AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

[H.A.S.C. No. 110–166]

IMPLICATIONS OF THE SUPREME COURT'S BOUMEDIENE DECISION FOR DETAINEES AT GUANTANAMO BAY, CUBA: NON-GOVERNMENTAL PERSPECTIVE

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

HEARING HELD
JULY 30, 2008

U.S. GOVERNMENT PRINTING OFFICE
45–826 WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

HOUSE COMMITTEE ON ARMED SERVICES

ONE HUNDRED TENTH CONGRESS

IKE SKELTON, Missouri, *Chairman*

JOHN SPRATT, South Carolina
SOLOMON P. ORTIZ, Texas
GENE TAYLOR, Mississippi
NEIL ABERCROMBIE, Hawaii
SILVESTRE REYES, Texas
VIC SNYDER, Arkansas
ADAM SMITH, Washington
LORETTA SANCHEZ, California
MIKE McINTYRE, North Carolina
ELLEN O. TAUSCHER, California
ROBERT A. BRADY, Pennsylvania
ROBERT ANDREWS, New Jersey
SUSAN A. DAVIS, California
RICK LARSEN, Washington
JIM COOPER, Tennessee
JIM MARSHALL, Georgia
MADELEINE Z. BORDALLO, Guam
MARK E. UDALL, Colorado
DAN BOREN, Oklahoma
BRAD ELLSWORTH, Indiana
NANCY BOYDA, Kansas
PATRICK J. MURPHY, Pennsylvania
HANK JOHNSON, Georgia
CAROL SHEA-PORTER, New Hampshire
JOE COURTNEY, Connecticut
DAVID LOEBSACK, Iowa
KIRSTEN E. GILLIBRAND, New York
JOE SESTAK, Pennsylvania
GABRIELLE GIFFORDS, Arizona
NIKI TSONGAS, Massachusetts
ELIJAH E. CUMMINGS, Maryland
KENDRICK B. MEEK, Florida
KATHY CASTOR, Florida

DUNCAN HUNTER, California
JIM SAXTON, New Jersey
JOHN M. McHUGH, New York
TERRY EVERETT, Alabama
ROSCOE G. BARTLETT, Maryland
HOWARD P. "BUCK" McKEON, California
MAC THORNBERRY, Texas
WALTER B. JONES, North Carolina
ROBIN HAYES, North Carolina
W. TODD AKIN, Missouri
J. RANDY FORBES, Virginia
JEFF MILLER, Florida
JOE WILSON, South Carolina
FRANK A. LoBIONDO, New Jersey
TOM COLE, Oklahoma
ROB BISHOP, Utah
MICHAEL TURNER, Ohio
JOHN KLINE, Minnesota
PHIL GINGREY, Georgia
MIKE ROGERS, Alabama
TRENT FRANKS, Arizona
BILL SHUSTER, Pennsylvania
THELMA DRAKE, Virginia
CATHY McMORRIS RODGERS, Washington
K. MICHAEL CONAWAY, Texas
GEOFF DAVIS, Kentucky
DOUG LAMBORN, Colorado
ROB WITTMAN, Virginia

ERIN C. CONATON, *Staff Director*
PAUL OOSTBURG, *Professional Staff Member*
THOMAS HAWLEY, *Professional Staff Member*
CATERINA DUTTO, *Staff Assistant*

CONTENTS

CHRONOLOGICAL LIST OF HEARINGS

2008

Page

HEARING:

Wednesday, July 30, 2008, Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba: Non-Governmental Perspective 1

APPENDIX:

Wednesday, July 30, 2008 51

WEDNESDAY, JULY 30, 2008

IMPLICATIONS OF THE SUPREME COURT'S BOUMEDIENE DECISION FOR DETAINEES AT GUANTANAMO BAY, CUBA: NON-GOVERNMENTAL PERSPECTIVE

STATEMENTS PRESENTED BY MEMBERS OF CONGRESS

Hunter, Hon. Duncan, a Representative from California, Ranking Member, Committee on Armed Services 3

Skelton, Hon. Ike, a Representative from Missouri, Chairman, Committee on Armed Services 1

WITNESSES

Davis, Col. Morris D., USAF, Former Chief Prosecutor, Office of Military Commissions (2005–2007) 14

Katyal, Neal K., Paul and Patricia Saunders Professor of National Security Law, Georgetown University Law Center 10

Klingler, Richard, Partner, Sidley Austin LLP 12

Oleskey, Stephen H., Partner, Wilmer Cutler Pickering Hale and Dorr LLP, Counsel for the Guantanamo Prisoners in *Boumediene* v. *Bush* 7

APPENDIX

PREPARED STATEMENTS:

Davis, Col. Morris D. 102

Katyal, Neal K. 74

Klingler, Richard 91

Oleskey, Stephen H. 55

DOCUMENTS SUBMITTED FOR THE RECORD:

[There were no Documents submitted.]

WITNESS RESPONSES TO QUESTIONS ASKED DURING THE HEARING:

[There were no Questions submitted during the hearing.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING:

[There were no Questions submitted post hearing.]

IMPLICATIONS OF THE SUPREME COURT'S BOUMEDIENE DECISION FOR DETAINEES AT GUANTANAMO BAY, CUBA: NON-GOVERNMENTAL PERSPECTIVE

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Wednesday, July 30, 2008.

The committee met, pursuant to call, at 10:04 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. Our committee will come to order.

Two hundred and twenty years ago, one of our founding fathers, Alexander Hamilton, warned that the imprisonment of individuals in distant or unknown locations without due process is a very dangerous engine of arbitrary government.

To guard against the tendencies of such governments, Hamilton advocated for the centuries-old power of British courts to order wardens to bring prisoners before it, so that a judge as a neutral third party could inquire into the basis for continued detention. This is the power of habeas corpus, or what became known as the "Great Writ."

The Military Commissions Act (MCA) of 2006, which was enacted in the last Congress, stripped our federal courts of this bulwark of our Constitution. As a result, the Administration received the green light to be jailer, judge, and jury, and it gladly revved its engine.

The engine roared until the highest court in our land determined that the price of fuel for that engine was more than our Constitution could bear. Last month, the Supreme Court, in a five-to-four opinion, decided that the detainees who were being held at the U.S. Navy station in Guantanamo Bay, Cuba, do have the habeas corpus privilege under the suspension clause of the Constitution and that Section 7 of the Military Commissions Act is unconstitutional.

As a former prosecutor, it is gratifying to know that the federal courts will resume their traditional role of ensuring that only the corrupt remain behind bars.

While I still believe the current military commissions system has some other significant weaknesses, this ruling of the court will help by ensuring that any commission ruling which is designed to bring terrorists to justice can better withstand judicial scrutiny, for certain convictions must go hand-in-hand with tough prosecution.

In addition to the now largely addressed habeas issue, I have repeatedly identified six other potential unlawful defects in the current military commissions framework.

First, the Military Commissions Act may violate the exceptions clause under Article III of the Constitution by impermissibly restricting the Supreme Court's review.

Second, it is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention.

Third, the provisions regarding coerced testimony may be challenged under our Constitution.

Fourth, the act contains very lenient hearsay rules, which rub up against the right of the accused to confront witnesses in evidence, as guaranteed by the Constitution.

Fifth, the act may be challenged on equal protection and other constitutional grounds for how it discriminates against the detainees for being aliens.

Last, Article I of the Constitution prohibits ex-post-facto laws, and that is what this act may have created.

Although I don't anticipate that all of these issues will be resolved before high-value detainees, such as Khalid Sheikh Mohammed, self-confessed mastermind of 9/11, go to trial, I have confidence that the courts and we here in our Congress will be deliberate and decisive, rather than recklessly headstrong on how we approach these very difficult questions. We must make sure that the verdicts of the military juries stick.

I look forward to hearing from our witnesses today.

We have as our witnesses in front of us Stephen Oleskey, a partner in Wilmer, Cutler, Pickering, Hale, and Dorr, and 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 corpus.

Would you raise your hand? We will know who is who. There you are. Thank you very much.

Next witness: Neal Katyal is a Saunders professional in national security law at Georgetown University Law School. In *Hamdan* v. *Rumsfeld,* he successfully argued before the Supreme Court that the Military Commissions Act, which predated the Military Commissions Act, were unconstitutional.

Would you raise your hand? Just want to thank you.

Richard Klingler, who served as the National Security Council's general counsel and legal adviser from 2006 to 2007 and is a partner in the law firm of Sidley Austin.

Thank you.

Mr. Morris Davis, colonel in the United States Air Force, although he is testifying as a civilian while on terminal leave. Colonel Davis was formerly the chief prosecutor for the Office of Military Commissions.

We certainly appreciate your being with us and giving us your thoughts on this highly important issue.

Ranking Member Duncan Hunter.

STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE FROM CALIFORNIA, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. HUNTER. Thank you, Mr. Chairman. And thanks for holding this important hearing.

And I would simply note that Alexander Hamilton, however, never recommended that habeas be given to prisoners of war (POWs). In fact, the habeas rights that have been directed by the court's decision are rights that terrorists have at this point, which no American soldiers have.

Over the last couple of years, this committee has spent a lot of time focusing on our detainee policy for the global war on terrorism. And the policy that the committee advanced took into account that this war against terror has produced a new type of battlefield and a new type of enemy.

In the last Congress, we worked hard to pass the Detainee Treatment Act (DTA) and the Military Commissions Act, MCA, ensuring that the United States is able to detain, interrogate, and try terrorists.

We had a practical problem that we had to address, this new type of war that doesn't involve particularly uniformed adversaries on the battlefield, but nonetheless very deadly adversaries. And we had to do so in a manner that is consistent with the Constitution and the international rules of war.

As the attorney general recently remarked about the DTA and the MCA, the Detainee Treatment Act and the Military Commissions Act, and he said, "These laws give more procedural protections than the United States or any other country, for that matter, had ever given to war-time captives, whether those captives were lawful soldiers in foreign armies or unlawful combatants who target civilians and hide in civilian populations."

And, Mr. Chairman, I just asked the staff, as we kick this thing off, to give me the list of procedural protections that we gave to accused terrorists when we put this bill together. Let me just go over these because I think this is important.

The right to counsel, none of our POWs have that. The presumption of innocence, POWs don't have that. Proof beyond a reasonable doubt, opportunity to obtain witnesses and other evidence, right to discovery, exculpatory evidence provided to defense counsel.

Statements obtained through torture are excluded. Classified evidence must be declassified, redacted or summarized to the maximum extent possible. Statements allegedly obtained through coercion are only admissible if the military judge rules that the statement is reliable and probative. A certified, impartial judge will preside over all proceedings of individual military commissions.

The U.S. Government must provide defense counsel, including counsel with the necessary clearances to review classified information on the accused terrorists they have. In capital cases, the military commissions' 12 panelists must unanimously agree on the verdict, and the President has a final review.

Panel votes are secret ballot, which ensures panelists are allowed to vote their own conscience. Right to appeal to a new military—a new court, a military commissions review, and the Court of Ap-

peals for the District of Columbia, and the right against double jeopardy.

Those, gentlemen, were derived from our scrutiny of other councils that were similar, tribunals, including Nuremberg, Rwanda, and others. And I think you could accurately say that we actually gave more rights to accused terrorists than any councils, any tribunals ever assembled.

