September 25). *New York Times*.

[34] *See, Services Along the Silk Road: Accommodations*. Retrieved January 10, 2006, from http://worldviewtours.com/service/accomodation.htm; *Adventure Travel Trek and Tour Operators*. Retrieved January 10, 2006 from http://www.adventure-touroperator.com/main.html; *Adventure Holiday in Pakistan: Budget Hotels and Guesthouses*. Retrieved January 10, 2006, from http://www.southtravels.com/asia/pakistan/index.html

IV. CONTINUED DETENTION OF NON-COMBATANTS

The most well recognized group of individuals who were held to be enemy combatants and for whom summaries of evidence are available are the Uighers[35] These individuals are now recognized to be Chinese Muslims who fled persecution in China to neighboring countries. The detainees then fled to Pakistan when Afghanistan came under attack by the United States after September 11, 2001. The Uighers were arrested in Pakistan and turned over to the United States.

At least two dozen Uighurs found in Afghanistan and Pakistan has been detained in Guantanamo Bay, Cuba. The Government originally determined that these men were enemy combatants, just as the Government so determined for all of the other detainees. The Government has now decided that many of the Uighur detainees in Guantanamo Bay are not enemy combatants and should no longer be detained. They have not yet been released.

The Government has publicly conceded that many of the Uighers were wrongly found to be enemy combatants. The question is how many more of the detainees were wrongly found to be enemy combatants. The evidence that satisfied the Government that the Uighers were enemy combatants parallel's the evidence against the other detainees --but the evidence against the Uighers is actually sometimes stronger.

The Uigher evidence parallels the evidence against the other detainees in that they were:

1. Muslims,
2. in Afghanistan,
3. associated with unidentified individuals and/or groups
4. possessed Kalishnikov rifles
5. stayed in guest houses
6. captured in Pakistan
7. by bounty hunters.

If such evidence is deemed insufficient to detain these persons as enemy combatants, the data analyzed by this Report would suggest that many other detainees should likewise not be classified as enemy combatants.

CONCLUSION

[35] Uighurs, a Turkic ethnic minority of 8 to 12 million people primarily located in the northwestern region of China and in some parts of Kyrgyzstan and Kazakhstan, face political and religious oppression at the hands of the Chinese Government. The Congressional Human Rights Caucus of the United States House of Representatives has received several briefings on these issues, including the information that the People's Republic of China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations." (United States Commission on International Religious Freedom, World Uighur Network) In response to oppression by the Chinese Government, many Uighurs flee to surrounding countries such as Afghanistan and Pakistan. Wright, Robin. Chinese Detainees are Men Without a Country. (2005, August 24) Washington Post, p. A01.

The detainees have been afforded no meaningful opportunity to test the Government's evidence against them. They remain incarcerated.

APPENDIX A

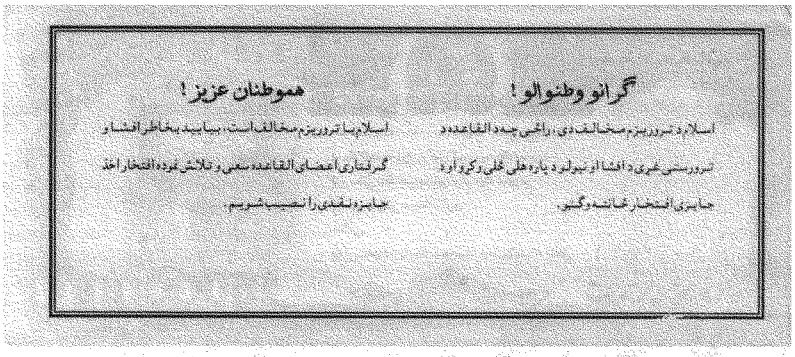
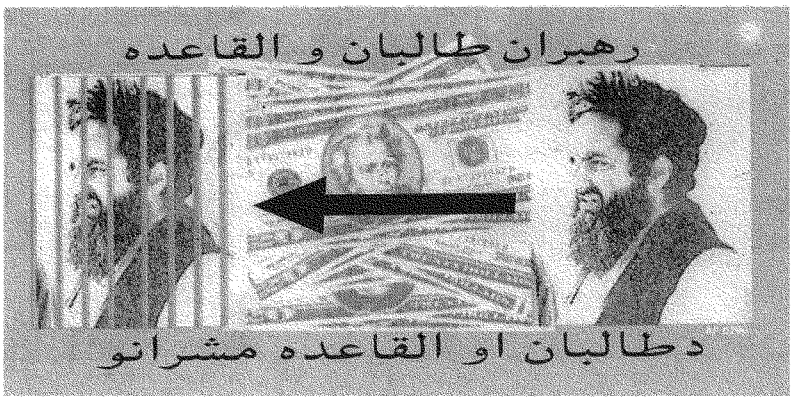


Image from http://www.psywar.org/apddetailsdb.php?detail=2002NC02

"Dear countrymen: The al Qaeda terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize." (taken from AP article, http://afgha.com/?af=article&sid=12975

"The reward, about $4,285, would be paid to any citizen who aided in the capture of Taliban or al-Qaida fighters."
Text on the back of the imitation banknote is "Dear countrymen: The al-Qaida terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize."

http://www.psywarrior.com/Herbafghan02.html



تا ۵ ملیون دالر جائزه در مقابل ارائه معلومات
موثق در باره محل بود و باش و یا دستگیری
رهبران طالبان و القاعده پرداخته میشود.

تر ۵ ملیون دالر جائزه دهغه موثق معلومات دپاره
چه د طالبان او القاعده مشرانو د نیولو او یا
استرګني ځای وشی ورکول کیږی.

Image from http://www.psywar.org/apddetailsdb.php?detail=2002AFD029P

AFD29p—leaflet code. This leaflet shows an unnamed Taliban leader (http://www.psywarrior.com/Herbafghan02.html)

REWARD FOR INFORMATION LEADING TO THE WHEREABOUTS OR CAPTURE OF TALIBAN AND AL QAEDA LEADERSHIP.

Translation: http://www.psywarrior.com/afghanleaf15.html

Afghanistan Leaflets

TF11-RP09-1

FRONT

"Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists"

BACK

TEXT ONLY

"You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

From http://www.psywarrior.com/afghanleaf40.html

APPENDIX B

Afghanistan Support Committee
al Birr Foundation
Al Haramain
Al Ighatha
Al Irata
Al Nashiri
Al Wa'ad
Al Wafa
Al-Gama'a al-islamiyya
Algerian Armed Islamic Group
Algerian resistance group
al-Haramayn
Al-Igatha Al-Islamiya, Int'ntl Islamic Relief Org
Al-Islah Reform Party in Yemen
Al-Itiihad al Islami (AIAI)
Ariana Airlines
Armed Islamic Group of Algeria
Bahrain Defense Organization
Chechen rebels
Dawa wa Irshad
East Turkish Islamic Movement
Egyptian Islamic Jihad (EIJ)
Extremist organization linked to Al Qaeda
Fiyadan Islam
Hamas (Islamic Resistance Front)
Harakat-e-Mulavi
HIG
Hizballah
International Islamic Relief Organization (IIRO)
Iraqi National Congress (INC)
Islamic Group Nahzat-Islami
Islamic Movement of Tajikistan
Islamic Movement of Uzbekistan
Islamic Salvation Front
Itihad Islami
JABRI, Wai Al
Jaish-e-mohammad
Jama'at al Tablighi
Jamaat ud Dawa il al Quran al Sunnat (JDQ)
Jamat al Taligh
Jamiat Al Islamiya
Jemaah Ilamiah Mquatilah
Jihadist
Karim Explosive Cell

Kuwaiti Joint Relief Committee
Lajanat Dawa Islamiya (LDI)
Lash ar-e-tayyiba
Lashkar-e-Tayyiba(LT)
LIFG
Maktab al Khidman
Mujahadin
Mujahedin Brigade in Bosnia
Mulahadin
Muslims in Sink'lang Province of China
Nahzat-Islami
Pacha Khan
Revival of Islamic Heritage Society
Salafist group for call and combat
Sami Essid Network
Samoud
Sanabal Charitable Committee
Sharqawi Abdu Ali al-Hajj
small mudafah in Kandahar
Takfir Seven
Takvir Ve Hijra (TVH)
Talibari
Tarik Nafaz Shariati Muhammedi Molakan Danija
Tunisian Combat Group
Tunisian terrorists
Turkish radical religious groups
Uighers
World Assembly of Muslim Youth
yemeni mujahid

APPENDIX C

"Captured by Whom" Notes

"other" includes "Bosnian Authorities", "Foreign Government", "Gambia", "Iranian Authorities", "Local Pashtun tribe", "natural elders of Andokhoy City" and "United Islamic Front for the Salvation of Afghanis"

"Pakistani Authorities" includes "Pakistani Greentown"

"Where Captured" Notes

"Afghanistan" includes "Mazar-e Sharif" and "Tora Bora"

"other" includes "Bosnia", "fleeing from Shkin firebase", "Gambia", "home of al Qaeda financier", "home of suspected HIG commander", "Iran", "Kashmir", "Libyan guesthouse", "Samoud's compound", "UK, Gambia" and "while being treated for leg wound"

"Affiliation" Notes

al Qaeda includes "al Qaeda or its network"

al Qaeda & Taliban includes "al Qaeda member taliban associate", "al Qaeda/Taliban", "member of al Qaeda & associated with Taliban", "member of Taliban and/or associated w/ al Qaeda", "Taliban and/or al Qaeda", "Taliban Fighter and al Qaeda Member" and "taliban member al Qaeda associate"

"other" includes "HIG" and "Uigher"

Unidentified includes "al Qaeda affiliated group", "enemy combatant", "forces allied with al Qaeda and Taliban", "forces engaged in hostilities against US", "organization associated w/ and supported al Qaeda", "terrorist", "terrorist organization", "terrorist organization tied to al Qaeda", "terrorist organization supported by al Qaeda" and "various NGOs with al Qaeda & Taliban connections"

"Nexus" Notes

"associated with" includes "affiliated", "material support", "supported" and "supporter"

"fighter" for includes "supported and fought for"

"member" includes "member and participated in hostile acts", "member of or associated with", "member or ally", "operative", "part of or supported" and "worked for"

CTC REPORT

An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries

25 July 2007

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Authors' Note

On July 20, 2007, a three-judge panel of the U.S. federal appeals court in Washington ordered the U.S. government to release all reasonable information on detainees being held at Guantanamo Bay who are challenging their detention.