If you have got some others that give more rights to accused terrorists, I would like to hear about it. And if you don't think that list of rights is long enough, I would like to know what you think we should—what additional rights we should give.

And once again, the right to habeas is a right that no American soldier enjoys.

This is a delicate and carefully balanced framework, agreed to by the large majorities in both Houses of Congress, and it was thrown into question as a result of the recent Supreme Court decision in *Boumediene*. And in a deeply divided opinion, a five-to-four majority made the unprecedented decision to afford a constitutional right of habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.

And while I disagree with the court's opinion, the decision is now the law of the land. The challenge before the committee today is clarifying the implications of the Supreme Court decision.

Though some of our panelists today advance the argument that the Supreme Court decision suggests other constitutional infirmities with the Military Commissions Act that warrant congressional action, I continue to believe that absent an explicit decision by the court that the commissions process is unconstitutional, the trials should go forward without congressional interference.

It is important to note that the majority in *Boumediene* addressed the process for status determinations regarding detention. The court was silent with respect to commissions.

Currently there are 20 commissions in the works, and the first trial has just commenced. Under the MCA, each of the accused will have the right to appeal a guilty verdict to the Court of Military Commission Review, to the Court of Appeals for the D.C. court circuit, and then to the Supreme Court.

I encourage the committee to heed the underlying principle of Chief Justice Roberts' dissent in *Boumediene*: "We should not rush to judgment on the constitutionality of the commissions until the process is complete and the trials have exhausted their reviews."

As we meet today, the case against the 9/11 conspirators is moving forward. As the Congress intended, the U.S. is in the process of bringing those responsible for the attacks on the World Trade Center and the Pentagon to justice. Congress should exercise discretion.

While *Boumediene* did not reach the issue of military commissions directly, it did raise a host of issues related to the process required to detain an individual the military believes to be a terrorist.

Moreover, the basis for which the court determined that detainees in Guantanamo have a constitutional right raises questions as to whether the court's rationale could extend to other places where the military holds detainees, like Iraq and Afghanistan.

I share Justice Scalia's concern that, absent congressional action, the policy for handling enemy prisoners in this war will ultimately lie with the branch that knows the least about the national security concerns the subject entails. I believe these are matters best left to political branches to decide.

So what policy matters are put into question by *Boumediene* that should not be left to the court to decide? Attorney General Mukasey's recent speech on the subject highlights six critical areas that need congressional action.

First and most important, Congress should make clear that a federal court may not order the government to bring enemy combatants into the United States. Even under the current system, we have released detainees that have resurfaced on the battlefield and engaged in armed conflict.

I share Justice Scalia's concern that, post-*Boumediene,* the number of enemy returned to combat will increase. And I remind my colleagues that we have had a number of people who were released from Guantanamo who showed up on the battlefield again, attempting to kill American soldiers.

Second, it is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence and what that intelligence is.

Attorney General Mukasey cites a terrorism case he presided over when he sat on the federal bench where the government was required by law to hand over to the defense a list of unindicted co-conspirators. This list found its way through the lawyers to Osama bin Laden in Khartoum.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Fortunately, one federal judge has already ruled on this matter, deciding that the trial should go forward, but this question is still at issue. The victims of September 11th should not have to wait any longer to see those who stand accused face trial. That is what he said.

Fourth, Congress should re-affirm that, for the duration of the conflict, the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations. Large majorities of this Congress support supplemental spending bills that pay for the war and allow for the continued fight against al Qaeda, yet there are judges who question whether there is still authorization to detain. We should put any doubt to rest.

Fifth, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. It is simply absurd to have the rules of the game change from one detainee's case to the next.

Last, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. Simply put, detainees should not have two bites at the apple. Now that they will receive habeas review, there is no reason for the D.C. circuit to review status determinations also.

At stake here is whether this Congress and this committee in particular will allow the slow creep of lawfare to replace warfare.

Our men and women in uniform are trained in armed conflict. The battlefield is not a place for a crime scene investigative unit.

And I can recall, Mr. Chairman, when we had one of our hearings on the proposed Detainee Treatment Act and we asked one of our very experienced litigators, one of our lawyers, in-service lawyers who understood the Uniform Code of Military Justice (UCMJ), and a number of people were saying, "Let us apply the UCMJ to detainees on the battlefield."

And we asked that particular attorney whether that would mean that when a Marine squad saw a terrorist shoot at him on the battlefield in Afghanistan, he would then have to give him his Miranda rights, as he interrogated him at the Humvee. And the answer was, in that lawyer's opinion, yes, he would have to do that, leading to the question of whether we were going to be able to assign lawyers to each squad of Marine combatants.

So I think this is an issue that we should look at very clearly from the perspective of people on the battlefield.

As the attorney general recently argued, military personnel should not be required to risk their lives to create the sort of arrest reports and chain-of-custody reports that are used under very different circumstances by ordinary law enforcement officers in the United States. Battlefields are not an environment where such reports can be generated without substantial risk to American lives.

Finally, Mr. Chairman, it is the battlefield that this committee needs to keep in mind here. We are the Armed Services Committee. We protect members of the Armed Services and try to make sure we have policies that allow them to execute their very difficult mission with a modicum of safety.

My greatest concern, in light of this recent Supreme Court decision, is its potential effect on operations in Iraq and Afghanistan. We detain thousands of detainees in Iraq and hundreds in Afghanistan. Detention is a fundamental component of warfare. It keeps combatants off the battlefield and provides actionable intelligence.

We can't hamper our warfighters by providing them with the perilous choice of releasing detainees or complying with process requirements of the criminal justice system that are impossible to comply with on the battlefield.

In the past, I would have thought such a concern was remote, bordering on paranoia. However, as we meet today, detainees in Afghanistan have filed petitions for habeas relief in U.S. courts.

As one editorialist recently pointed out, the Supreme Court rejected the concept that court jurisdiction is limited to sovereign American territory and could extend not just to captives at Guantanamo, but all detainees abroad. And I think this is simply untenable.

So, Mr. Chairman, thank you for holding this very important hearing today. I look forward to the testimony of our witnesses.

The CHAIRMAN. I thank the gentleman.

We are extremely fortunate to have the witnesses we have on this panel. And we look forward to hearing from you. I hope I don't mispronounce your name as I call on it, but let me try.

Stephen Oleskey, did I get it? All right. Get the——

Mr. OLESKEY. Yes, you did, Mr. Chairman. Thank you.

The CHAIRMAN. Okay. With that, we will call on you first, so we hope you will summarize your testimony. We on the committee are governed, as you know, by the five-minute rule, and we will proceed.

STATEMENT OF STEPHEN H. OLESKEY, PARTNER, WILMER CUTLER PICKERING HALE AND DORR LLP, COUNSEL FOR THE GUANTANAMO PRISONERS IN BOUMEDIENE V. BUSH

Mr. OLESKEY. Thank you, Mr. Chairman, Ranking Member Hunter, members of the committee.

I have been since July 2004 co-lead counsel in the case which the Supreme Court decided on June 12th, Boumediene against Bush. My clients, as the chairman mentioned, were arrested at the behest of the United States in Bosnia in the fall of 2001, despite the fact that the Bosnians had no evidence——

The CHAIRMAN. Could you get just a little closer to the microphone?

Mr. OLESKEY [continuing]. Despite the fact that the Bosnians had no evidence to arrest them, were investigated thoroughly by the Bosnia system, with the cooperation of the United States, and then ordered released in January 2002.

However, instead of being released, they were turned over again at the demand of the United States to our forces there and flown to Guantanamo, where they have been since January 20, 2002. So they are now completing six and a half years in Guantanamo without charge or a hearing.

Our case was originally dismissed in January of 2002. Another parallel case was ordered to go forward. Both cases then went up through the appellate system. While that was happening, this Congress—the previous Congresses passed first the Detainee Treatment Act of 2005 and then the Military Commissions Act of 2006, both of which you have referred to in your opening remarks.

Then, in 2006, the Supreme Court held in the *Hamdan* case that habeas had not been stripped or taken away by the Detainee Treatment Act and habeas could go forward.

Thereafter, the Congress passed the Military Commissions Act, which dealt both with military commissions and with the status of habeas corpus for the detainees in Guantanamo who had been characterized as enemy combatants. And that law appeared to say on its face that there could be no habeas corpus rights to be pursued by men designated as enemy combatants through the military Combat Status Review Tribunal, or CSRT, a design which was established in 2004.

Our clients and others then challenged that habeas-stripping provision both in the circuit court and in the court of the—and in the United States Supreme Court, resulting in the *Boumediene* decision of June 12th.

That decision holds for the first time that Congress has unlawfully suspended the writ of habeas corpus provided in Article I, Clause 9 of the Constitution, because, in the circumstances existing in Guantanamo, the court found that habeas rights ran there and could be invoked by those prisoners, a decision that was foreshadowed in the *Rasul* and *Hamdi* decisions of 2004, also by the Supreme Court.

Now, the suspension clause states that the privilege of the writ of habeas corpus may not be suspended, except when in times of rebellion or invasion the public safety may require it. That is bedrock. It is in the body of the Constitution. It was so important to the Founders that they didn't wait for a Bill of Rights. They put it as a limitation on the power of the Executive and of the Congress right in the body of the Constitution.

The Supreme Court then found in *Boumediene* that prisoners could claim habeas corpus despite the fact that the Cuban government retains legal sovereignty over the United States' base there because the United States has had total control and jurisdiction over that 45-mile enclave since the lease of 1903 under which we obtained the right in perpetuity to hold that base as a military facility for the United States.

The Supreme Court also found that the prisoners' alien or foreign status was not a part of their invoking habeas corpus in the context of Guantanamo, in view of the Framers' intent in enshrining habeas corpus in the body of the Constitution and the Supreme Court's history of construing some fundamental constitutional rights as applying outside the United States, depending on particular facts and circumstances, that is a history that goes back over 100 years.

Since there was no congressional finding in these cases of rebellion or invasion, the Supreme Court concluded there was no lawful basis for Congress to suspend habeas corpus for the approximately 275 men remaining in Guantanamo.

Then the court examined whether the statutes that you enacted, particularly the Detainee Treatment Act and the habeas-stripping provision of the Military Commissions Act of 2006, together provide an adequate substitute or an acceptable remedy for habeas, which it found had been stripped.

The court found that these congressional remedies were not adequate substitutes because the underlying process in Guantanamo, unlike a trial in federal court, a criminal trial or another adversarial proceeding, was fundamentally not adversarial. There was no evidence, no classified evidence made available to anyone there to defend himself. No one had lawyers. They had limited ability to call witnesses and offer documents. And the government evidence was presumed valid.

The only review that Congress allowed of this was a limited review, an administrative review, essentially, a record review by the Court of Appeals in Washington, which could not make new fact-finding, unless a federal habeas court, which could not go beyond the record from Guantanamo, which was this extremely non-adversarial record that resulted from a process created by the Defense Department in 2004.

In effect, this Court of Appeals would be reviewing a baked-in record with many procedural deficiencies that the court found would not begin to provide anything approximating fair or due process. For example, there would be no ability to challenge the legal authorization for detention, which the Administration has always asserted is found in the Authorization for Use of Military Force resolution of Congress in September of 2001.

There is no authority in the district court to order conditional release of any prisoner found to be entitled to the grant of habeas corpus. A federal district court can order a conditional release. I say that release is conditional because that is the word the Supreme Court used.

And what the court was saying was that, even if someone has ordered release, it is still up to the political branches—in this case, the Executive—to negotiate their return to the country from which they were taken or to some other country which is willing to take them.

And as the committee may be aware, there are a number of men who the Defense Department itself has cleared, has said are not enemy combatants or are no longer enemy combatants, who are awaiting in Guantanamo for some country to be willing to take them.

The United States has said properly that no one would be sent back at this time to a country where they will be tortured or mistreated, for example, the Chinese Uyghurs we are not willing to return to China for that reason. So they are actually being held, many of them, as cleared men, but with no place to go.

So those are the deficiencies that the Supreme Court found in the existing process and why it found that the circuit court process for limited review that Congress enacted was not sufficient in view of the constitutional entitlement of these men to some fair process.

It is correct that the Supreme Court left various details about how the habeas trials would be conducted to the federal district court in Washington, right down the street in the Prettyman Courthouse, but this result that experienced Article III federal judges, sitting in the trial court, will now do their jobs and conduct habeas trials is unremarkable and scarcely a justification, let alone one rising to a necessity, for additional congressional action with respect to habeas corpus at this time.

Former Chief Judge Hogan is presiding over the bulk of those cases which are before him on remand from the Supreme Court in the short time since June 12th. He has had a number of hearings, has had briefings, and has begun to issue orders.

The balance of the cases are before Judge Richard Leon, including my case. He has also held a number of hearings, is beginning to issue orders, and has stated publicly that he intends to have all the cases before him, involving approximately 25 prisoners, completely resolved and final orders issued by the end of calendar 2008.

Both judges are consulting closely, they have assured us, in meeting the Supreme Court's mandate to move these cases expeditiously. These cases are heavily fact-intensive and, in my view, would be difficult for Congress to weigh in on with respect to habeas at this time because the facts and circumstances are so different among the varying cases.

For example, as I mentioned, my clients were arrested not on a battlefield, but in a friendly country, Bosnia, where they were working, living with their families, and not with any criminal record or any indication that they would be terrorists. Other people were arrested in Africa, other places in the world far from Afghanistan or Iraq.

Moreover, the enactment of both the DTA and the MCA with respect to habeas has caused extensive delays already in resolving these cases, as the court of appeals here in Washington sought additional briefing and argument each time on the significance of these acts to the pending appeals. Therefore, the appeals took from early 2005 until the middle of 2007 to resolve at the Court of Appeals level and, obviously, until June of 2008 to resolve at the Supreme Court level.

Given the recognition of Secretary Rice, Secretary Gates, many others in the Congress and the Government of the great damage done to U.S. prestige and reputation by our perceived failure to give the 275 men in Guantanamo any fair hearing, despite the passage of six and a half years, it would be my suggestion that Congress stay its hand at this time with regard to any further actions concerning habeas and let the experienced federal trial judges down the street at the Prettyman Courthouse do their job, which is at long last to review the specific individual facts concerning these 6—these remaining 275 men to determine which should be held and which should be ordered conditionally released.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Oleskey can be found in the Appendix on page 55.]

The CHAIRMAN. Thank you so much.

Now, you all correct me if I mispronounce your name. Katyal.

Mr. KATYAL. Perfect.

The CHAIRMAN. I got it?

Mr. KATYAL. That is perfect.

The CHAIRMAN. Okay, please.

STATEMENT OF NEAL K. KATYAL, PAUL AND PATRICIA SAUNDERS PROFESSOR OF NATIONAL SECURITY LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. KATYAL. Thank you, Chairman Skelton, Representative Hunter, and members of the committee.

The last time I was before your committee was in March of last year. And as I was preparing for today, I was reminded of your opening words, Chairman Skelton, at that hearing. You said, "Last year, when Congress passed the MCA, I argued that the most important task was to design a system that could withstand legal scrutiny. There are at least seven potential constitutional defects."

"First, it seems clear to me and many others that the act may be unconstitutionally stripping the federal courts of jurisdiction over habeas cases."

Your opening statement, like the one you made today, went on to list a number of infirmities, including violations of the Geneva Conventions and equal protection, as ex post facto, confrontation, and exceptions clause problems under our Constitution.

And you concluded, "Providing for expedited review by the Supreme Court of these seven issues continues to be important. If the justices find the Military Commission Act includes constitutional infirmities, it is likely that known terrorists could receive a get-out-of-jail-free card or have their death sentences reversed."

Chairman Skelton, what you said back in 2007 looks prophetic now in 2008. We stand now with that very act invalidated on the

very grounds you mentioned: stripping habeas corpus, a part of Anglo-American jurisprudence since the Magna Carta of 1215.

Even before 2007, during those hasty Military Commission Act debates of 2006, many warned the Administration that, if they rushed to implement their proposed legislation, they would accomplish very little because that legislation had constitutional infirmities and courts would strike it down.

But the Administration's defenders reassured Congress that the Constitution did not apply to Guantanamo and not to worry. That legal advice was always dubious, and the Supreme Court put an end to it.

In the *Boumediene* decision last month, the court stated that political branches cannot switch the Constitution on and off as they please. Our basic charter cannot be contracted away like this, they said.

And so here we are again, nearly seven years after the horrible 9/11 attacks, with only half of a single trial completed at Guantanamo and the Military Commission Act already struck down in part by our highest court.

Now some are proposing yet again another rushed proposal to respond to the new court decision. The proposals are legion. Some would create a national security court; others would centralize litigation in a few judges; and still others would try to overhaul the military commission process.

I support many of these proposals. I think the military commissions created in 2006 are deficient and unlikely to survive judicial scrutiny.

The act's foundational presumption in 2006 was that the Constitution did not apply to Guantanamo and so the trials need not have even basic rights guaranteed by the Constitution, such as the right of a defendant not to have coerced testimony used against him.

This system is going down, and it is right and proper for this body to put commissions on hold as soon as possible to develop appropriate, constitutionally balanced legislation.

I am also a believer, to the chagrin of some, in a national security court to authorize a very limited preventative detention system for individuals who truly are unable to be tried in military or civilian court. I have been studying such a court for well over a year now, and the one thing I can say with certainty is that it is a very difficult undertaking.

Who will the judges be? Who will the defense lawyers be, if any? How long will the detention periods last? Will there be periodic review? What evidence is going to come in? Who will be subject to the court's jurisdiction? Will there be appeals?

There are hundreds of different models from which to choose. And yet each of them will differ from our traditional system of justice.

Americans take pride in our criminal justice system. And our system works best when we convict terrorists in it. We showcase the rule of law and contrast it with the despicable world of the enemy, who lacks respect for our way of life and our values.

If we are to modify this system, we should do so cautiously with appreciation for the risks involved. That is why, moving forward,

the most important line in *Boumediene* belonged not to the majority, but to the dissent by Chief Justice John Roberts.

He said, "After the court in 2004 gave Guantanamo detainees habeas corpus rights, Congress responded 18 months later and cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe," cannot be faulted for taking that time.

The very worst time, it occurs to me, to contemplate such changes is a few months before an election, particularly when both Presidential candidates have announced that they will close Guantanamo. A rush to judgment runs the risk of creating slogans, not sustainability. That is exactly what happened in 2006 with the Military Commission Act.

We need a better plan than simply looking tough if we want to demonstrate to our courts and to the world that we are serious about terrorism. This country desperately needs and deserves a serious inquiry, perhaps catalyzed by a bipartisan national commission to examine whether a national security court is necessary and, if so, what it should look like.

We have spent far too many years with intemperate solutions that have gotten us nowhere. Many warned the Administration that they needed a plan for the day after the Supreme Court's highly predictable decision to restore basic habeas corpus rights to detainees, but the Administration stubbornly clung to notions of Executive power that the Supreme Court in *Boumediene* eviscerated.

If we rush into legislation today, we will need yet another plan for the next predictable day after.

Thank you.

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

The CHAIRMAN. I thank the gentleman.

I think I can pronounce this next one. Mr. Klingler. Did I get it? Okay.

STATEMENT OF RICHARD KLINGLER, PARTNER, SIDLEY AUSTIN LLP

Mr. KLINGLER. Mr. Chairman, Ranking Member Hunter, members of the committee, I appreciate the——

The CHAIRMAN. Be sure and—you are going to have to get real close to the microphone so that we will hear you.

Mr. KLINGLER. Sorry about that. Can you hear me now?

The CHAIRMAN. Yes, sir.

Mr. KLINGLER. I appreciate the opportunity to address you today in my personal capacity regarding the important issues raised by the U.S. Supreme Court's decision in *Boumediene* v. *Bush*. I would like to emphasize a few points canvassed at greater length in my written testimony.

Boumediene presents very significant issues that only legislation can address effectively.

The CHAIRMAN. A little closer, please. Just speak right into it.

Mr. KLINGLER. Better?

The CHAIRMAN. Yes, stay close to it.

Mr. KLINGLER. I will try to. Thank you.

Federal courts have traditionally deferred very considerably to the executive branch and to Congress on military matters. Detaining persons the military has found to be enemy combatants is a central and legitimate component of the war on terrorists.

As a unanimous Supreme Court indicated in a separate case just last month, the Constitution requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Boumediene abandoned that tradition of deference. It opens the door to an unprecedented era of judicial policymaking in military matters. At the same time, the decision provided almost no guidance to lower courts regarding the processes to be used in the newly required proceedings, the detainees' substantive rights, or the protections that must be afforded to military and security interests.

The resulting problem is straightforward. In their new, undefined role overseeing military functions, civilian judges are likely to draw too directly on processes designed to protect U.S. citizens in traditional criminal proceedings. They are unlikely to appreciate how their decisions affect national security policy or the conduct of military operations.

The principal problem created by the decision is not, I believe, with the military commission trials. Assertions of equal protection in international law difficulties are considerably overstated on the merits and have already been presented to federal courts and will be presented to them again upon review of any convictions.

Some portray the issue as simply ensuring that the military holds people at Guantanamo who actually threaten Americans. The actual issue is far broader and more complex. The *Boumediene* decision is not limited by its terms to Guantanamo and has implications far beyond, including for Iraq and Afghanistan.

The resulting judicial proceedings will allow judges to review the military's evidence supporting detention, but also to decide when and how the military is empowered to detain enemy combatants, as judges find and define them. They create open-ended litigation regarding counterterrorist capabilities.

Particular issues extend to how to resolve overlapping judicial processes, how to protect sensitive information, and how to ensure that military resources aren't diverted from their core tasks. And in the end, judges may make decisions for reasons having nothing to do with the evidence of threat or may make mistakes leading to the release of persons who do, in fact, seek to kill American soldiers, civilians, and their allies.

In these circumstances, Congress should fulfill the political branch's constitutional role. Legislation would create legal certainty and operational flexibility.

The executive branch, through the attorney general, has requested legislation to protect military and security interests, and the judiciary, through the chief judge of the district court most burdened by the uncertainties of litigation surrounding habeas petitions, has very unusually welcomed guidance from Congress and indicated that "such guidance sooner rather than later would certainly be most helpful."