The court ruled that meaningful review of the military tribunals would not be possible "without seeing all the evidence." The ruling, written by Douglas H. Ginsburg, the chief judge of the United States Court of Appeals for the District of Columbia Circuit, noted that, "In order to review compliance with those procedures [for determining whether the government's classification of an individual as an enemy combatant was supported by a preponderance of evidence], "the court must be able to view the government information."[1]

This ruling comes in the midst of a highly charged debate over the issue, with critics of the Combatant Status Review Tribunal (CSRT) process arguing that most detainees have no way to contest charges that are based on generalizations and incomplete intelligence reports. As we were not involved in the initial data collection process nor were we present at any of the CSRT hearings, we cannot comment in any meaningful way on the veracity or completeness of data contained in the publicly available CSRT unclassified summaries. We did seek to familiarize ourselves with the various dimensions of the CSRT process by visiting the facilities at Guantanamo Bay where the CSRT hearings were conducted and by meeting with personnel directly involved in the CSRT process.

We are pleased to share the findings of our analysis of this public data as part of the Combating Terrorism Center's ongoing effort to make information related to aspects of terrorism and counterterrorism more accessible for public scrutiny and dialogue. Given the politically sensitive and highly charged nature of this topic, we have tried to be as methodologically rigorous and transparent throughout our report as possible.

We recognize that advocates of America's current detention policy will point to this study as an illustration of the threat posed by these individuals. We also anticipate that those justly concerned with advocating for the legal rights of the detainees will point to this study as further evidence regarding the dearth of information made publicly available by the U.S. government about their cases. It is this debate that we hope to stimulate and inform with this report.

Any inaccuracies or oversights made in this study are entirely the responsibility of the authors as this report does not reflect the official position of the Combating Terrorism Center, the United States Military Academy, the U.S. Army nor the Department of Defense.
We sincerely hope that this report will stand as a useful contribution in the ongoing discussion over U.S. designation and detention of enemy combatants.[2]

Joseph Felter and Jarret Brachman

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[1] See the 'Bismullah, Haji vs. Gates, Robert' (06-1197a) Opinion Released on July 20, 2007 by the United States Court of Appeals, Washington D.C. Circuit.
http://pacer.cadc.uscourts.gov/docs/common/opinions/200707/06-1197a.pdf (July 2007)

[2] The authors would like to thank faculty at the Combating Terrorism Center and faculty of the Department of Social Sciences at the United States Military Academy, especially Dr. Michael Meese and Dr. Cindy Jebb for their review and comments of this article.

Executive Summary

Between July 2004 and March 2005, the Department of Defense (DoD) conducted Combatant Status Review Tribunals (CSRT's) for 558 detainees being held at U.S. Naval Base Guantanamo Bay, Cuba (GTMO). The DoD's objective in conducting this tribunal process was to determine whether those detainees continued to warrant the 'enemy combatant' designation through a non-adversarial, administrative status review process.

In early 2005 [3] DoD (the Office for the Administrative Review of the Detention of Enemy Combatants) released 517 CSRT (pronounced "see-cert") unclassified summaries.[4] These unclassified summaries, prepared in advance of the actual hearings, informed the detainees about the unclassified basis for their detention as enemy combatants. Of the 517 unclassified records, one of those records is a duplicate, which brings the total of CSRT unclassified summaries to 516. The DoD posted those 517 unclassified summaries (including the one duplicate) on its public website in response to a Freedom of Information Act (FOIA) request.[5]

In 2007, the Office of Detainee Affairs in the Office of the Secretary of Defense, asked faculty at the Combating Terrorism Center (CTC) at West Point to review information recorded in the 516 CSRT unclassified summaries (hereinafter referred to as "CSRT records") and provide an objective assessment of this information.[6]

After querying the 516 CSRT unclassified summaries, the CTC found that 73% of the unclassified summaries meet the CTC's highest threshold of a 'demonstrated threat' as an enemy combatant. The CTC established two other categories with four discrete proxy characteristics in each[7] ('potential threat' and 'associated threat') in order to help assess whether the information in these records indicated these individuals *posed or potentially posed a threat as an enemy combatant.* The CTC found that six of the publicly available CSRT unclassified summaries contained no evidence that fit any of the CTC's twelve threat variables.

Level 1: Demonstrated Threat as an Enemy Combatant

Data in the CSRT unclassified summaries indicating that a detainee participated, prepared to participate or intended to participate in, direct hostilities against the US and its Coalition

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[3] The final CSRT hearing was held in January 2005 and the final Convening Authority letter was signed in March 2005.
[4] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>
[5] See Department of Defense website, <http://www.dod.mil/pubs/foi/detainees/OARDEC_docs.html>
[6] The Combating Terrorism Center was asked to review and address the criticisms raised in an earlier study by a research team affiliated with Seton Hall University and the Denbeaux & Denbeaux law firm. The Seton Hall study draws on the same 516 unclassified CSRT summaries and concludes that the DoD is wrongfully holding individuals who, based on the DoD's own data, neither pose a serious threat to America's national security, nor seem to have been involved in conducting or supporting hostile action against the United States.
[7] Detailed coding criteria are discussed in subsequent sections. CTC faculty worked closely with the Office of Detainee Affairs in order to ensure that the coded data accurately represented the raw data contained in the publicly available 516 CSRT unclassified summaries.

Allies was placed into the *Demonstrated Threat* as an enemy combatant category. It includes the following detainee activities and attributes:

- HOSTILITIES: Having definitively [8] supported or waged hostile activities against the US/Coalition allies. 56% of the 516 unclassified CSRT summaries met this criteria.
- FIGHTER: Having been identified as a 'fighter' for al-Qa`ida, the Taliban or associated forces. (35% of the CSRT unclassified summaries)
- TRAINING CAMP: Having received training in a training camp run by al-Qa`ida, the Taliban or associated forces. (35% of the CSRT unclassified summaries)
- COMBAT WEAPONS: Received training in the employment of combat weapons *other than or in addition to rifles/small arms* including grenades, rocket propelled grenades, sniper rifles and the construction and/or deployment of explosives and IED's. (27% of the CSRT unclassified summaries)

73% of the publicly available CSRT unclassified summaries contained at least one piece of evidence that meet this threshold definition of demonstrated threat.

Level 2: Potential Threat as an Enemy Combatant

Data in the CSRT unclassified summaries indicating that a detainee *supported* hostile activities or was affiliated with groups that executed and/or supported terrorist acts, or received weapons training/possessed weapons that could be used in support of terrorist activities was placed into the *Potential Threat as an Enemy Combatant* category. Four discrete variables were included in this category:

- SUPPORT ROLES: Evidence of performing a supporting role in terrorist or extremist groups. (27% of the CSRT unclassified summaries)
- COMMITMENT: Having expressed a commitment to pursuing violent Jihadist goals. (19% of the CSRT unclassified summaries)
- SMALL ARMS: Received training in the use of rifles e.g AK-47 and other small arms but not in other combat weapons such as RPG's, grenades, explosives and IED's. (17% of the CSRT unclassified summaries)
- GROUP AFFILIATIONS: Affiliations with al-Qa'ida, the Taliban, and other terrorist/extremist groups. (92% of the CSRT unclassified summaries)

95% of the publicly available CSRT unclassified summaries contain one or more pieces of evidence that meet the criteria considered a *potential threat* as an enemy combatant[9].

[8] By 'definitive' the CTC means that there is an explicit statement made without qualification about that data field in the publicly available CSRT unclassified summary.
[9] Much of this total is attributed to the 92% of the CSRT unclassified records that contain evidence of affiliations with terror groups.

Level 3: Associated Threat as an Enemy Combatant

Data contained within the CSRT unclassified summaries indicating that a detainee interacted with members of terrorist groups or exhibited behavior frequently associated with terrorist group members was placed into the *Associated Threat* as an enemy combatant category and includes the following discrete variables:

- CONNECTIONS: Possessing a definitive connection to an al-Qa`ida member and/or other individual affiliated with an extremist groups. (62% of the CSRT unclassified summaries)
- GUEST HOUSE: Evidence of staying at a guest house known or suspected to be used as a way station for individuals enroute to supporting jihad and other terrorist activities. (24% of the CSRT unclassified summaries)
- TRAVEL: Evidence that the detainee traveled to three or more different countries (23% of the CSRT unclassified summaries)
- LARGE SUMS CASH: Detainees carrying large sums of US or foreign currencies.(2% of the CSRT unclassified summaries)

77% of the CSRT unclassified summaries contain evidence associated with terrorist group members and behavior and met the stated criteria as an associated threat as an enemy combatant.

Level 4: No Evidence of Threat

Importantly, six of the publicly available 516 CSRT unclassified summaries (1.16%) do not contain evidence of involvement or attributes fitting any of the aforementioned twelve variables. The CTC does not know whether additional incriminating details on these six detainees are available in their respective classified files.

Recap

A summary of the Level I through Level III attributes identified in the CSRT unclassified summaries is depicted graphically at Figure 1: (Note: Most summaries visualized in this graph and those that follow contain evidence of multiple attributes across all three categories thus the total number often exceeds 516 or 100% of the 516 population)

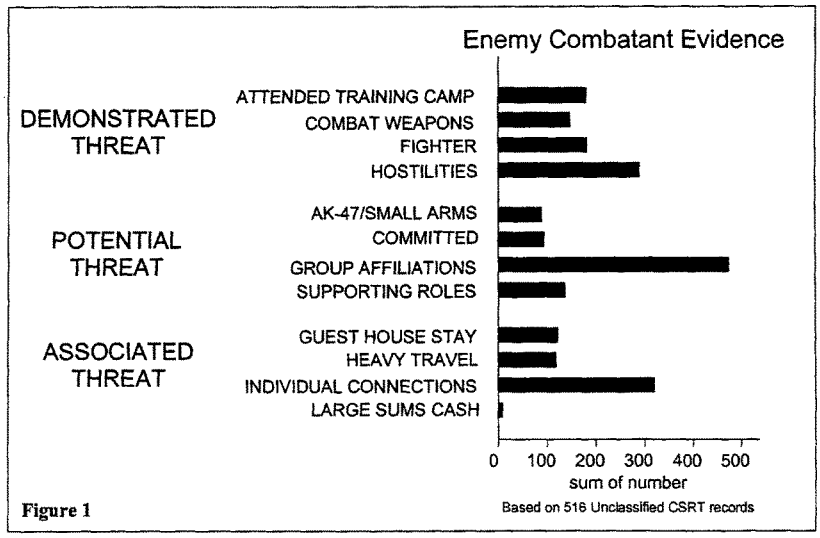

Figure 1

The mean number of attributes across all twelve discrete measures supported by evidence in 516 CSRT unclassified summaries is 4.2. Nearly half of these summaries - 48% - contained 7 or more pieces of evidence that indicated the detainee demonstrated, potentially demonstrated or was associated with threats as an enemy combatant.