More broadly, Congress has the opportunity to re-affirm the principles underlying the military's actions against terrorists. The nub of many of the judicial disputes is simply that some members of the judiciary and the bar do not believe that we are truly or appropriately at war against those who would use terror against our soldiers and this Nation, or they believe that time is—the threats we face to those we can manage through criminal-like processes.

Assuming that Congress continues to support the military's counterterrorism efforts, re-affirming and clarifying the bounds of the Authorization for Use of Military Force (AUMF) would update that authorization in light of our increased knowledge of the foes we face.

It would remind the court to the commitment of two coordinate branches to using all appropriate means to confront pressing threats to our national security. Doing so may even return the courts to a centuries-old tradition of deferring to the political branches in matters of military and foreign affairs.

Thank you.

[The prepared statement of Mr. Klingler can be found in the Appendix on page 91.]

The CHAIRMAN. Colonel Davis.

STATEMENT OF COL. MORRIS D. DAVIS, USAF, FORMER CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS (2005–2007)

Colonel DAVIS. Thank you.

Chairman Skelton, Mr. Hunter, members of the committee, thank you for allowing me to participate in the hearing today.

Much of what I have to say this morning is based upon my two-plus years of experience as the chief prosecutor at Guantanamo Bay, Cuba. However, I am here speaking in my personal capacity, not on behalf of the Department of Defense (DOD) or the Department of the Air Force. And I think you would have figured that out in any event, but I wanted to make that clear.

The CHAIRMAN. You are going to have to get closer, too, just like everyone.

Colonel DAVIS. Yes, sir.

For more than two years, I spent time inside the camp. I have sat down with some of the detainees. I have reviewed the evidence, both classified and unclassified. I led the prosecution for more than two years. In fact, the cases that are being tried today, the *Hamdan* case, I personally authorized and approved those charges.

So I hope my experience and my observations will contribute to finding a credible way forward on how we deal with this important issue that in many ways defines who we are.

I was privileged to serve for a quarter century as an Air Force judge advocate and to participate in the military justice system at almost every level and in a variety of different capacities. For most of my career, the military justice system operated in relative obscurity with little attention from the media, the public, or even Congress.

Those of us who worked inside the military justice system always knew what a good system it was, but until the post-9/11 era, when the military justice system gained some notoriety as a basis of com-

parison for the processes we would use to prosecute detainees, it was largely unknown and under-appreciated.

I was pleased that during the debate over the Military Commissions Act people from across the political and ideological spectrum referred to military justice as the gold standard of justice. Some of us knew that all along, but it was nice to see it recognized on a broad scale.

The processes currently in place to deal with detainees, particularly those at Guantanamo Bay, Cuba, are being sold to the public as part of the ongoing war on terrorism. They are included in Title 10 of the United States Code, the section on Air Force, not Title 18. And they are supposedly wrapped under the military justice banner.

In my view, what we are doing at Guantanamo Bay is neither military nor justice, and if this reflects what passes for military justice in 2008, I am glad my uniform is hanging in a closet. This isn't the military justice system I respected and admired for nearly 25 years.

Over the past several months, I have written a number of articles, and given talks, and done interviews, and shared my observations with special interest groups, nongovernmental organizations (NGOs), think tanks, and some members of this body.

The question of how we move forward to ensure the treatment of detainees and to begin to restore our reputation in the eyes of the world is an important issue. But with soaring gas prices, plunging home values, rising foreclosures, a looming record deficit, and wars in Iraq and Afghanistan, and all of that taking place within 100 days of an election, this probably isn't the number one issue on a lot of people's lists.

I understand that. As someone about to be unemployed and with an interest-only adjustable-rate mortgage, it is probably not number one on my list either, but it should be on everybody's top 10 list.

It is an issue that warrants thoughtful consideration now. And we shouldn't wait until after November 4th or January 20th to begin having this discussion.

Now, I think the most beneficial use of our time today will be in answering your questions, so I am going to keep my comments relatively brief. However, there are a few points to keep in mind in discussing detainees at Guantanamo Bay.

One thing I found in talking to different groups is apparently I am in the middle of the road. I tend to get hit by folks on either side. I tend to aggravate everybody because I think my views are neither left nor right.

I think, first, it is important to recognize that there is an internationally recognized right during a period of armed conflict to indefinitely detain the enemy to keep him from inflicting harm on us and on others. To the best of my knowledge, there has never been and there never will be a date certain that we know when an armed conflict is going to end.

Now, that is not to discount in any way the $64,000 question of how we assess who is or is not the enemy, but some seem to argue and believe that unless we bring criminal charges or release a de-

tainee within some prescribed period of time, that we have committed a foul. And that is just not the case.

Second, the intelligence community wants to know what is going to happen in the future in order to prevent the next 9/11. The law enforcement community wants to know what happened in the past to punish those responsible for the last 9/11.

As you can see, the perspectives are in opposite directions, one being prospective and one being retrospective. Add to that that one agency operates in a very rigid and very visible environment where the rules are well-known, things like Miranda rights, speedy trial, chain of custody, search warrants, and such.

The other operates in a very fluid and invisible environment, where the rules are generally secret. When you try to overlay the two communities, you get a lot of square peg and round hole problems. And in a nutshell, that is Guantanamo Bay, which began as an intelligence operation and largely is still to this day an intelligence operation, with any thought of some law enforcement or criminal prosecution process taking a back seat at best.

Now, it is wonderful when those two conflicting communities overlap and dovetail, but that is seldom the case, and that is the real conundrum with Guantanamo Bay.

Lloyd Cutler was a giant in the legal community, having served as White House counsel twice and as co-founder of one of the most prestigious law firms in the world. In 1942, when he was just beginning his career, he served as a prosecutor in the trial of the eight Nazi saboteurs, which took place not too far from where we are today, and which led to the Supreme Court decision in *Ex Parte Kiernan.*

In December 2001, Mr. Cutler wrote an article in the *Wall Street Journal* drawing on his experience from more than 60 years earlier. He said, "How we prosecute the members of al Qaeda and their supporters will say as much about the American legal system as it does about al Qaeda."

Now, Mr. Cutler passed away in 2005, and I doubt if he was here today he would be pleased with what the past 80 months have said about the American legal system. We are better than that.

Military commissions apply to only some of the detainees, certainly not the entirety. And my experience is pretty much limited to the military commission cases.

Judge James Robertson, in his decision on July 18th denying Salim Hamdan's request for an injunction in the military commissions, said, "The eyes of the world are on Guantanamo Bay. Justice must be done there, and it must be seen to be done there fairly and impartially."

Now, I believe the current system may do justice in some cases—perhaps in many cases—but we need a system that is capable of doing justice in all cases.

There are, in my view, four main problems with the current military justice process. And I would stop to say that I believe that the Military Commissions Act was a commendable piece of legislation. And I still believe that. It was the implementation by political appointees after it had been passed by Congress, signed by the President where it was hijacked along the way.

The four areas are, one, if the military commission is really a military commission, it should be under military control and free of political interference. Now, proponents argue that a commission is really, for all practical purposes, just like a court martial.

Well, for a variety of reasons, the analogy to the court martial system does not fit. And I will give you one example. Since 9/11, the Army, the Navy, the Air Force, and the Marine Corps have conducted in excess of 50,000 court martials. To the best of my knowledge, each of those 50,000 court martials was convened by a military officer, not by a political appointee.

So if the military commissions are just like a court martial, why are these the only Title 10 criminal proceedings convened by a political appointee who had never worn a military uniform a day in her life?

Second, in the court martial system, the convening authority and his or her senior attorney, what we refer to as the staff judge advocate, has some oversight authority over the prosecutors. And it is that level of command involvement in the military justice system that is often cited as the greatest weakness in the court martial process.

All of the international—all the comparable international tribunals that are sanctioned by the United Nations (U.N.) guarantee the independence of the prosecutors. Trying to explain what a convening authority is, is a difficult proposition, particularly to an international audience who is accustomed to that international model where the prosecutors are independent.

Now, I thought language that Senator Lindsey Graham added to the Military Commissions Act at my request ensured that no one could try to influence the exercise of professional judgment by me or the prosecutors. And it aligned us more closely with the international model that would be more understandable to the international community, but it hadn't stopped some from continuing to try to influence the process.

The military judge in the *Hamdan* case is Navy Captain Keith Allred. And he ruled that the legal adviser to the convening authority, Brigadier General Tom Hartmann, broke the law by engaging in unlawful influence over me and the prosecution in the *Hamdan* case. And he disqualified General Hartmann from any further involvement in the *Hamdan* case.

Unlawful influence has been called the moral enemy of military justice, so many waited to see how the Department of Defense would respond to a finding that the legal adviser broke the law.

What has happened since that finding that he broke the law has been nine more detainees have been charged. The 9/11 cases have been referred to trial. And General Hartmann is still in place and pressing ahead at full speed.

Third, we have to make a commitment to open and transparent trials. Some closed sessions are inevitable, but that should be the exception and not the rule. I can tell you from firsthand experience that the evidence declassification process is time-consuming and is frustrating, but it is necessary if we are going to have open trials.

You can have speed, but if you have speed it comes at the expense of transparency. And as tainted as the process has become in the eyes of the world, I believe it is imperative that we take the

time and the effort to make these trials as open and transparent as possible.

In fact, I had often joked in the past that we should have these proceedings on Court TV, and I still think that might be a good idea.

Finally, we must reject the use of evidence obtained by unduly coercive techniques such as waterboarding. Those techniques may produce useful intelligence, but they do not produce reliable evidence suitable for use in an American court of justice. If we condone it now, we forfeit the right to condemn it later when the shoe is on the other foot.

Information obtained by convincing a man to say what the interrogator wants to hear or possibly die, which is really what waterboarding is, or the same as putting a gun to someone's head and saying, "I am going to count to 10 and pull the trigger if you don't talk," is what the person on the other end believes.

It doesn't matter if the gun is empty and there is no possibility of death or if the waterboarder is not going to drown the individual. The person on the other end doesn't know that, and he believes his choices are talk or possibly die. That practice has no place in an American court of justice, and it should be banned.

In a speech delivered in April at West Point, Secretary Gates said, "Listen to me very carefully. If as an officer you don't tell blunt truths, then you have done yourself and the institution a disservice."

Later, in June at a speech he gave at Langley Air Force Base, he said, "None of the services easily accept honest criticism or scrutiny that expose institutional shortcomings. This is something I believe must change across the military."

Secretary Gates went on to say, "When you see failures or problems, throw a flag. Bring them to the attention of people who can do something about it."

Mr. Chairman, members of the committee, I have thrown the flag and I have told blunt truth. As a result, my service has been characterized as dishonorable. I was denied a medal for my service as chief prosecutor. And I find that the truth not only sets you free; it also makes you largely unemployable.

And that is fine. To me, it would be a disservice if I would put my head down, pressed ahead, and pretended everything was fine when it was not, and I have no regrets about doing what I did.

Thank you for allowing me to be here today.

[The prepared statement of Colonel Davis can be found in the Appendix on page 102.]

The CHAIRMAN. We thank you for your testimony and for each of you and your excellent words of wisdom and advice for us.

Colonel Davis, it is interesting to note your reference to the 1942 case. Of personal interest, there was a World War I soldier who stayed in the Army Reserve as a Judge Advocate General (JAG) officer by the name of Colonel Carl Ristine from my home town of Lexington, Missouri, and was quite a well-known lawyer in western Missouri.

When the Second World War came along, he returned to active duty and was the lawyer for one of the two—I think his name was

Dasch—who was not given the death penalty from the 1942 commission.

My recollection is that six of the eight German saboteurs-to-be were given the death penalty, and that was carried out immediately. Two were not, as my recollection. And Colonel Carl Ristine represented the one.

And a footnote: He was my father's mentor when my father graduated from law school. So it is really interesting that today in your testimony you mentioned it.

Let me ask one question before I ask Mr. Hunter.

Mr. Oleskey, could you address the suggested points that the attorney general made for or recommended for congressional action in response to the *Boumediene* case?

Would you respond as to how—and I don't know if you have the list of them there in front of you—would you respond as to your thoughts on each of them—I think there are six of them—please?

Mr. OLESKEY. I don't have a list in front of me, Mr. Chairman, but I am generally familiar with the attorney general's suggestions.

The CHAIRMAN. Why don't you go ahead and tell us your thoughts?

Mr. OLESKEY. Absolutely. Essentially what he has suggested is that Congress step in and tell the federal courts how to conduct the habeas proceedings to decide what the burden of proof should be, to decide how to deal with classified evidence, and a lot of other issues that trial judges who hear habeas cases every day, coming out of the federal and state courts, normally do in reviewing and deciding habeas cases.

As I stated in my remarks, the problem with that one-size-fits-all approach is that no one sitting in Congress or in any advisory capacity over a habeas case is ever going to know enough about the facts that are at issue in a particular case because they are so varying and different and raise so many issues, to be able to devise a protocol that will work.

So my view is that the federal courts have extensive experience dealing with these issues that are now presented by this ruling. It is only the ruling that is unusual, not the issues that have to be explored, which is, what is the basis to hold somebody indefinitely? What are their defenses? What are the facts that bear on that decision to hold? And what are the facts that bear on whether the person should be released?

These are, if not garden variety issues, very common issues that federal habeas courts in every jurisdiction, represented by every one of you in the country, deal with, if not every day, then every week.

So what happened with the MCA and the DTA, as we have all been saying in our various ways, were that some clarity was brought to some aspects of these military commission and habeas proceedings, but fundamentally we ended up with years of appeals that were foretold by many of us and many of you, resulting in delays from 2002, really, when the first case was brought, until 2008, so six and a half years of appeals just to get to the fundamental issue in each individual case of whether someone should be held further or should be released.

Legislation, in my view, well-intentioned as it may be, is not going to clarify those circumstances. It is going to complexify and complicate those circumstances, delay the cases, lead to general appeals that are likely again to hold up all the cases.

And, in contrast, Judge Leon and Judge Hogan are now moving these cases forward rapidly on schedules which they are very easily able to handle and establish. And the cases are going to be tried, it appears, in the relatively near future, certainly in my case is in front of Judge Leon.

So I understand why the attorney general and the Administration say that, Mr. Chairman. But I don't think that the result will be anything that any of us will be proud of, as Mr. Davis and Mr. Katyal were saying about what has happened in the military commission area.

The CHAIRMAN. Thank you. I should have read the attorney general's quick summary before asking you that question, Mr. Oleskey, but let me do that very quickly and then I will ask for brief comments from each of the other three panel members.

One, prohibit the federal court from ordering the government to bring enemy combatants into the United States. Two, adopt procedural safeguards to protect the sources and methods of intelligence-gathering. Three, to ensure that habeas proceedings do not delay military commission trials of detainees charged with war crimes.

Four, acknowledge explicitly that this Nation remains engaged in armed conflict with al Qaeda and the Taliban and associated organizations and reaffirm that, for the duration of the conflict against these groups, we may—the United States may detain enemy combatants.

Fifth and last, establish the sensible procedures for habeas challenges going forward by ensuring that the one district court has exclusive jurisdiction over the proceedings.

And, excuse me, there is a sixth one. Limit the ability of detainees to pursue other forms of litigation.

So that is—those are the six recommendations made by the attorney general. Let me ask you if you have comments or thoughts on them. We will go right down the line.

Mr. OLESKEY. Let me just comment specifically, Mr. Chairman, on those six points then.

The CHAIRMAN. Yes.

Mr. OLESKEY. Release in the United States—the Supreme Court was very clear, the law is clear that a habeas judge can't release anywhere. He can order a conditional release in this case or she can order a conditional release, subject to the decision by the executive branch about how to return and where to return the particular prisoner. So I think that is not a real issue, as I see it.

In terms of classified evidence, Colonel Davis has referred to how the military commissions handle that. There is a federal statute that the Congress enacted, the Classified Information Procedures Act (CIPA) statute, that provides procedures for that. That has been done in every terrorist criminal trial I can think of. I don't think more legislation is needed on that.

The ranking member commented on delaying the military commissions as not being in anybody's interest. I think we all agree with that. I can't see how further legislation at this time with cases

going forward would not delay those cases and result in appeals. Others may differ.

The President's right to detain enemy combatants is something spelled out in the Authorization for Use of Military Force resolution of the Congress on September 18, 2001. That is in the process of being worked out. As to what it means as to each detainee on a case-by-case basis, that is what has to happen.

Each detainee has a different story, a different set of facts, and the government's right to detain them further will turn on where they fit in the scheme that you all outlined in general in that resolution. I don't believe that that needs further clarification at this time.

Consolidation of cases, the Supreme Court said they should all be heard essentially in one court. They are all being heard in the district court right down the street, as I said, and they are all being consolidated for preliminary purposes before two judges who are ruling on all the general and common issues that are likely to arise.

And then, as to multiple avenues for litigation, you all decided in 2005 and 2006 to allow a process for review of the Combatant Status Review Tribunals (CSRT). Most of us went forward and filed both habeas actions, which were doubtful until the Supreme Court ruled in June, and DTA cases. Most of us will probably pursue habeas cases for the reasons I stated in my opening remarks.

There is no showing that anyone has abused the second avenue, the DTA avenue. There are lots of statutes that allow more than one claim and sometimes in more than one court. This is more a theoretical concern right now than a real concern, as I see it.

The CHAIRMAN. Thank you.

Mr. Katyal, your comments?

Mr. KATYAL. I support the idea of legislation in general. Our Founders in Article I, Section 8 gave this body, the Congress, the prerogative over legislation in this area.

And I do think legislation is inevitable at some point, for reasons that I think Representative Hunter illustrated and also things that Justice Jackson said earlier in his famous *Youngstown* opinion, that legislation will put the program on more stable footing and produce a program that is more sustainable in courts and in the world's community.

However, having said that, this does not seem right now to be the appropriate time for legislation for a couple of reasons. One is, we don't have any experience yet with how the federal courts are going to handle this.

I think we should let the system play out a little bit, as Mr. Oleskey said, see how the federal courts are dealing with this. There is a system in place by very experienced judges. There isn't some overwhelming need right now to act. And then this body can be informed by that legislative—by that judicial experience.

In addition, I am very worried about a rush to judgment in this area. We did that in 2006. Some people warned Congress that, if you do so, if the program is not going to be sustainable, it is going to be struck down, that is exactly what happened. And so I think, before acting again, we need to do this very carefully, with all the relevant information.

Let me speak to one aspect of Attorney General Mukasey's comments, his third one, about clarifying the writ of habeas corpus should not delay military commission trials. I think that is a very dangerous idea.

These military commissions are unprecedented. We have never had trials like this before in America. And I think anyone who listened to Colonel Davis' remarks a moment ago will understand just how different these trials are.

The worst time to review the legality of these trials is after they have taken place. There are a lot of constitutional problems with the military commissions going on.

And if, as I suspect, courts will invalidate that system down the road, you do run the prospect, as Chairman Skelton said last year, of terrorists going free or possibly having to be re-tried. That is a terrible way of meting out justice.

Instead, we should do what Representative Skelton proposed before, which is expedite review over the military commission process. Let us make sure that system is legal, as its defenders say it is. If it is legal, let us have the trials. Let us have them go forward. If it is not, then let us have a new system come in and take place.

I am very sympathetic to what Ranking Member Hunter said a moment ago, that the victims of 9/11 should not have to wait any longer for trials. Let us have real trials. Let us make sure they are on a stable footing and then have them, instead of have them be invalidated years after the fact.

The CHAIRMAN. Thank you.

Mr. Klingler was next on the list, and then Colonel.

Go ahead, Mr. Klingler.

Mr. KLINGLER. Thank you.

If I could just address your question by picking up some of the comments that have been made, the notion that there are only garden-variety issues before the habeas courts I think is just a fantasy. The notion that there won't be years of appeals I think has no basis at all.

The chief judge of the district has welcomed quick congressional guidance. Judge Hogan isn't processing cases; what Judge Hogan has done is request briefing, very extensive briefing from the government and from detainees' lawyers, on a whole range of open issues.

What types of discovery must there be? How much classified and intelligence information does the government have to offer up? What standard? Is it clear and convincing? Is it some traditional standard regarding the government's showing that is required?

What type of presumption, if any, does the government get? What kind of hearsay can be offered? What kind of witnesses can be pulled forth? Do they get to be called from Iraq and Afghanistan? Can the detainees personally participate? Are they going to be able to call other detainees as witnesses?

All these are open, common issues that are being briefed right now. It is not as though the cases are being presented in the initial form.

As to some of the particular issues, I mean, I have covered those in some of the written testimony. I would just address two briefly.

The release in the United States point, I was initially somewhat less sympathetic to that point than to the others of the attorney general's. And then I found out that, in fact, some of the detainees'—one of the detainee's lawyers has, in fact, requested release in the United States, in the case of *Parhat,* was my understanding.

As to the timing of the military commission trials versus habeas proceedings, I think the notion of final resolution, either through legislation or through court processes of the lawfulness of the military commission process, before we have even seen how they perform, before we have seen how the judges and how the appeal process works, that is going to be a tremendous range of delay.

Legislation would take time to finally resolve any differences. And certainly the course that Professor Katyal would have of going into federal court and habeas proceedings to disrupt and delay the military commission trials is one that would just initiate a longstanding judicial process.

And I think the judge who heard those arguments already that the professor has put forth didn't reject them on their merits, but appropriately abstained, pending the operation of the military trial process.

Thank you.

The CHAIRMAN. Thank you very much.

Colonel.

Colonel DAVIS. I guess two points. One is—my personal opinion is I think the *Boumediene* decision was wrongly decided. Of course, you know, it is the court's opinion that counts and not my own. My personal opinion is a foreign terrorist whose only connection to the Constitution is destroying it has no constitutional rights. The court disagreed, and it is their opinion that counts.

So I disagree with the rationale, but if the result is that it gets folks to pay attention to the issue, then I can live with the rationale, if it gets a good result.

My read of the *Boumediene* decision is what the court was—I think the court was very deferential to the executive branch. If you recall initially when *Boumediene* was filed, the court refused to hear it. Then, Colonel Steve Abraham came forward, who had sat on some of the CSRT proceedings and identified some defects, where in some cases the evidence was flimsy, and others, if the results wasn't what the leadership wanted, they just re-did it until they got the right result.