The following study is almost entirely informed by the information that is publicly available in the 516 CSRT unclassified summaries, which by their nature are limited in detail. The Department of Defense has kept the remaining information classified as it is being used in support of ongoing military operations.

The authors of this study have sought to be both objective and impartial in their interpretations of this data. They have strived to maintain transparency regarding the coding criteria, as well as their interpretation and analysis of the processed data. The authors visited U.S. Naval Base Guantanamo Bay, Cuba and discussed coding rules and details of the CSRT process with those directly involved. The study's coded data set is available on request. The authors also note that classified files likely contain additional evidence relevant to any decision on detainee status as enemy combatant.

It is the hope of the CTC that this comprehensive data collection and accompanying coding effort will inform a variety of future studies. Ideally, this report and the data from which it was informed will enhance our collective understanding of the threats facing the United States, its allies and its interests.

Preliminary Observations about the West Point Study Commissioned by the Department of Defense to Evaluate Seton Hall Law School's "Report on Guantanamo Detainees: A profile of 517 Detainees through Analysis of Department of Defense Data

Mark Denbeaux* & Joshua Denbeaux**

PRELIMINARY RESPONSE TO THE PENTAGON COMMISSIONED REPORT

The Pentagon commissioned West Point to respond to the findings of the first Seton Hall Report, A Profile of 517 Detainees through Analysis of Department of Defense Data (2/8/06). **This Pentagon commissioned report was issued on July 24, 2007, the day before the House Armed Services Committee hearings were scheduled. The authors of the Seton Hall report have prepared this brief and summary review which identifies some of the significant flaws in its methodology.**

I. The West Point study does not address whether the CSRT is an adequate substitute for *habeas corpus*. As such, it is IRRELEVANT to the current debate.

A. The West Point study does not address any of the procedural aspects of the CSRT. All it even purports to do is categorize the unclassified summary of evidence used in the CSRTs.

B. This report merely addresses Seton Hall's first of five reports, which did not focused on the process. The *No Hearing Hearings* Report specifically focused on the critical issue of lack of *habeas* and insufficient substitute of the CSRTs. West Point fails to address that report.

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* Professor of Law and Director, Seton Hall Law School Center for Policy and Research,
** Joshua Denbeaux, Denbeaux & Denbeaux. Professor Denbeaux and Mr. Denbeaux represent two Guantánamo detainees. The reports upon which this submission is based were written with the aid of the following Seton Hall Law School students: David Gratz, '07 John Gregorek,, '07., Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann and Helen Skinner, '08, Grace Brown, Jillian Camarote, and Jenifer Ellick all Fellows of the Seton Hall Center for Policy and Law.

II. The West Point study erroneously redefined and expanded DoD's terminology.

A. Instead of adhering to DoD's distinction between enemy combatant and non-enemy combatant, the West Point study invents an arbitrary hierarchy of alleged activities in order to new categorizations of detainees. This is contrary to DoD's procedures. The study does not even attempt to articulate a relationship between these levels and DoD's determination of enemy combatant status.

B. West Point's invented hierarchy and associated terminology bears no relation to reality. For example, West Point's system of categorization makes someone who has "traveled to three or more different countries" a "Level 3: Associated Threat as an Enemy Combatant." West Point never explains why the act of travelling to three countries renders someone a terror risk to the United States. The DoD has never taken the position that such is the case.

C. This reveals the flaw in the West Point methodology. The West Point report rejects the DoD data that it set out to analyze. The DoD found that 45% of the detainees had committed "hostile acts," but West Point, using its expanded criteria, found that 56% had committed "hostile acts." The DoD classified only 8% of detainees as "fighters" but the West Point report concludes that the DoD data shows that 35% are fighters.

III. The West Point study fails to refute the findings of the Seton Hall Reports.

A. The West Point study claims to take issue with a few aspects of the first Seton Hall report (of five). None of these issues are of consequence to the Seton Hall report's core conclusions.

1. The first criticism is that Seton Hall did not use as many categories as the West Point report. As described above, West Point invented the additional categories that they criticize Seton Hall for not using. Seton Hall used the categories provided by DoD. There is no connection between the number of data fields and the accuracy of the report.

2. West Point accuses Seton Hall of not grasping the contextual meaning of certain terms. Specifically, they chastise the Seton Hall report for not concluding that a "guest house" is equated with a "safe house." Seton Hall used the plain meaning of the words used by the DoD, and unlike the West Point study, did not use subjective interpretation to extrapolate other meanings from DoD's term.

3. West Point alleges that Seton Hall does not grasp the incompleteness of the records. Limitations of the record did not reveal any deficiency on the part of Seton Hall's methodology. Seton Hall based its report on the same records that West Point did; any limitation on those records is not the fault of Seton Hall.

4. Finally, the bulk of West Point's criticism is focused on the use of a list of 72 organizations that appeared in the Seton Hall report's appendix. The list was culled from DoD records and is not pertinent to Seton Hall's findings. To criticize the accuracy of this data is not to criticize the Seton Hall report, but rather is to criticize DoD.

IV. The following facts remain true:

A. According to DoD the majority of those detained in Guantánamo as enemy combatants are not accused of engaging in any combat, against either the United States or its allies. According to DoD fifty-five percent (55%) of the detainees have not been determined to have committed any hostile acts against the United States or its coalition allies. That means that 55% of the "worst of the worst," those alleged to be enemy combatants, are actually enemy *civilians*.

B. According to DoD at least 60% of those detained in Guantánamo were neither fighters for nor members of either al Qaeda or the Taliban. In fact, 60% of those detained are alleged only to have had some kind of "association" with one or the other. It is undisputed that to have been associated with the Taliban was to be associated with the ruling party of Afghanistan before the United States took military action there.

C. According to DoD at most 5% of those detained in Guantanamo were captured by US forces and even fewer were captured on any battlefield.

D. According to the DoD's own documents 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. These detainees were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

E. West Point cannot dispute the factual basis of Seton Hall's report because its facts are based on DoD data and DoD terminology.

V. The West Point study does not even attempt to address the glaring procedural defects in the CSRT proceedings which Seton Hall reported in its No Hearing, Hearings Report of November 17, 2006. Those defects remain unchallenged:

A. The Government Presented No Evidence

1. The Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing in 96% of the cases.

2. The Government relied upon classified evidence that it kept secret from the detainee and which was presumed to be reliable and valid.

B. Detainees Were Not Allowed to Produce Evidence

1. All requests by detainees for witnesses not already detained in Guantánamo were denied.

2. The only documentary evidence that the detainees were allowed to produce was from family and friends.

C. Detainees Were Denied Lawyers

1. Instead of a lawyer, the detainee was assigned a "personal representative," whose role, both in theory and practice, was minimal.

(a) In most cases, the personal representative met with the detainee only once (82%) for no more than 90 minutes (88%) only a week before the hearing (90%).

(b) At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases.

D. Even When Detainees Won, They Lost

1. In three of the 102 CSRT returns reviewed, the Tribunal found the detainee to be not/no-longer an enemy combatant. In each case, DoD ordered a new Tribunal convened, and the detainee was then found to be an enemy combatant. In one instance, a detainee was found to no longer be an enemy combatant by two Tribunals, before a third Tribunal was convened which then found the detainee to be an enemy combatant. The detainee was not told of his favorable decision.

VI. The West Point report has little to do with the current debate.

A. Seton Hall's fifth report, Latest GUANTÁNAMO REPORT: No-Hearing Hearings (11/17/06), and Lt. Colonel Abraham's recent affidavit are ignored by the West Point report. It is those documents that demonstrate that the CSRT process is fatally flawed and must be replaced by *habeas corpus*.

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July 25, 2007

The Honorable Ike Skelton
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Skelton:

On behalf of the American Bar Association, I write to express our support for H.R. 2826, which restores habeas corpus jurisdiction to the federal courts.

The ABA applauds your efforts in introducing H.R. 2826 and your leadership in holding hearings to educate members on the importance of restoring habeas. This important bipartisan legislation would fix the troublesome provision in the Military Commissions Act (MCA) that prohibits judicial review of habeas corpus claims filed by detainees in U.S. custody that were already pending at the time the law was enacted. The legislation protects against the unintended consequence of extending habeas jurisdiction to the traditional battlefield in a way that that could disrupt active combat situations. It also provides injunctive relief against transfers to ensure that there are no attempts to circumvent fair process for the detainees.

Habeas corpus is a legal tradition that has its roots in the Magna Carta. It serves as an important check on the power of executive detention and embodies the fundamental principle that one should not be held by the government without opportunity for a fair and impartial determination that there is a reasonable basis in law and fact for the detention.

The current system of detaining individuals at Guantanamo Bay without providing an adequate independent review process has created a political firestorm and has undermined the reputation of the United States as a guardian of the rule of law. With 360 individuals being detained at Guantanamo, only three have been charged under the process set forth in the MCA. One case resulted in a plea bargain for a nine-month sentence and the other two cases were dismissed by military judges on grounds that may well result in substantial delays before any further commission proceedings can begin.

Under current law, the remaining prisoners could be held indefinitely as "enemy combatants" without ever being charged and without access to meaningful federal judicial review of the legitimacy of their detention.

The abolition of habeas review for detainees by Congress last year has prevented the federal courts from exercising their traditional role of determining if the government's claims have legal and factual support and has resulted in unchecked executive power that is neither necessary nor wise. Restoring a credible review process will enhance, rather than undermine, our national security and will restore international confidence in our efforts to battle terrorism.

In order to strengthen our efforts to combat terrorism, it is essential that we establish procedures that inspire public confidence in the system and that we would find acceptable if applied to our own service members. We hope that your committee will act quickly to advance H.R. 2826.

Thank you for your consideration of these points.

Sincerely,

Karen J. Mathis

MSNBC.com

MTP transcript for June 10, 2007

Colin Powell on the war in Iraq, Decision 2008 and much more

Updated: 12:17 p.m. ET June 10, 2007

MR. TIM RUSSERT: Our issues this Sunday: February 5th, 2003, then Secretary of State Colin Powell goes before the United Nations to lay out the case against Saddam Hussein. Much of it turns out to be based on faulty intelligence. Four years later, what does he think about the war in Iraq? We'll ask him. Our guest retired General Colin Powell.

Then, as she seeks the Democratic nomination for president, new books emerge about her life and career. With us, the authors of "Her Way: The Hopes and Ambitions of Hillary Rodham Clinton." New York Times reporters Jeff Gerth and Don Van Natta Jr.

But first, joining us now is the man who served first as chairman of the Joint Chiefs of Staff, then secretary of state.

Retired General Colin Powell, welcome.

GEN. COLIN POWELL (RET.): Good morning, Tim. How are you?

MR. RUSSERT: Before we talk about Iraq, I want to bring you back 10 years to Philadelphia. Here you are with four presidents in attendance: former President Bush, President Clinton, Vice President Gore, President Carter. This is when you announced the formation of America's Promise: Alliance For Youth. What have you achieved in 10 years?

GEN. POWELL: We've created a great organization called America's Promise, which has become one the leading organizations, an umbrella organization for youth serving programs throughout the country. And in that 10-year period, we have created communities of promise, universities of promise. We have mobilized the corporate sector. We have assisted in, in leveraging up the ability of youth-serving organizations to get more resources. For example, in 1997 the Boys and Girls Clubs of America had 1500 clubs throughout America. I think as a result of their effort, but with our support in providing an umbrella to it overall, we now have 4,000 Boys and Girls Clubs. We have two million more kids who have mentors. We have millions more kids who have acquired health care because, I think, America's Promise has served as sort of the leading edge of the youth movement. We have millions of kids who are still in need, however.

And now, to celebrate our tenth anniversary, we want to go for an even bigger goal to try to touch the lives of 15 million kids over the next five years with those same basic things that we were talking about 10 years ago: Make sure that every child has responsible, caring adults in his or her life, in their life; make sure that every child has a safe place in which to learn to grow; every child has a healthy start in life and access to health care; every child is getting the education that they need to become a useful citizen; and finally, make sure that every child gets an opportunity to give back, to serve the community.

And the focus in this next part, this next phase in America's Promise life is going to be on getting health care coverage for our kids through C—CCHIP, SCHIP, the children's health insurance program, and also to make sure that schools become the center of gravity of youth service. You build a school, how do you connect it to a Boys and Girls Club? How do you connect it to a Big Brothers and Big Sisters program? How do you put other youth-serving programs attached to that school? Because that's where the kids are most of the day. And we also want to make sure that, as part of our movement forward with America's Promise, that we give youngsters the opportunity to serve, especially in middle school. At that age, start teaching these kids that is a part of being a responsible citizen to help and serve others. And by so doing, they get a better understanding of who they and what they are and what may be in store for them in life.

MR. RUSSERT: We're going to talk a lot more about that on our Web site after the show. Let me turn now to something that—a little bleaker, and that's the war in Iraq. We have lost 3,484 soldiers; 25,830 injured or wounded; 70,000 Iraqis killed; $350 billion spent. Is the war in Iraq worth the price we've paid?

MR. RUSSERT: But did you think at that time a pre-emptive war was the best course for the US, or did you think that Saddam was already boxed because of the sanctions?

GEN. POWELL: I would've preferred no war because I couldn't see clearly the unintended consequences. But we tried to avoid that war with the UN sanctions and putting increasing diplomatic and international pressure on Saddam Hussein. But when I took it to the president and said, "This is a war we ought to see if we can avoid," I also said and made it clear to him, "If, at the end of the day, it is a war that we cannot avoid, I'll be with you all the way." That's, that's part of being part of a team. And therefore I couldn't have any other outcome, and I had no reservations about supporting the president in war. And I think things could've turned out differently after the middle of April if we had responded in a different way.

MR. RUSSERT: After your presentation to the United Nations and you realized the information that you'd been given was faulty, did you ever thing of resigning?

GEN. POWELL: The information was faulty, but it wasn't faulty because people in the intelligence community were lying or trying to deceive. It was faulty because intelligence sometimes can be faulty, and it wasn't managed properly, it wasn't processed properly and we should have realized the inadequacy of some of our sourcing earlier. But it wasn't venal behavior on the part of the intelligence community.

MR. RUSSERT: Four years later, are we safer now with the situation in Iraq the way it is?

GEN. POWELL: I think in terms of another 9/11 attack, we are safer, not because of Iraq necessarily. We are safer because we've done a better job of integrating our intelligence and law enforcement activities. We have done a better job of protecting the nation and also protecting the traveling public. So in 9/11 terms, I think we are safer.

With respect to Iraq, we have a very dangerous situation. You know, most of the world is moving in a positive way in many, many ways, whether it's the trans-Atlantic relationship or our relationship with China, but in this arc, which is centered now in Iraq, we have serious difficulties, serious difficulties that have to be resolved, one, by getting this civil war resolved. And it's going to take the Iraqis to do that. Two, I believe we should be talking to all of Iraq's neighbors. I think we should be talking to Iran, we should be talking to Syria. Not to solve a particular problem or crisis of the moment or the day, but just to have dialogue with people who are involved in this region in so many ways. And so I think it is shortsighted not to talk to Syria and Iran and everybody else in the region, and not just for the purpose of making a demand on them "and I'll only talk to you if you meet the demand that I want to talk to you about." That's not the way to have a dialogue in my judgement.

MR. RUSSERT: Guantanamo, the torture. When John McCain was seeking ways to deal with the issue of torture, you wrote him a letter and you said this: "The world is beginning to doubt the moral basis of our fight against terrorism."

GEN. POWELL: Right.

MR. RUSSERT: What do you mean?

GEN. POWELL: They are. Guantanamo has become a major, major problem for America's perception as it's seen, the way the world perceives America. And if it was up to me, I would close Guantanamo not tomorrow, but this afternoon. I'd close it. And I would not let any of those people go. I would simply move them to the United States and put them into our federal legal system. The concern was, "Well, then they'll have access to lawyers, then they'll have access to writs of habeas corpus." So what? Let them. Isn't that what our system's all about? And, by the way, America, unfortunately, has two million people in jail all of whom had lawyers and access to writs of habeas corpus. And so we can handle bad people in our system. And so I would get rid of Guantanamo and I'd get rid of the military commission system and use established procedures in federal law or in the manual for courts-martial. I would do that because I think it's a more equitable way to do it and it's more understandable in constitutional terms. I would always—I would also do it because every morning I pick up a paper and some authoritarian figure, some person somewhere is using Guantanamo to hide their own misdeeds. And so, essentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission. We don't need it, and it's causing us far damage than any good we get for it. But, remember what I started in this discussion

saying, "Don't let any of them go." Put them into a different system, a system that is experienced, that knows how to handle people like this.

MR. RUSSERT: The only two countries from the original NATO group that do not allow openly gay people to serve in the military are the U.S. and Portugal. Is it a time to do away with "don't ask, don't tell" and allow openly gay people to serve in the military?

GEN. POWELL: I think the, the country has changed in its attitudes quite a bit. "Don't ask, don't tell" was an appropriate response to the situation back in 1993. And the country certainly has changed. I don't know that it has changed so much that this would be the right thing to do now. My, my, my successor, General Shalikashvili has written a letter about this.

MR. RUSSERT: Yes.

GEN. POWELL: He thinks it has changed sufficiently. But he ends his letter by saying, "We're in a war right now, and let's not do this right now." My own judgment is that gays and lesbians should be allowed to have maximum access to all aspects of society. In the State Department, we had a very open policy, we had gay ambassadors. I swore in gay ambassadors with their partners present. But the military is different. It is unique. It exists for one purpose and that's to apply state violence. And in the intimate confines of military life, in barracks life, where we tell you who you're going to live with, where we tell you who you're going to sleep with, we have to have a different set of rules. I will not second-guess the commanders who are serving now, just as I didn't want to be second-guessed 12 or 13 years ago. But I think the country is changing. We may eventually reach that point. I'm not sure.

MR. RUSSERT: Is it inevitable?

GEN. POWELL: I don't know if it's inevitable, but I think it's certainly moving in that direction. I just don't—I'm not convinced we have reached that point yet, and I will let the military commanders and the Joint Chiefs of Staff and the Congress make the judgment. Remember, it is the Congress who put this into law. It was a policy. And that's all I wanted it to be was a policy change, but it was Congress in 1993 that made it a matter of law. And so there are some proposed pieces of legislation up there. I don't know if all of the candidates the other night who were saying it ought to be overturned have co-signed that or introduced law. But it's a matter of law now, not a matter of military policy.

MR. RUSSERT: Before you go, Newsweek magazine reports that Senator Barack Obama has sought you out for your advice on foreign policy. True?

GEN. POWELL: True. I've met with Senator Obama twice. I've been around this town a long time, and I know everybody who is running for office, and I make myself available to talk about foreign policy matters and military matters with whoever wishes to chat with me.

MR. RUSSERT: Would you ever come back in the government?

GEN. POWELL: I would not rule it out. I'm not at all interested in political life, if you mean elected political life. That is unchanged. But I always keep my, my eyes open and my ears open to requests for service.

MR. RUSSERT: Any endorsements?

GEN. POWELL: Oh, not yet. It's too early.

MR. RUSSERT: But you'll support the Republican?

GEN. POWELL: It's too early.

MR. RUSSERT: Would you support an independent?

GEN. POWELL: I'm going to support, I'm going to support the best person that I can find who will lead this

General Colin L. Powell, USA (Retired)
909 North Washington Street
Suite 700
Alexandria, Virginia 22314
September 13, 2006

Dear Senator McCain:

I just returned to town and learned about the debate taking place in Congress to redefine Common Article 3 of the Geneva Convention. I do not support such a step and believe it would be inconsistent with the McCain amendment on torture which I supported last year.

I have read the powerful and eloquent letter sent to you by one my distinguished predecessors as Chairman of the Joint Chiefs of Staff, General Jack Vessey. I fully endorse in tone and tint his powerful argument. The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.

I am as familiar with *The Armed Forces Officer* as is Jack Vessey. It was written after all the horrors World War II and General George C. Marshall, then Secretary of Defense, used it to tell the world and to remind our soldiers of our moral obligations with respect to those in our custody.

Sincerely,

Senator John McCain

To Members of Congress:

The undersigned retired federal judges write to express their strong opposition to the Military Commissions Act of 2006 ("MCA"), which curtails the habeas corpus jurisdiction of the federal courts. Specifically, Section 7 of the MCA purports to eliminate jurisdiction to consider a habeas petition filed by or on behalf of "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." We urge Congress to repeal Section 7 as well as the habeas-stripping provisions of the Detainee Treatment Act of 2005 ("DTA").

Habeas corpus is central to our legal system. The Framers of the Constitution viewed habeas as an essential check against arbitrary executive power. At its core, habeas guarantees that the Executive demonstrate a sufficient basis in fact and in law when it deprives an individual of his liberty. The Constitution forbids suspension of the writ except in cases of actual rebellion or invasion, where the public safety requires it, and Congress has suspended the writ on only four occasions in U.S. history.