And then, amazingly, the only time in my lifetime the court reconsidered and agreed to hear the *Boumediene* case, which to me—and then the decision itself—is an expression of a lack of confidence in the executive branch to do it right, that folks have a right to some meaningful review before they are locked up for in excess of 80 months.

And I think the attorney general's comments were somewhat disingenuous, to kind of throw down the gauntlet and say Congress has got to fix this in the next couple of months, when the Administration has had 80 months since the President signed the order in November of 2001 to get this right. And they haven't gotten it right.

It was frustrating over a year ago, when the court granted a review in *Boumediene*—about that same time, we had two cases

down at Guantanamo (Gitmo), *Qatar* and *Hamdan,* where the judges in those cases dismissed charges for lack of jurisdiction because there was a disconnect in the wording—the jurisdictional language of the Military Commissions Act said we have jurisdiction over unlawful enemy combatants.

The regulation for the CSRT process requires that tribunal to make a finding the individual is an enemy combatant, but not an unlawful enemy combatant. So we had a disconnect in the language.

There were a number of us that proposed, since we had two problems—you had *Boumediene*, which was being heard by the Supreme Court. We had us thrown out of court out of the military commissions because of the defect in the jurisdictional language. Why not fix the CSRTs and do them right, which hopefully would allay the concerns of the Supreme Court and also fix the jurisdictional problem?

But as tended to be the case quite often, there were a few people that—what I have described many times. I think it was a combination of arrogance and ignorance, that they knew the right way to do it and they didn't need any assistance with doing it right, so rather than fix the CSRTs, here we are, more than a year later, you know, with this mess, and the attorney general suggesting that you have got to fix it the next couple of months. And I think that is wrong.

The CHAIRMAN. Colonel, thank you.

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman, again. And, gentlemen, thank you for your testimony.

You know, again, I am looking at this bundle of rights that we went over, Senate and the House, when we put together the Detainee Treatment Act and the Military Commission Act, right to counsel, presumption of innocence, proof beyond a reasonable doubt, opportunity to obtain witnesses and other evidence, right to discovery, exculpatory evidence provided to defense counsel, statements obtained through torture are excluded.

The classified evidence, I remember the exercise we went through, the difficulty of making sure that you maintain the secrecy of evidence, which nonetheless the accused has a right to confront, and we finally went through this exercise of redaction that would be utilized to try to make sure that they were given the fairest shot possible at being able to confront the evidence that was used against them.

That went through a lot of iterations and a lot of analysis by counsel in the House and the Senate as we put this thing together. I am looking at the statements obtained through coercion are only admissible if the military judge rules that the statement is reliable and probative.

Because most of these people come, while some of them—not all of them come from the battlefield situation, most of them do—the situation in which many of these statements are made is inherently coercive. And we had a—we obviously had to work our way through that.

Certified impartial judge, we went to the—the question we were concerned about as to whether a—if you had military officers on

the tribunal, whether you would have a vote for guilty by a junior officer on the basis that his superiors were watching him and were on the body with him. So we provided for the secret ballot. We did things that went far beyond what I saw as a standard of Nuremberg, Rwanda, and other councils.

So my first question would be is, have you looked at this bundle of rights that we gave to the accused in the MCA? And what additional rights would you give to them?

Mr. KATYAL. Thank you very much, Ranking Member Hunter.

I have looked at them. And they are the same rights largely as what the Administration said the last military commission system had in 2006. When I argued the *Hamdan* case before the Supreme Court, the solicitor general's brief listed the very rights you said, the right to counsel, presumption of innocence, opportunity to get evidence, right to discovery, the use of torture being excluded, the impartial judge, and so on, the provision of a defense counsel, and so on.

That was all at page two of their brief and what the solicitor general opened his argument to the Supreme Court with.

It wasn't enough. And it wasn't enough for one simple reason: It is not about the rights on paper. It is about, rather, what the system—its ultimate backdrop is.

In both 2006 and now, there has been assumption that the Constitution does not protect the detainees at Guantanamo Bay and, because of that, these rights, while there on paper, wind up not being very much in practice.

And that is what I think Colonel Davis was getting at when he said that the military justice system that he knows is the gold standard of justice and what is happening at Guantanamo Bay is neither military nor justice.

I mean, this is a remarkable thing. We have been adversaries for two years on the very same case, the chief prosecutor and one of the defense attorneys, and yet I think you are hearing some agreement from the people who have experience in the system in telling you that the rights on paper aren't the rights that translate in practice.

Mr. HUNTER. Yes, but, counsel, what we have the power to do here is to write the law with the expectation it is going to be followed. Now, obviously, if those rights are not allowed, then that is reversible error and is something that can be corrected.

But the point is—my question to you is, when we put this thing together, we looked at terrorist tribunals, and we looked at Nuremberg, and we looked at Rwanda, and we looked at these other tribunals. And we gave a larger package of rights, it appears to me—for example, in Nuremberg, I believe you only had one layer of appeal. Here you have got three layers of appeal.

We gave a larger package of rights than these previous terrorist councils. So my question to you is, in what we have laid out in the law—because that is what we are dealing with. You have got a trial going forward right now and you have got 20—as I understand—some 20 commissions gearing up to go, they are going to go with what I just laid out and what you just acknowledged are, in fact, this bundle of rights.

So my question to you is, do you think that additional rights—do you think that these are inadequate and there are additional rights that should be in the commissions law?

Mr. KATYAL. Sir, we could have a debate about Nuremberg or Rwanda or the other tribunals. I certainly think that, for example, none of the other tribunals have such broad substantive offenses, such as conspiracy. That is something that Nuremberg rejected, yet it is being used in most of those 20 cases today.

But my fundamental point, Ranking Member Hunter, is that we don't live in Rwanda and we don't live in Nuremberg. We live in the United States of America. And in the United States of America, we are governed by the United States Constitution.

And the United States Constitution sets out some—sets out a backdrop from which——

Mr. HUNTER. And conceding that we don't live there, that is why my question to you was, are there additional rights beyond this package of rights that we put in legislation that you think should be in the MCA? Very basic. What additional do you think we should give to the accused?

Mr. KATYAL. The rights guaranteed by the Constitution writ large. That is, it is not the micro-rights that you are pointing to. It is the bigger right that says that all of these—you know, that these problems are constitutionally based. They are not just statutorily based.

Without that fundamental backdrop of understanding that the Constitution constrains what is going on at Guantanamo, the rights can be chipped away at on either side. And that is what I think the Supreme Court was getting at in 2006, that it is not the rights on paper, but——

Mr. HUNTER. Okay, but when we write a law, the law is always on paper, and we presume that the law will be followed. And if the law is not followed, that is reversible error.

My next—so let me ask the other gentlemen, do you see—are there other substantive rights—and, incidentally, I wouldn't refer to the right to counsel and the presumption of innocence as trivial or somehow technical rights. Those are very fundamental rights.

Do the other counsel have any additional rights that you would add to this package? And let me go left to right here, sir.

Mr. OLESKEY. Ranking Member, I don't have any clients, fortunately, in front of military commissions, so I haven't—I really am not here today to testify on that subject. And I would defer it to Colonel Davis.

Mr. HUNTER. Okay. If you could look for the record, if you could look through the MCA, as we put it together, and see if there are additional rights that you would recommend, I would like to see those for the record, if you could do it.

Yes, sir, Colonel.

Colonel DAVIS. No, I don't think so. As I said—and I think, you know, we have a disagreement. My personal opinion is they don't have constitutional rights. They have rights under Article 3 of the Geneva Convention, as expounded upon in—I think it is Article 75 of the Additional Protocol, which to me lays out their fundamental rights, which are covered in the Military Commissions Act.

Mr. HUNTER. Okay.

Mr. Klingler, do you see any additional rights beyond this package of 15 rights that I have enumerated that you think the accused should have?

Mr. KLINGLER. Look, *Boumediene* simply didn't hold that the Constitution extends all rights contained in the Constitution to Guantanamo detainees. I think that that is a mischaracterization of the decision, and I think they are contrary court decisions.

I think the short answer to your question is that the only point that *Boumediene* called into question is potentially the exclusive direct review in the federal courts and the preclusion of habeas rights after there is any conviction that takes place.

Mr. HUNTER. Okay, let me go to the habeas rights. We had the case—it was after World War II—in which an appeal was made to the Supreme Court or a request for habeas was made, presumably by one of the criminal accused of World War II. It was the *Eisentrager* case.

And the Supreme Court was requested to give habeas, but they were imprisoned outside of the United States. And the decision by the court was they didn't have a right to ask for habeas.

Now, as I understand, both the Supreme Court ruled, both in *Rasul* v. *Bush* and on the instant case, *Boumediene*, that the holding in *Eisentrager* didn't apply to Gitmo, to Guantanamo.

So here is my question. You have all described to some degree—or at least several of you have described habeas as rising from basic American values. And I think that the chairman laid that out in his opening statement.

But the court in *Eisentrager* said, "Wait a minute. If you are making this thing, you are a detainee and presumably in Germany, you don't have the right." And the recent court said, "We still agree with that. If you weren't in Gitmo, we wouldn't give you that right."

So my question to you is, do you think that the detainees in Iraq and Afghanistan—because when we talked about Guantanamo, we talked about control. We said, "Wait a minute. Maybe Guantanamo is not a state, but it is definitely under American control. It is an extension of American control." That same argument could be made with respect to people that are under the supervision of a Marine sergeant in Afghanistan or Iraq.

So my question to all four of you is, do you think that habeas should be applicable to detainees that are held in other parts of the world, and specifically Iraq and Afghanistan? I will just go from left to right. What do you think?

Mr. OLESKEY. I think the court was proceeding cautiously on that question, as I read the decision. What they were saying was that what you have in Guantanamo is not only a place under total United States control and dominion; you also have people who have been held without any approximation of process for six and a half years.

And it is that, the latter point, that seemed to me to be the driver for the court that we had held people for so long in such a place, said we had a process—what we are referring to as the CSRT process—given limited review of that limited process, and that wasn't enough in those particular circumstances to hold people for that length of time——

Mr. HUNTER. But don't you think that same circumstance could take place in Iraq or Afghanistan, that people would be held for a long period of time, you could make that argument?

Mr. OLESKEY. I imagine that that could happen and that people will make that argument.

Mr. HUNTER. So do you see——

Mr. OLESKEY. And the courts will deal with it when it comes along.

Mr. HUNTER. Okay. But in your opinion, should habeas be afforded to detainees under American control in Iraq or Afghanistan?

Mr. OLESKEY. If they meet those circumstances as found in *Boumediene*. That would be a fact-intensive question arising in those cases. How long has the person been held? Is he a prisoner of war or enemy combatant? Has he had a CSRT? How long before did the CSRT take place?

As was just said in answer to other questions, has the CSRT process been revised to make it more fair and adversarial? Those would all be fact——

Mr. HUNTER. Okay. So in some cases, it might be yes; in other cases, no.

Mr. OLESKEY. That would be my view.

Mr. HUNTER. Okay.

Sir.

Mr. KATYAL. I would agree with the way you had characterized it and believe that the Supreme Court's decisions are clear that there is no habeas corpus rights in Iraq or Afghanistan.