Regrettably, Congress hastily – and narrowly – enacted the habeas-stripping provisions of the MCA on the eve of a mid-term election without adequately considering the implications of handing the President unchecked detention power. The Executive has broadly construed this statute, claiming that it deprives even legal permanent residents and other immigrants in the United States of the right to habeas corpus.

Congress's ill-considered decision to eliminate the Great Writ appears to be based on several misconceptions. Contrary to the suggestion of the MCA's sponsors, habeas has historically been available during wartime, both to foreign nationals and citizens. Moreover, the administration's assertion of sweeping detention powers in what it describes as an amorphous and ubiquitous "war on terror" makes habeas more, not less, important, to ensure that these powers are being exercised lawfully.

Preserving habeas corpus is fully consistent with national security. For decades, federal courts have successfully managed both civil and criminal cases involving classified and top secret information. Invariably, those cases were resolved fairly and expeditiously, without compromising the interests of the country. The habeas statute and rules provide federal judges with ample tools for controlling and safeguarding the flow of information in court, and we are confident that Guantanamo detainee cases can be handled under existing procedures.

Further, Congress has failed to provide an adequate or effective substitute for habeas. The MCA and DTA limit judicial review to the record of a summary decision by a military status tribunal that denies the most elementary safeguards, including a detainee's right to see the evidence against him, to the assistance of counsel, to compel proof of his innocence, and to a hearing before a neutral decisionmaker. The MCA and DTA, as written, do not authorize a judge to consider any additional evidence, including evidence showing that a prisoner's detention is based on information gained through torture. Such circumscribed review by an appeals court of a fundamentally flawed process undermines the integrity of the Judiciary.

Prisoners have been detained at Guantanamo for more than five years without lawful process. With each passing day, Guantanamo becomes further entrenched as a symbol of injustice and debasement of American values. The Supreme Court recently declined review of the District of Columbia Circuit's decisions in *Boumediene v. Bush* and *Al-Odah v. United States*, upholding the MCA's elimination of habeas jurisdiction for Guantanamo detainees. Congress should not wait any longer. It should restore habeas rights now to preserve the United States' reputation as a nation committed to its Constitution and to the rule of law.

Respectfully,

Lourdes G. Baird
Michael Burrage
Edward B. Davis
Lisa Hill Fenning
Susan Getzendanner
John Gibbons
Shirley Hufstedler
Nathaniel R. Jones
George Leighton
Timothy K. Lewis
Frank McGarr
Abner Mikva
William Norris
Layn Phillips
Stanley J. Roszkowski
Lee Sarokin
William S. Sessions
Pamela Tynes
Patricia Wald

William Webster
Alfred Wolin
(List in Formation)

ARNOLD & PORTER LLP

September 25, 2006

To United States Senators and Members of Congress

Dear Madams/Sirs:

This letter is written in the name of the former members of the diplomatic service of the United States listed below.

We urge that the Congress, as it considers the pending detainee legislation, not eliminate the jurisdiction of the courts to entertain habeas corpus petitions filed on behalf of those detainees.

There is no more central principle of democracy than that an officer of the executive branch of government may restrain no one except at sufferance of the judiciary. The one branch is vital to insure the legitimacy of the actions of the other. Habeas corpus is the "Great Writ." It is by habeas corpus that a person – any person – can insure that the legality of his or her restraint is confirmed by a court independent of the branch responsible for the restraint. Elimination of judicial review by this route would undermine the foundations of our democratic system.

We are told that the central purpose of our engagement in that "vast external realm" today is the promotion of democracy for others. All nations, we urge, should embrace the principles and practices of freedom and governance that we have embraced. But to eliminate habeas corpus in the United States as an avenue of relief for the citizens of other countries who have fallen into our hands cannot but make a mockery of this pretension in the eyes of the rest of the world. The perception of hypocrisy on our part – a sense that we demand of others a behavioral ethic we ourselves may advocate but fail to observe – is an acid which can overwhelm our diplomacy, no matter how well intended and generous. Pretensions are one thing; behavior another, and quite the more powerful message. To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests in the larger world.

This is the first and primary reason for rejecting the proposal. But the second is almost as important, and that is its potential for a reciprocal effect. Pragmatic considerations, in short, are in this instance at one with considerations of principle. Judicial relief from arbitrary detention should be preserved here else our personnel serving abroad will suffer the consequences. To deny habeas corpus to our detainees can be seen as prescription for how the captured members of our own military, diplomatic and NGO personnel stationed abroad may be treated.

As former officials in the diplomatic service of our nation, this consideration weighs particularly heavily for us. The United States now has a vast army of young Foreign Service officers abroad. Many are in acute and immediate danger. Over a hundred, for example, are serving in Afghanistan. Foreign service in a high-risk post is voluntary. These officers are there willingly. The Congress has every duty to insure their protection, and to avoid anything which will be taken as justification, even by the most disturbed minds, that arbitrary arrest is the acceptable norm of the day in the relations between nations, and that judicial inquiry is an antique, trivial and dispensable luxury.

We urge that the proposal to curtail the reach of the Great Writ be rejected.

Respectfully submitted,

William D. Rogers, former Under Secretary of State

Ambassador J. Brian Atwood
Ambassador Harry Barnes
Ambassador Richard E. Benedick
Ambassador A Peter Burleigh
Ambassador Herman J. Cohen
Ambassador Edwin G. Corr
Ambassador John Gunther Dean
Ambassador Theodore L. Eliot, Jr.
Ambassador Chas W. Freeman, Jr.
Ambassador Robert S. Gelbard
Ambassador Lincoln Gordon
Ambassador William C. Harrop
Ambassador Ulric Haynes, Jr.
Ambassador Robert E. Hunter
Ambassador L. Craig Johnstone
Ambassador Robert V. Keeley
Ambassador Bruce P. Laingen
Anthony Lake, former National Security Advisor

Ambassador Princeton N. Lyman
Ambassador Donald McHenry
Ambassador George Moore
Ambassador George Moose
Ambassador Thomas M. T. Niles
Ambassador Robert Oakley
Ambassador Robert H. Pelletreau
Ambassador Pete Peterson
Ambassador Thomas R. Pickering
Ambassador Anthony Quainton
Helmut Sonnenfeldt, former Counselor of the Department of State
Ambassador Roscoe S. Suddarth
Ambassador Phillips Talbot
Ambassador William Vanden Heuvel
Ambassador Alexander F. Watson

HARVARD LAW SCHOOL
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Gerald L. Neuman
J. Sinclair Armstrong Professor
of International, Foreign, and Comparative Law

April 26, 2007

Congressman Ike Skelton
Chairman, House Armed Services Committee
U.S. House of Representatives
2120 Rayburn House Office Building
Washington, DC 20515-2504

Dear Chairman Skelton,

I write this letter in connection with your deliberations concerning proposals to amend the federal habeas corpus statutes in order to restore jurisdiction that was restricted by Section 7 of the Military Commissions Act of 2006. As a scholar active in the field of habeas corpus law, and committed to the rule of law, I support the restoration of such jurisdiction to the federal courts.

This letter will address one issue that arises from these proposals, namely the effect that restoration of the status quo preceding the enactment of the Military Commissions Act would have with respect to detention of foreign nationals arrested abroad and held as enemy combatants outside the sovereign territory of the United States at places other than the Guantanamo Bay Naval Base (Guantanamo).

In all likelihood, federal habeas corpus jurisdiction would not be available to foreign nationals under those circumstances. This conclusion follows from an interpretation of the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466 (2004), and its probable future application. In Rasul, a six-Justice majority of the Supreme Court held that federal habeas corpus jurisdiction was available for foreign nationals who contested their classification as enemy combatants and who had undergone long-term detention at Guantanamo.

Five Justices joined the majority opinion, which was written by Justice Stevens. The majority stated the question before it as "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" 542 U.S. at 475. The majority distinguished the World War II-era precedent of Johnson v. Eisentrager (which had denied the availability of habeas corpus) on several grounds, including the character of the territory in which the enemy aliens in Eisentrager were held, occupied Germany. Id. at 476. Putting Eisentrager aside, the Court rejected the government's argument that the decision should be controlled by the presumption against extraterritorial application of congressional statutes, finding instead that the permanent grant of "complete jurisdiction and control" over Guantanamo

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placed that base within, not outside, the territorial jurisdiction of the United States. Id. at 480-81. The majority went on to consider analogous English precedents, concluding that historically habeas corpus jurisdiction extended to foreign nationals detained in territories under the subjection of the Crown, as well as in formal sovereign territory. Id. at 481-82. Thus the predominant focus of the majority opinion was on the unusual extent of United States authority at Guantanamo, and the reach of habeas corpus to territories that bear a particularly close relationship to the nation. A few sub-arguments are phrased in a manner that might suggest a broader reach, but the principal thrust of the argument turns on features peculiar to Guantanamo.

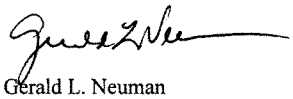
The limitation to Guantanamo becomes more explicit in the opinion of Justice Kennedy, concurring in the judgment. Justice Kennedy's analysis has become more important for the future as a result of the retirement of Justice O'Connor, who had joined the majority opinion in Rasul. Justice Kennedy attributed greater vitality to the precedent in Eisentrager, but he found it inapplicable to the petitions before the Court. 542 U.S. at 485. He emphasized two critical distinctions between Rasul and Eisentrager, which demonstrated that recognition of habeas corpus jurisdiction would not unduly interfere with military affairs. "First, Guanantamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities." Id. at 487. Second, the petitioners were being held in "indefinite pretrial detention." Id. at 488. Thus, Justice Kennedy regarded the peculiar status of Guantanamo as a necessary condition for the extension of habeas corpus jurisdiction to the petitioners as foreign nationals.

The dissenting opinion, written by Justice Scalia, would have included Guantanamo within the traditional rule that habeas corpus jurisdiction does not extend to the detention of foreign nationals outside the nation's territory, which he would have limited to formal sovereign territory.

Taken either separately or together, the majority and concurring opinions in Rasul make clear that habeas corpus jurisdiction extended to foreign nationals held outside the sovereign territory of the United States because of factors specific to Guantanamo, the plenary and exclusive authority exercised there as a result of the indefinite continuation of a colonial-era lease from Cuba. Moreover, the focus of the Justices was on the nature of U.S. power over an entire territory, not merely on power over a person or a building. There is no other country in which the United States has been granted comparable authority. As a consequence, a return to the post-Rasul status quo would not authorize the exercise of habeas corpus jurisdiction on behalf of foreign nationals arrested abroad and detained as enemy combatants in any other country.

I thank you for the opportunity to address these important issues.