Guantanamo, the court has said, is different because no other law applies. There isn't a law of Iraq or Afghanistan to protect the detainees. There is only United States law. We don't recognize Cuban law as having any force at Guantanamo.

Mr. HUNTER. Okay, but you wouldn't—so you would not—you do not believe that habeas attaches to detainees in Iraq or Afghanistan?

Mr. KATYAL. I do not. We do not have total control over those areas.

Mr. HUNTER. Okay. Okay.

Colonel.

Colonel DAVIS. I don't think it applies at Guantanamo, so certainly not Iraq or Afghanistan.

Mr. HUNTER. Okay.

Mr. Klingler.

Mr. KLINGLER. I don't. I think that that would be just a gross distortion of the history of the writ and the purposes for which it is used, if it were implemented in the battlefield areas, particularly, or anywhere, frankly.

Mr. HUNTER. Okay.

Mr. KLINGLER. But if I could, just one—I think *Boumediene*—that is the best reading of *Boumediene*, as well. However, it is clear that *Boumediene*'s open-ended test created the opportunity for counsel—and we heard it at the end of the table—to argue that, in fact, the writ does extend.

And as you said, a case has—a petition has been filed in relation to that. There is going to be litigation over this and uncertainty for some time.

Mr. HUNTER. Okay.

The Miranda rights, the right to—because you have talked, gentlemen, about the need to not undertake—to not accept testimony as been coerced. And by its very nature, the battlefield is coercive.

And the safeguard that was imposed in our domestic system was to give Miranda rights so that people were told, they were instructed that they didn't have to talk, so when they saw that police dog and they saw that snub-nosed .38 or .45 that the officer had, that wouldn't coerce them into saying something that they wish they hadn't said later. So we had—we inserted that safeguard.

Do you think that, on the battlefield, that enemy combatants should have the right to be Mirandized, to be given the Miranda warning, so that they are not later in a court in which they feel that they are being prosecuted with coerced statements?

Left to right, what do you think?

Mr. OLESKEY. I don't think the Supreme Court was saying that. I think the court——

Mr. HUNTER. I am not asking what the Supreme Court said. I am asking—I mean, they made a statement on a limited area. I am asking for your expert opinion or your feeling as to whether that is a right that should be afforded to enemy combatants to ensure that they don't make coerced statements, that is, to make sure that they are advised on the battlefield upon being apprehended that they do not have to speak and that what they say will be used against them? Do you think they should have that right?

Mr. OLESKEY. I wouldn't advocate for that, Representative Hunter. I think that is not practical on the battlefield. And I do have to make my touchstone——

Mr. HUNTER. Well, okay. But let me hold off for a second then. If that is so—or maybe I should ask the next gentleman, because you said coerced statements should not be utilized——

Mr. OLESKEY. But he and I are talking about the situations that we are all familiar with, where people are taken into imprisonment, sent to Guantanamo, or sent to some other place, and then tortured and mistreated. And that has been basic in our law for 75 years that that kind of a statement, post-apprehension, after you have been detained and seized and held, doesn't produce reliable evidence and so it shouldn't be admitted.

Mr. HUNTER. Well, that may be so, counsel, but any good lawyer is not going to differentiate between the treatment on the battlefield, where he may make his most damning statements in which he is surrounded by people with weapons, which he will allege later were pointed right at him, when they took those statements, extracted those statements from him.

That is why we have—that is why Miranda is always given early on. It is not given later on in the—when you are in the incarceration, when you are in jail or in prison. It is a given right at the point when you are suspected of criminal activity. And that was done for a reason, and that is so that you would know that you didn't have to make the statements.

So my question is, because our counsel advised us or one of our witnesses advised us at one hearing that, if you had followed the UCMJ, which was advocated by some Members of Congress, a Miranda warning would be necessary on the battlefield.

So my question is, to prevent coercive statements being taken, do you think that Miranda should be followed?

Mr. KATYAL. Sir, I am not sure who that witness was that you are referring to, and I obviously have respect for any witness——

Mr. HUNTER. One of our JAG witnesses.

Mr. KATYAL [continuing]. But my understanding is that there is no way that Miranda rights will apply to people on the battlefield, captured on the battlefield, right at that battlefield situation.

And the reason is that our Nation's highest military court, the Court of Appeals for the Armed Forces in 1992, decided a case—I think it is called *United States* v. *Lonetree.* And what *Lonetree* says is that when someone is even being interrogated and that the interrogation is motivated by intelligence, then there is no need to read Miranda rights.

So it is an even broader exception in our current military system than the one you are positing about Miranda being read to people on the battlefield. So I think that would take care of your worry, the existing military law.

Mr. HUNTER. But I think you may be wrong, because *Lonetree,* I believe, was an espionage case with respect to embassy activity. And I think that clearly the presence on the battlefield, the inherent coercive situation on the battlefield, lots of people with weapons, at least I would think most lawyers would use that as proof of a coercive environment——

Mr. KATYAL. Sir, it is——

Mr. HUNTER [continuing]. When statements were made. So you might be right that *Lonetree* will be brought up, but I think it might be difficult to make *Lonetree*——

Mr. KATYAL. The battlefield is undoubtedly coercive. And that aspect was—*Lonetree.* But *Lonetree* says that is not what is relevant. It is the purpose underlying the interrogation. And the purpose, I think, would be the same. I don't see any good defense lawyer winning this argument. Sorry.

Mr. HUNTER. Okay. But in your estimation, Miranda should not be a part—should not be extended?

Mr. KATYAL. That is correct.

Mr. HUNTER. Okay.

Sir, Colonel, what do you think?

Colonel DAVIS. Well, first off, you know, the witness that was referred to that was asked the question—I think the person you described in your opening statement as a very experienced military prosecutor, that was me. I was sitting in the back row at the hearing that you were the chairman of, and the issue came up——

Mr. HUNTER. That was you. That is right. We said, if you took the guy who shot at you with an AK–47, because we had a number of members saying, "Why can't we use UCMJ?" And I asked you the question, would you have to Mirandize them? If you used the UCMJ, if you applied it, and you said, yes, you would.

Colonel DAVIS. Right. And I believe it——

Mr. HUNTER. Right?

Colonel DAVIS [continuing]. Was Professor Michael Sharaf was the witness. And he said he wasn't an expert on military law, but the guy in the back row——

Mr. HUNTER. And I referred to you as some JAG guy.

Colonel DAVIS. That was me.

Mr. KATYAL. That was you? Okay.

Colonel DAVIS. But literally—if you applied the UCMJ literally—and it is not Miranda. It would be Article 31 of the UCMJ, which is comparable to Miranda. But if you read it literally in the scenario you described, I think—my recollection was you described they put him across the hood of the Jeep and want to ask him some questions.

Literally, yes, that would require an Article 31 rights warning if you literally applied the UCMJ. But, again, as I said, I don't think constitutional rights apply.

Mr. HUNTER. Okay. Okay.

And, sir, very quickly—and I apologize to my colleagues for taking as much time as I have. Go right ahead, sir, and then we will move—I will wrap up here.

Mr. KLINGLER. I don't believe Miranda rights are required. I don't believe the full range of constitutional rights extend extraterritorially to people who aren't U.S. citizens or who don't have ties to the United States that are substantial.

Mr. HUNTER. Okay. Thank you.

Thank you, Mr. Chairman.

And thank you, gentlemen.

Mr. SPRATT [presiding]. Thank you, Mr. Hunter.

Mr. Oleskey, I believe you are representing two petitioners at this point in time?

Mr. OLESKEY. Six, Representative Spratt.

Mr. SPRATT. Six? And six different procedures, six different cases?

Mr. OLESKEY. It is one case, because they were all arrested together in Bosnia, but, in effect, there are six separate cases within that one petition, yes.

Mr. SPRATT. And we have a request from the attorney general to the effect that Congress needs to intercede relating back to the finding, amongst other things, that the executive branch can't do this unilaterally on its own, it requires out working together in a lawmaking capacity to create something like this.

You seem to say, however, that the courts can do it, that there is sufficient law, sufficient known procedures, sufficient precedent for the courts to proceed, and that is what is happening in the cases you are conducting—where you are representing petitioners at the present time?

Mr. OLESKEY. Yes, sir.

Mr. SPRATT. And you are saying that Judge Leon, is it, and Judge Hogan are blazing this path as we go along and haven't encountered any problems that require congressional intercession?

Mr. OLESKEY. That would be the way I read what they have done. And I have been following both their proceedings carefully. They are consolidating all the cases, either between—either with Judge Hogan or Judge Leon, working out, as Mr. Klingler said, the common issues—and there are many common issues—and then coming to decisions on those common issues that will allow the cases to proceed, to be heard as a trial in a habeas court.

Mr. SPRATT. What kind of evidentiary hearing do you think that will be, in this particular case?

Mr. OLESKEY. Well, that is still to be worked out, but it seems clear from what the Supreme Court said that, unlike what would have happened under the Detainee Treatment Act, where the circuit court of appeals could only review the CSRT record frozen in time, no matter what new evidence you had to present that might exonerate your client, that there was likely to be fact-finding by the district court judges based on evidence that will be offered that could tend to exonerate your client, either to show that the wrong person has been held or that there is no authority to hold that person in the case of my clients, because they weren't in Afghanistan, they weren't connected to 9/11, they had nothing to do with al Qaeda.

Those would be the kinds of facts, I think, that will be heard in these cases.

Mr. SPRATT. How does the court propose to handle coerced testimony? Is there——

Mr. OLESKEY. There is no decision on that yet, but I would expect——

Mr. SPRATT. Have you made motions to eliminate, to——

Mr. OLESKEY. Not yet, because we don't know what the government is going to say. I think you need to understand that, about three weeks ago, the government suddenly said to all of us in the habeas cases that, instead of relying on the records they filed from the CSRTs in 2004, they now want to amend all those records and add new claims against virtually everyone who is still at Guantanamo.

So we don't know, as I sit here, what the claims will be against any particular person today, as opposed to the claims that were made in the CSRTs, which led to the findings four years ago that they were enemy combatants. It is a very odd situation to be in and rather unfortunate, but the government seems inclined to try that. And we will see whether the judges allow it.

Mr. SPRATT. Now, if Congress decided that it needed to intercede to find coerced testimony, classified evidence, confrontational witnesses, to go back and revisit some of the law we have passed in light of the Supreme Court decision, would this delay the trial that you are now in the—the case that you are now conducting?

Mr. OLESKEY. It certainly would delay our case because our judge has said that he intends to try every case in front of him by December 30 and that our case is the lead case. So we expect, based on what he said, that our case will be tried in October.

It would seem unlikely, as I sit here, that this legislation that we are talking about hypothetically could work its way through all the committee process, and the thoughtful hearings that people would want to give it, and be out in time to be useful in our case.

And I believe that would be true of other cases, as well. That would be likely to advance rapidly, in view of the Supreme Court's directive.

Mr. SPRATT. And your clients don't appear to have been known combatants engaged in an ongoing conflict or—I don't know if it is the allegation of association with al Qaeda, the Taliban, or anything of that nature. They appear to have been suspects of some kind of incipient terrorist activity.

If they are acquitted or if the court cannot find satisfactory evidence to continue holding them, what is their status?