Sincerely yours,



Gerald L. Neuman

Richard A. Epstein
4824 So. Woodlawn Avenue
Chicago, IL 60615

July 25, 2007

The Honorable Ike Skelton
Committee on Armed Services
U.S. House of Representatives

Re: H.R. 2826

Dear Mr. Chairman:

First, I should like to thank you for extending me an invitation to speak before the Committee on Armed Services on the vital topic of the restoration of habeas corpus. In my view, the restoration of that writ to its former status is needed to undo the damage wrought by the Military Commissions Act of 2006. Even though I am unable to appear at the session, I would like to take this occasion to write to express my strong support for H.R. 2826, which in prudent and balanced form can restore the writ of habeas corpus in those cases where it is most urgently needed. I think that this action is long overdue. I was dismayed to learn that many members of Congress who voted for the MCA put aside serious doubts about its constitutionality. In my view, those doubts are well founded, as there is nothing in the Due Process or Suspension Clauses that allows for Congress to enact, or the President to enforce, procedures that categorically deny Habeas Corpus to individuals, citizens and aliens alike, who seek to challenge the legality of their detentions before an independent federal judge.

Even if every court in the land should disagree with my constitutional views, it should not influence the deliberations in the House. Constitutional or not, the MCA represents a political and legal mistake of epic proportions. Its current provisions read like a Kafkaesque novel in which the word of an anonymous government official is sufficient to allow the detention of any and all aliens found either in the United States or abroad. The key provision of the MCA that accomplishes this result currently reads "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

As written, this provision draws no distinction among various kinds of aliens. Those who are lawfully in the United States, even as permanent aliens, are treated the same as enemy combatants found in uniform abroad. The implementation of the MCA is made deliberately faceless. No person in authority must answer by name for the acts of detention for which they are responsible, for MCA allows the "United States" as a

national abstraction to make this decision for which no government official from the President on down must stand accountable. The actions of unnamed officials are in my view an open invitation to government abuse. Nor does the MCA articulate any standards by which these nameless officials may proceed. The MCA does not state in so many words whether a mere anonymous say-so counts as a determination of combatant status, or whether someone, let alone who, has to review the evidence before the writ of habeas corpus is lost. Nor need the government run the charade at all: it can make sure that detainees are kept "awaiting" a determination, say, forever.

This conscious disregard of traditional practice in the United States should count as an affront to the rudimentary principles of fair play that has commended itself to every court that does not model itself on the old English Star Chamber. It is, moreover, impossible to justify this limitation on ordinary protections on the grounds that the MCA, as now constituted offers a modern substitute *of equal worth* for the traditional writ of habeas corpus in the form of a hearing, maybe, before the newly refurbished Combat Status Review Tribunals. There may be no magic in the Latin words habeas corpus. But if the name does not matter, the protections do: do people held against their will have a chance to challenge the legality of their confinement in a regular proceeding before a neutral official? In my view, they do, and that includes the detainees at Guantanamo Bay, Cuba, who are *not* at present afforded this chance. The huge doubt over the legality of many individual incarcerations make it evident that some hearing should be allowed to determine the legality of the confinement. Whether people are held in the United States or abroad should not make any difference to the overall analysis, for the Due Process Clause of the Fifth Amendment to the Constitution contains no explicit territorial limitation on the protections of due process, which are consciously extended, by use of the word "person" to citizen and alien alike. Similarly "the privilege of the writ of habeas corpus" extends to all persons, not just citizens, and it too cannot be suspended "unless when in cases of Rebellion or invasion the public safety may require it." I realize that there are some judicial decisions that narrow the scope of the writ of Habeas Corpus, but none go so far as the MCA, which in my judgment is unconstitutional in its present form, and never should have been enacted into law in the first place.

In this light, it is most welcome that H.R. 2826 works to repeal 28 U.S.C § 2241(e) and to replace 10 U.S.C. § 950j(b), with new a totally new approach. Let me comment on these briefly.

First, I heartily applaud Section 1(a) of the Act, the keystone of H.R. 2826, which calls for the restoration of the writ of Habeas Corpus in those cases where it is needed. It is most welcome, in a nation that is home to millions of legal aliens, that detained aliens within the United States are permitted to seek habeas corpus, which is so critical in cases like *al-Marri*, which the application of the MCA was deflected only by an ingenious form of statutory construction that may not commend itself to other courts. What is needed is a clear and unambiguous Congressional repudiation of the MCA, not some clever judicial argument that happily deflects its application.

I also think that it is appropriate to have the reach of habeas corpus cover transfers from detention facilities and to supply future relief when needed. The former is

appropriate because the nature of the detention has vast impact on the lives of those whose liberties are denied, and the ability to gain prospective relief avoids the spectacle of requiring legal proceedings to start from scratch with each new violation. The inclusion of these provisions does not, of course, mandate a finding in favor of an applicant. It just opens up the way for courts to supply full and effective relief when it is warranted on the record.

I also understand the reason to exclude from this protection those persons who are detained in zones of active conduct, such as Iraq and Afghanistan, and am pleased that the protections of H.R. 2826 are extended to many people outside the United States, including those held in Guantanamo Bay, Cuba. In my view, this provision is consistent with the basic tenor of the due process clause, which on any view must recognize that the circumstances of the confinement has to influence the level of process that is owed. So long as there are military risks, then some truncation of procedures is required. It is also sensible to condition the limitation on habeas corpus on the implementation of general army regulations, such as U.S. Army Regulation, 190-8, which is specifically tailored to the cases to which H.R. 2826 does not apply.

I might also add that H.R. 2826 does not transform the rights of persons who are detained in battle zones overseas so that they must be accorded the full rights of criminal defendants. As I read H.R. 2826 it operates as legislation that restores the status quo ante prior to the adoption of the MCA. Under that earlier body of law no one claimed that habeas corpus applied to combatants who were captured in combat overseas. Nor is there anything in the Constitution that compels this reading. The Suspension Clause addresses the circumstances under which the operation of the writ is suspended, but it does not establish a new class of cases to which it applies in the first instance. Those questions are properly taken up in the ordinary course of adjudication. There are many difficult questions about whether any, and if so which, aliens taken into custody by the United States overseas should receive the protection of the writ, see e.g. *Johnson v. Eisentrager,* 339 U.S. 763 (1950), On those questions there is room for robust disagreement. But nothing in H.R. 2826 addresses that question. By returning matters to the status quo ante before the MCA, H.R. 2826 neither blocks nor influences the normal evolution of constitutional doctrine, one way or the other, thereafter.

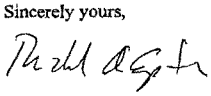
Second, section 1(b) of H.R. 2826 makes sense because the appellate process available under the MSA excludes from judicial consideration much of the evidence that is needed to make a reasoned determination. The current appeal from the CSRTs is not an adequate substitute for habeas protection, which is therefore rightly retained under the circumstances.

Third, section 1(c) rightly permits courts on writ of habeas corpus to review all the procedures and actions of any Military Commission that is established in accordance with the MCA. The serious defects in the MCA could easily invite structural errors in the operation of individual commissions, and these should be subject to review like any other weakness in the underlying system.

Fourth, section 1(e) is surely necessary to make sure that the statute is not construed by the President to apply only to future cases. If anything, the longer the detention the greater need for the coverage of H.R. 2826, which this legislation accomplishes. It would be most unfortunate if disputes over coverage could delay implementation of the Act.

In sum, I believe that H.R. 2826 goes a very long way to rectify major mistakes in legal policy under the MCA. I urge your committee to recommend passage of this important piece of legislation, and trust that, even at the eleventh hour, the President will see that his signature is necessary to repair the damage that our detention policies have already caused at home and abroad.

Sincerely yours,



Richard A. Epstein

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George Mason University

Hubert Williams
Police Foundation

Helen Wright

(Affiliations listed for identification purposes only)

I. Scott Messinger
Director of Management and Operations

July 19, 2007

Dear Representative:

I write today concerning the House Armed Services Committee's upcoming hearing on "Upholding the Principle of Habeas Corpus for Detainees." I am forwarding letters by nine prominent conservative leaders as well as the Constitution Project's statement by a bipartisan group of over forty-five legal and policy experts, all of which urge Congress to restore the *habeas corpus* jurisdiction eliminated by the Military Commissions Act.

The authors of the letters are Colonel Lawrence B. Wilkerson, U.S. Army (Ret.), former chief of staff to Secretary of State Colin Powell; William S. Sessions, former Director of the Federal Bureau of Investigation and federal judge; Alberto Mora, former General Counsel for the United States Navy; David Keene, Chairman of the American Conservative Union; John Whitehead, President of the Rutherford Institute; Bruce Fein, Chairman of the American Freedom Agenda and Deputy Attorney General in the Reagan administration; Richard Epstein, professor of law at the University of Chicago and Senior Fellow at the Hoover Institution; Bob Barr, 21st Century Liberties Chair at the American Conservative Union and former member of Congress (R-GA); and Don Wallace, Jr., professor at Georgetown University Law Center and Chairman of the International Law Institute.

I hope you find these materials helpful. If I can provide you with additional assistance, please don't hesitate to contact me.

Sincerely,

Virginia E. Sloan
President

Lawrence B. Wilkerson
Colonel, U.S. Army (Retired)
7312 Rockford Drive
Falls Church, Virginia 22043-2931

18 July 2007

Dear Members of Congress:

I served for thirty-one years in the United States Army and, from 2002 to 2005, as Chief of Staff to Secretary of State Colin Powell, and am writing to urge you to restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system. I am aware that Abraham Lincoln suspended these rights in our Civil War. But I believe that had Lincoln survived to read it, he would have applauded the Supreme Court decision in 1866 that restored these rights. I also know that no matter how desperate our Civil War was at times, no one seriously believed it would endure for several decades. The so-called war on terror may do just that. We cannot afford to become accustomed to a deprivation of these rights.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

Lawrence B. Wilkerson

Holland Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006-6801
www.hklaw.com

William S. Sessions
202 419 2410
william.sessions@hklaw.com

July 16, 2007

Dear Members of Congress:

I am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. I am a former Chief Judge in the United States District Court for the Western District of Texas and served as Director of the Federal Bureau of Investigation. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

William S. Sessions

WSS/abw

Alberto J. Mora
6 Mission Hills Circle
Rogers, AR 72758

July 17, 2007

Dear Members of Congress:

I served as General Counsel to the Department of the Navy earlier in the current administration and am writing to urge that you restore the habeas corpus rights eliminated by the enactment of the Military Commissions Act last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances.

Habeas corpus rights represent the essence of the American legal system, a manifestation of fundamental fairness. But restoration of these rights is required not only as a matter of consistency with our values and legal system. In the War on Terror, the extension of habeas rights to potentially long-term detainees helps etch the sharpest possible distinction between ourselves and our adversaries at no real cost to our security. At the same time, it helps establish a common legal framework with our traditional allies – which we do not now have – for the prosecution of the war. Such a framework, and the broad-based alliances it can facilitate, is a war-fighting necessity in this type of war. Its absence reduces our defenses.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these rights.

Sincerely,

Alberto Mora

July 18, 2007

Dear Members of Congress:

I am writing to you today both as Chairman of the American Conservative Union and as Co-chair of the Constitution Project's Liberty & Security Initiative to urge your support of action to restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year.

The world wide struggle in which our nation is today engaged is one we must win and I agree completely with those who argue that our government needs the powers necessary both to pursue that struggle to a victorious conclusion and to protect the US homeland from terrorist attack, but that does not mean that we simply ignore the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

David Keene

American Conservative Union
1007 Cameron Street Alexandria, VA 22314
(P) 703.836.8602 (F) 703.836.8606
www.conservative.org

THE RUTHERFORD INSTITUTE

INTERNATIONAL HEADQUARTERS
Post Office Box 7482
Charlottesville, Virginia 22906-7482

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

Dear Members of Congress:

I urge you to restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year.

Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

As a constitutional attorney who has served as president of The Rutherford Institute for the past 25 years, I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely yours,

John W. Whitehead
President

Enclosure

American Freedom Agenda

910 SEVENTEENTH STREET, NW SUITE 800
WASHINGTON, DC 20006
TELEPHONE: 202-775-1776, FACSIMILE: 202-478-1664
WWW.AMERICANFREEDOMAGENDA.ORG

July 18, 2007

Dear Members of Congress:

I served as Associate Deputy Attorney General in the Reagan Administration and am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the rule of law.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

Bruce Fein
Chairman
American Freedom Agenda

Richard A. Epstein
4824 So. Woodlawn Avenue
Chicago, IL 60615

May 4, 2007

Dear Members of Congress:

I understand that the Congress is now considering the possibility of restoring the *habeas corpus* rights that were eliminated by the enactment of the Military Commissions Act (MCA) last year. It is an issue to which I have devoted much thought as both a professor of law at the University of Chicago and a Senior Fellow at the Hoover Institution. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. That broad coalition understood that excessive uses of government power against any individual, either domestic or foreign, constitutes a threat to our democratic institutions that should be opposed by all persons regardless of their political persuasion. I shall not recount in this covering letter the arguments that stirred our coalition to action. But I have taken the liberty of enclosing the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement rightly notes that the writ of *habeas corpus* is of greatest importance in instances of executive detention without charge, as is now possible under the MCA.

Congress's unwise decision to block the use of *habeas corpus* should be of great concern to all Americans, no matter what their political philosophy. I urge you to support legislation that will restore the right to *habeas corpus* that was stripped away in the MCA.

Sincerely,

Richard Epstein /TB

Richard Epstein

BOB BARR
Member of Congress, 1995 - 2003

July 17, 2007

Dear Members of Congress:

As a former Member of Congress (R-GA), I respectfully urge that you restore the fundamental *habeas corpus* rights eliminated by the enactment last year of the Military Commissions Act (MCA). Earlier this year, I was pleased to join with a broad, bipartisan group of over 45 legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

With best wishes,

Bob Barr
Member of Congress, 1995 - 2003

900 Circle 75 Parkway, Suite 1280 • Atlanta, Georgia 30339 • 770/836-1776 • Fax 678/384-5745

INTERNATIONAL LAW INSTITUTE

Don Wallace, Jr.
Chairman, and Professor of Law,
Georgetown University Law Center

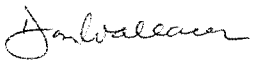
May 1, 2007

Dear Members of Congress:

I am a professor at Georgetown University Law Center and serve as Chairman of the International Law Institute, and am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,



The Foundry Building • 1055 Thomas Jefferson St. NW • Washington, DC 20007, USA
Telephone • (202) 247-6006 • Fax (202) 247-6010 • wallace@ili.org • www.ili.org

STATEMENT ON RESTORING *HABEAS CORPUS* RIGHTS ELIMINATED BY THE MILITARY COMMISSIONS ACT

Statement of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances

March 4, 2007

The Constitution Project
1025 Vermont Avenue, NW
Third Floor
Washington, DC 20005

202-580-6920 (phone)
202-580-6929 (fax)

info@constitutionproject.org
www.constitutionproject.org

STATEMENT ON RESTORING *HABEAS CORPUS* RIGHTS ELIMINATED BY THE MILITARY COMMISSIONS ACT*

We, the undersigned members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances, are deeply troubled by the recent legislation eliminating *habeas corpus* for certain non-citizens detained by the United States. We recommend that Congress vote to restore federal court jurisdiction to hear these *habeas corpus* petitions.

Habeas corpus has for centuries served as the preeminent safeguard of individual liberty and the separation of powers by providing meaningful judicial review of executive action. In 2004, the United States Supreme Court upheld the right of Guantanamo detainees to file *habeas corpus* petitions to challenge the lawfulness of their indefinite detentions.

Nevertheless, in October 2006, Congress enacted the Military Commissions Act ("MCA") eliminating *habeas corpus* for certain aliens held by the United States as "enemy combatants." While we recognize the need to detain foreign terrorists to protect national security, we do not believe repealing federal court jurisdiction over *habeas corpus* serves that goal. On the contrary, *habeas corpus* is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values.

The protections of *habeas corpus* have always been most critical in cases of executive detention without charge. In these circumstances, *habeas corpus* proceedings afford prisoners a meaningful opportunity to be heard before a neutral decisionmaker.

The unconventional nature of the current "war on terrorism" makes *habeas corpus* more, not less, important. Unlike in traditional conflicts, there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. The administration claims the power to imprison individuals without charge indefinitely, potentially forever. For that reason, it is essential that there be a meaningful process to prevent the United States from detaining people without legal

* The Constitution Project sincerely thanks Jonathan Hafetz, Litigation Director, Liberty & National Security Project, Brennan Center for Justice at NYU School of Law, for sharing his expertise on this subject and for his guidance in drafting this statement.

authority or mistakenly depriving innocent people of their liberty. *Habeas corpus* provides that process.

Habeas corpus is particularly important because of the way in which many detainees at Guantanamo came into U.S. custody. Most detainees were captured far from an active battlefield; many were sold for bounty by Afghani warlords to the Northern Alliance before being handed over to American forces. And, unlike in previous conflicts, the U.S. military did not provide a prompt hearing to determine a detainee's status, as the Geneva Conventions and U.S. army regulations require. As the Supreme Court has made clear, in the absence of such process *habeas corpus* is necessary to ensure that legal and factual errors are corrected and detention decisions are viewed as legitimate.

We recognize that the Military Commissions Act and the Detainee Treatment Act of 2005 provide detainees at Guantanamo with hearings before a Combatant Status Review Tribunal ("CSRT"), and that the CSRT decisions may be reviewed by the United States Court of Appeals for the D.C. Circuit. But we believe that this review scheme cannot replace *habeas corpus* for two principal reasons.

First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the assistance of counsel. In addition, the process permits the tribunal to rely on evidence obtained by coercion. Second, the D.C. Circuit's review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing a *habeas corpus* petition, the D.C. Circuit cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

The result does not provide these prisoners the process which they are due. The government has detained prisoners for more than five years without a meaningful opportunity to be heard, and has failed to create an adequate substitute for *habeas corpus*.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United

States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others.

If the United States is going to establish a system of indefinite detention without charge, it must at least ensure there is a meaningful process to determine it is holding the right people. When no such process has been provided, as in the case of Guantanamo detainees, *habeas corpus* supplies the critical fail-safe procedure to ensure that the executive has complied with the Constitution and laws of the United States. We also believe that in our constitutional system of checks and balances, it is unwise for the legislative branch to limit an established and traditional avenue of judicial review.

America's detention policy has undermined its reputation in the international community and weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy. Therefore, we urge Congress to restore the *habeas corpus* rights that were eliminated by the Military Commissions Act.

Members of the Constitution Project's Liberty and Security Committee & Coalition to Defend Checks and Balances Endorsing the Statement on Restoring *Habeas Corpus* Rights Eliminated by the Military Commissions Act*

Floyd Abrams, Partner, Cahill Gordon & Reindel LLP

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of Patriots to Restore Checks and Balances; Practicing Attorney; Consultant on Privacy Matters for the ACLU

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; US Ambassador to the UN for UN Management and Reform, 1994-96

Christopher Bryant, Professor of Law, University of Cincinnati; Assistant to the Senate Legal Counsel, 1997-99

David Cole, Professor, Georgetown University Law Center

Phillip J. Cooper, Professor, Mark O. Hatfield School of Government, Portland State University

John J. Curtin, Jr., Bingham McCutchen LLP; former President, American Bar Association

John W. Dean, Counsel to President Richard Nixon

Mickey Edwards, Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution

Bruce Fein, Constitutional Lawyer and International Consultant at Bruce Fein & Associates and The Lichfield Group; Associate Deputy Attorney General, Reagan Administration

Eugene R. Fidell, President, National Institute of Military Justice; Partner, Feldesman Tucker Leifer Fidell LLP

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

Melvin A. Goodman, Senior Fellow, Director of the National Security Project, Center for International Policy

Morton H. Halperin, Director of U.S. Advocacy, Open Society Policy Center; Senior Vice President, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton Administration

Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton Administration

Robert E. Hunter, U.S. Ambassador to NATO, 1993-98

David Kay, Former Head of the Iraq Survey Group and Special Adviser on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

David Keene, Chairman, American Conservative Union

Christopher S. Kelley, Visiting Assistant Professor of Political Science, Miami University (OH)

Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001

David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

Thomas Mann, Senior Fellow and W. Averell Harriman Chair, Governance Studies Program, the Brookings Institution

Joseph Margulies, Deputy Director, MacArthur Justice Center; Associate Clinical Professor, Northwestern University School of Law

Alberto Mora, Former General Counsel, Department of the Navy

Norman Ornstein, Resident Scholar, the American Enterprise Institute

Thomas R. Pickering, Undersecretary of State for Political Affairs 1997-2000; United States Ambassador and Representative to the United Nations, 1989-1992

Jack Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Professor, Glen Earl Weston Research Professor, George Washington Law School

L. Michael Seidman, Professor, Georgetown University Law Center

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Jerome J. Shestack, Partner, Wolf, Block, Schorr and Solis-Cohen LLP; former President, American Bar Association

John Shore, Founder and President, noborg LLC; former Senior Advisor for Science and Technology to Senator Patrick Leahy

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Suzanne E. Spaulding, Principal, Bingham Consulting Group; former Chief Counsel for Senate and House Intelligence Committees; former Executive Director of National Terrorism Commission; former Assistant General Counsel of CIA

Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, the University of Chicago

Jane Stromseth, Professor, Georgetown University Law Center

William H. Taft, IV, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; former Legal Advisor, Department of State, George W. Bush Administration; Deputy Secretary of Defense,

Reagan Administration

John Terzano, Vice President, Veterans for America

James A. Thurber, Director and Distinguished Professor, Center for Congressional and Presidential Studies, American University

Charles Tiefer, General Counsel (Acting), 1993-94, Solicitor and Deputy General Counsel, 1984-95, U.S. House of Representatives

Patricia Wald, Former Chief Judge, U.S. Court of Appeals for D.C. Circuit

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute, Washington, DC

John W. Whitehead, President, the Rutherford Institute

Lawrence B. Wilkerson, Col, USA (Ret), Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of U. S. Community Relations Service, Johnson Administration

**Affiliations Listed for Identification Purposes Only*

Department of Defense
Office for the Administrative Review of the Detention of Enemy Combatants, Guantanamo Bay, Cuba
Office of the Secretary of the Navy
1000 Navy Pentagon, Washington, DC 20350-1000

10 December 2004

MEMORANDUM FOR REAR ADMIRAL McGARRAH

VIA: Commander, OARDEC (DC)

Subj: Tour Assignment, LTC Stephen E. Abraham, 265-98-6302

1. Request is hereby made to be released from my present tour of duty. This request is based on circumstances that have given rise to the possibility that performance of duties in support of this Organization, specifically duties as a participant in the Administrative Review Board process, may be in conflict with my obligations as an attorney admitted to practice law in the jurisdictions of California, Colorado, and/or the District of Columbia.

STEPHEN E. ABRAHAM
LTC, MI
US Army Reserves

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 26, 2007

QUESTIONS SUBMITTED BY MR. SKELTON

The CHAIRMAN. As of August 1, 2007, are the United States Armed Forces applying Army Regulation 190-8 in Iraq and Afghanistan?

Mr. DELL'ORTO. Army Regulation 190-8 is being applied by the United States Armed Forces in Iraq and Afghanistan as of August 1, 2007, as it was before that date. As with all doctrine, it is subject to further guidance issued by the chain of command.

The CHAIRMAN. In response to a question, Admiral McGarrah (Ret.) stated that he intended to submit for the record a letter which he says you sent to him, expressing your desire not to be assigned to any future Combatant Status Review Tribunal (CSRT). Did you submit such a letter? If so, what reasons did you have for such a submission?

Mr. ABRAHAM. As to the first question, Admiral McGarrah has mischaracterized my letter of December 10, 2004. Attached is a copy of the letter that I sent to Admiral McGarrah. The letter was not a request to not be assigned to any future CSRT but, rather, a request to be released from my tour of duty at OARDEC. The letter made no specific reference to my assignment as a CSRT panel member.

[The information referred to can be found in the Appendix on page 267.]

I wrote the letter because of my considerable concerns about participating in the process of prosecuting the CSRTs where my questions regarding the lack of fairness and absence of constitutional due process were repeatedly ignored. My concerns did not relate specifically to my service on a CSRT panel, where, at least, I had the ability to challenge evidence that I found to be insufficient, even if my panel's decision might later be reversed. Rather I was concerned about assisting in the prosecution of the CSRT cases by compiling evidence that I knew was not reliable or sufficient.

As a lawyer, I was familiar with the Supreme Court's decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld,* and I was concerned that my participation in the prosecution of CSRT cases did not respect the Constitution or the Supreme Court's decisions. When I addressed these concerns with Rear Admiral McGarrah and Captain Sweigart, they were dismissive. When I addressed my concerns with OARDEC's legal advisor, he informed me that other lawyers had expressed similar concerns and that the Department of Defense would probably not offer any protection if allegations of misconduct were made against me by my state bars or in federal court.

After I submitted the December 10th letter to Admiral McGarrah, I was not assigned to another CSRT. No explanation was given. However, I was told that I would continue in my other assignments at OARDEC notwithstanding my specific request. This did nothing to assuage my concerns about my duties and potential liability that I might face upon return to my law practice. In fact, the response to my letter was directly counter to my request and increased my concern. As a Tribunal member, I could act in accordance with my obligations under the Constitution notwithstanding the deficiencies about which I previously testified. However, I saw no way that I could perform other tasks in support of the CSRT process, a fundamentally flawed process, without violating my legal and ethical duties.

The CHAIRMAN. In addition to the one CSRT on which you served on the Tribunal, in how many other CSRTs did you actively participate in the preparation of the materials for the CSRT hearings? What was the nature of your participation on these other CSRTs?

Mr. ABRAHAM. The CSRT process, generally speaking, consisted of two phases, a preparatory phase and a hearing phase. Between October 1, 2004 and December 8, 2004, OARDEC prepared more than 200 research packages for CSRT hearings and conducted approximately 350 hearings. I was involved, to varying degrees, in each of the packages and its associated hearing.

I was closely involved in every aspect of the preparatory phase. At the outset, I singlehandedly created the database that not only tracked all aspects of the CSRT process in DC but served as the repository of information collected and assembled for use in the CSRTs both in Washington and in Guantanamo.

I personally coordinated with various agencies and reviewed information received from those agencies regarding most of the detainees for whom Tribunals were held between October and December and many others thereafter. Notwithstanding fun-

damental constraints imposed upon and by OARDEC, this coordination resulted in increased access to information by research writers.

I reviewed thousands of documents that were used by the Recorders and Tribunal members during the CSRT hearings in nearly all of those cases. Throughout the process, I worked closely with the researchers, answering questions regarding particular intelligence products or the source agencies. My involvement constituted one of the only instances of substantive and critical review of intelligence information used in support of the hearings.

I was directly involved in the revisions of the templates that were used to structure the unclassified and classified summaries for the hundreds of CSRT's for which research was conducted in OARDEC's DC offices. I was involved in the compilation of information and inputs from research writers and others that was used to prepare the materials to be presented to the Tribunals.

Ultimately, my direct involvement touched upon nearly every aspect of the CSRT process, from the moment that a detainee's hearing was scheduled until the hearing packets were received by the Tribunals.

The CHAIRMAN. Do you agree with the proposition that "the military's determination to detain an alien overseas as an enemy combatant in an armed conflict has never been reviewable in civilian court"? Why or why not? Even if correct, is this proposition applicable to the detainees at the U.S. Naval Station, Guantanamo Bay, Cuba?

Mr. OLESKEY. First, I disagree that the proposition quoted above is accurate. Aliens detained by the military as enemy combatants have always had the right to contest the factual basis for their classification, wherever they were detained—so long as it was within the jurisdiction of functioning civilian courts and away from active hostilities. *See, e.g., Case of Three Spanish Sailors,* 96 Eng. Rep. 775 (C.P. 1779) (taking evidence in challenge by prisoners of war to their detention); *R. v. Schiever,* 97 Eng. Rep. 551 (K.B. 1759) (reviewing affidavits submitted by petitioner and a third party in review of a Swedish national's detention as a prisoner of war); *Du Castro's Case,* 92 Eng. Rep. 816 (K.B. 1697) (ordering discharge of alleged foreign spy); *cf. Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 121 (1866) (reviewing citizen's challenge to his classification as a prisoner of war).

This is no less true where prisoners are held overseas. In the case of *Yamashita v. Styer,* for example, the Supreme Court reviewed a habeas challenge brought by a Japanese general in United States custody in the Philippines. 327 U.S. 1 (1946). Despite the fact that Yamashita was held in overseas military custody as an enemy combatant and was a convicted war criminal, the Supreme Court exercised jurisdiction over his challenge to his detention. *See id.* at 25 ("We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful."). Indeed, the Supreme Court considered not only whether the military commission that tried Yamashita had lawful jurisdiction, but also the substantive question whether the commission which tried him had "violate[d] any military, statutory, or constitutional command." *Id.; see also, e.g.,* 18-19 (adjudicating challenge to prosecution's use of deposition testimony as well as other hearsay and opinion evidence).

Second, even if the proposition quoted above were correct as applied to certain overseas detention facilities, it would certainly be inaccurate as applied to Guantanamo Bay. In fact, the Supreme Court has already held that Guantanamo detainees had the right to challenge their imprisonment, because "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Rasul v. Bush,* 542 U.S. 466, 484 n.15, 485 (2004).

Even though the statutory framework has changed in the three years since *Rasul* was decided, I note that the Supreme Court has also held as a constitutional matter that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' *INS* v. *St. Cyr,* 533 U.S. 289, 301 (2001) (quoting *Felker* v. *Turpin,* 518 U.S. 651, 663-664 (1996)). In this context, it has already been established by the Supreme Court that the historical writ of habeas corpus—which permits prisoners to test the lawfulness of executive detention before an independent judge in civilian courts—would have extended to detainees at Guantanamo Bay. As explained in *Rasul,* the right of "persons detained at the [Guantanamo] base" to challenge their detention on habeas is wholly "consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. In sum, because petitioners held under similar circumstances at the time of the Founding would have had access to habeas review, detainees at Guantanamo Bay cannot be denied access to such review unless Congress validly suspends habeas corpus, which it has not done here.

Moreover, habeas corpus extends to Guantanamo Bay because the naval base there "is in every practical respect a United States territory, and it is one far re-

moved from any hostilities." *Id.* at 487 (Kennedy, J., concurring in the judgment). Because "the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States," the United States' permanent ownership and control has extended "the 'implied protection' of the United States to it." *Id.* (quoting *Johnson v. Eisentrager,* 339 U.S. 763, 777-778 (1950)). In such circumstances, far from any battlefield, military claims of a right to detain present "a weaker case of military necessity and much greater alignment with the traditional fimction of habeas corpus." *Id.* at 488.

The CHAIRMAN. Beyond the U.S. Naval Station, Guantanamo Bay, Cuba, what was the extraterritorial reach of 28 U.S.C. § 2241 before the enactment of Detainee Treatment Act of 2005 (DTA)? After the DTA but before the enactment of Military Commissions Act of 2006 (MCA)? After the MCA?

Mr. KATSAS. [The information referred to was not available at the time of printing.]

The CHAIRMAN. How many *habeas* petitions had been filed in United States federal district courts on behalf of detainees in Iraq or Afghanistan from October 31, 2001, to August 1, 2007? Have these petitions generally been dismissed?

Mr. KATSAS. [The information referred to was not available at the time of printing.]

The CHAIRMAN. In the last five years, on average, how many *habeas* petitions have been filed in United States federal district courts by detainees or prisoners in the United States?

Mr. KATSAS. [The information referred to was not available at the time of printing.]

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