Mr. OLESKEY. Their status would be that the court could order them conditionally released, in the words of the Supreme Court, subject to the executive negotiating with, in their case, in the first instance, Bosnia, for their return to Bosnia under terms and conditions satisfactory to Bosnia and to the United States.

That is what has been happening for the hundreds of men who have already been released. Our government has been negotiating with Afghanistan, Pakistan, Saudi Arabia, Kuwait and other countries, and that is how these men have been released, not because of anything the courts have done, but because the Executive has decided it is right and appropriate to release those men for whatever reasons.

And the lawyers who are testifying before you haven't been a part of that process. That has all been done by the executive branch. And that is how the releases of anybody cleared in habeas would have to be accomplished, as far as I can determine.

Mr. SPRATT. Professor Katyal, you seem to be recognizing the need for more structure, and you expressed concern that if Congress doesn't act and create better structure that the whole process is likely to come unraveled in different courts, and different rulings, and different decisions?

Mr. KATYAL. I do. I think that this is an unprecedented system that is going on at Guantanamo. And if our desire is to actually bring justice to the victims of 9/11 who have suffered so much in the horrible attacks, we want a system that works, that is going to sustain—that is going to be sustained over the long-term.

And what we have instead is a system that is woefully deficient on paper and in practice and is likely to get struck down. And so I think that this body does need to pause these military commissions, take a deep breath, and figure out, "What do we really want our trial system to look like? And let us figure out what structural guarantees shall we put in place to make sure it stands the test of time and metes out justice?"

Mr. SPRATT. Are you concerned about the delays it may cause and the concerns on the part of counsel, like Mr. Oleskey, that it could deny his clients speedy justice?

Mr. KATYAL. Oh, I am deeply concerned about that. I certainly don't think that Congress should interfere with the ongoing process at this point in habeas corpus hearings that judges in the Washington, D.C., courts are undertaking at this moment. I think we should actually use that as a basis for legislation, if any, in the future.

But with respect to the military commissions, this novel, unprecedented system, yes, I think they need to be put on pause now, which is the fastest way to mete out justice, because we are going to have these trials. We are going to have years of appeals. The system is going to get struck down, and we will all be at the starting point once again in 2012, 2013, something like that, with no convictions.

We are six and a half years after 9/11. Only half of one trial has taken place at Guantanamo. The system keeps getting struck down

because there is a rush to judgment. And, instead, I think it is important to take a pause and adopt a durable system instead.

The CHAIRMAN [presiding]. Thank you very much.

Dr. Gingrey, five minutes.

Dr. GINGREY. Thank you, Mr. Chairman.

My question is going to be directed toward Mr. Klingler, but let me kind of set the stage first. Those before us today argue in favor of more rights for the terrorist detainees, implying that their detainee is motivated by something other than a simple desire by the President and likeminded Americans to keep our Nation safe.

We are trying to balance the rights of these detainees as human beings with the rights of the American people to be safe and secure. We have bent over backwards to protect the detainees' rights, providing them with a forum to challenge their status and detention, which, by the way, I think goes beyond the Geneva Conventions, which do not bestow rights to challenge detention or the opportunity to be released prior to the end of hostilities on the POWs.

Many of those we are continually seeking to confer more and more rights upon have been involved with terrorist groups that have absolutely no respect for Geneva or international law. In fact, they behead prisoners; they fight out of uniform; they hide amongst women and children.

My question is, where does it stop? How far is the liberal elite going to go to ensure that the terrorist detainees have all the rights afforded American citizens under the Constitution?

This is the same group of people who want to make it more difficult for us to listen to the foreign communications of suspected terrorists, thus more difficult to prevent terrorist attacks, while at the same time continuing to provide more rights to those who do commit these acts.

Mr. Klingler, this is absolutely appalling to me. Does the review process currently in place provide the detainees the ability to challenge their detention? And do you believe that those we capture trying to kill us should, in turn, be provided the rights reserved for American citizens under the Constitution?

Mr. KLINGLER. There is a series of ways that detainees can assert——

Dr. GINGREY. Mr. Klingler, if you don't mind, if you are turn that mike directly toward your mouth, I would appreciate it.

Mr. KLINGLER. Thank you. Is that better?

Dr. GINGREY. That is better.

Mr. KLINGLER. There are a series of ways that detainees can now press their rights in federal court. I think the main issue is how broad those rights should be and what interests should be taken into account in figuring out the scope and breadth of those rights.

I would focus on two things. One is the point that you are making, the extent to which the detainees are U.S. citizens or have ties to the United States. For the detainees at issue, they don't.

And traditionally—and under established Supreme Court precedent—for particular components of the Constitution, they don't have the same degree of underlying substantive rights. Now, that affects particularly the military commission process.

The second area of discussion surrounds the habeas proceedings themselves. And there they clearly do have habeas rights. The

question there is, then how do you conduct those proceedings in a way that legitimately reflects the military and national security interests at stake?

And there, it is a question of what type of hearing we are going to have. Is it going to be a trial-like hearing, a show hearing that really brings into question a whole range of issues surrounding Guantanamo that are extraneous to the immediate issues before the court, in terms of the substantive evidence supporting detention?

And is there going to be a wide latitude for judicial policymaking in that context? Or, as the government has argued before Judge Hogan, is it going to be a relatively straightforward process?

And then the third is the review process that is still on the books in relation to the federal court review of the CSRT process. And there, the attorney general has suggested that that is highly duplicative of the habeas proceedings and—I understand the government is seeking to have those at least held in abeyance. And I think that that would be appropriate.

Dr. GINGREY. In the few seconds I have got left, let me ask you a follow-up. Does the right of the terrorist detainees to confront their accuser mean they need to be brought to America? Do we have to bring soldiers out of combat, as an example, so the detainees get to confront their accuser?

Mr. KLINGLER. Well, I would argue that the right of confrontation is a criminal right that wouldn't apply in the habeas context at all and that it would be perfectly appropriate for courts to allow that evidence to be presented through hearsay evidence, rather than pulling American soldiers from Iraq and Afghanistan.

Dr. GINGREY. And, finally, if the courts forced the release of certain detainees, can they be released in the United States? Do judges have the right to say where they can be released?

Mr. KLINGLER. That is an open issue. I think that that is very possible, and I expect that the detainees' lawyers will argue that.

Dr. GINGREY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Dr. Snyder.

Dr. SNYDER. Thank you, Mr. Chairman.

For you sitting at that table that are defense attorneys in this business, I hope that you won't go out of here thinking you are going to have opportunity that sometime to use the Miranda absence as a way to get your clients off the hook.

There is not now—nor has there ever been—any interest by any Member of Congress in applying the Miranda warnings to the battlefield. And I don't know why that topic keeps coming up. It was a red herring, every year it has been brought up since this war began. And there is not even point in talking about.

Mr. HUNTER. Would the gentleman just yield on that for one second?

Dr. SNYDER. No, Mr. Duncan. It is 11:55. Most of us have been here for almost two hours. The clock finally has been working after an hour and 50 minutes. It wasn't used. And I am going to take the remaining time I have.

You will have all the time, unlimited time you want to when the rest of us are done. And let me please finish my question, because I don't have——

Mr. HUNTER. Well, then if the gentleman is going to bring up an issue that I brought up, and he wants to discuss it in a meaningful way——

Dr. SNYDER. Mr. Chairman——

Mr. HUNTER [continuing]. I hope he would give me the opportunity to respond to it, because that issue was brought up and that was offered as a part of the UCMJ.

Dr. SNYDER. Mr. Chairman, I would respectively request that my five minutes be begun anew.

Mr. HUNTER. And I would second his request. I think that is fine.

The CHAIRMAN. Start the clock over again.

Dr. SNYDER. Thank you very much.

The CHAIRMAN. There.

Dr. SNYDER. I will repeat what I had said, which is there is no interest in this Congress in applying any Miranda warning to the battlefield. And if anyone were to apply it, I can assure you that every Member of Congress and the American people would be shocked and would not want that. So don't—you defense attorneys, don't take heart by anything said here today.

Colonel Davis, what I wanted to ask you about was—in your statement, I sensed almost hopelessness that the military commissions can ever be revived with the integrity that you thought they would have at the beginning of it. But you—a glimmer of hope when you give four suggestions about how to give them. And I want to read what you say in your statement.

One of them is ensure the independence of each component in the military commission process. Another one, make openness and transparency of the proceedings an imperative. The fourth one, expressly reject the use of evidence obtained by undue coercion.

It is the first one that concerns me the most here, in which you say put the military back into military commissions and take the politics out. And then your written statement you provide to us—and you are very clear. You highlight, "Take the politics out."

And, unfortunately, we have had over the last several years too many examples in our justice system in this country of political influence, this most recently in the report that has just come out in the last few days, in which officials in the Justice Department have been castigated by the Justice Department for political influence. And Monica Goodling, I think, has been very candid about her having stepped over the line. And this obviously is not over yet.

As I read your written statement, you are at least implying, if not alleging, that you thought there was political influence being exerted leading up to the 2006 congressional elections in this country and then also that political influence was being exerted perhaps to help Prime Minister Howard in Australia, who subsequently lost his election.

Is that your allegation here?

Colonel DAVIS. Yes, sir. And I think I described in a statement—it was September, I believe, 28th of 2006 was when Deputy Secretary of Defense Gordon England, right after the high-value detainees were transferred to Department of Defense (DOD) custody,

said that there could be strategic political value in getting some of them charged quickly, which was, you know, weeks before the November midterm elections.

Dr. SNYDER. I think in your written statement you said it was six weeks before the 2006 election. You know, I think you are all—Mr. Hunter has been very eloquent today, as have some of you, about the importance of these trials is it is not just our safety. It is bringing justice to those families that lost so many people on September 11, 2001.

And to see this process—you may not be right, Colonel Davis. You are a very well-respected man. You may not be right in your allegation, but I think, Mr. Chairman, these allegations concern me as much as anything we have read today, that it is not just some political appointee stepping in, in the spirit of, "Colonel Davis, you are not doing this job well enough," but stepping in, in the spirit of trying to influence an ally's election or trying to influence the congressional election.

I don't know where this aspect of this hearing today is going to go, but it is very concerning to hear a man of your experience and the position that you held in Guantanamo make those kind of allegations.

And, Mr. Chairman, I will yield any remaining time I have to Mr. Hunter for any comments he wants to make about the Miranda warnings.

Mr. HUNTER. Well, I thank my colleague for yielding and would simply say to my colleague that that was—that when we had our testimony, with respect to what body of law we were going to follow when we put together the MCA, we had witnesses who testified that they thought the UCMJ, the Uniform Code of Military Justice, was the right blueprint.

Now, it was important for us to establish what ramifications that would have. And when I asked the question, what would that mean on the battlefield?

In fact, the very colonel you have in front of you here, who I think you find to have some good degree of credibility, testified, if we adopted that—and you may recall, that was actually recommended by several Members of the Senate who were initial architects of the bill, that we follow the UCMJ, he testified to us, he said, "You can't do that." Or he said, "If you do it, you are going to require Miranda on the battlefield."

So that is not a red herring that is thrown up as a matter of something that is trivial to the discussion. That was a real ramification of a substantive direction that was testified to by witnesses and recommended by some of the architects of the bill.

We are now looking at some expansions that may take place, in terms of the rights of the accused. I think it is an absolutely appropriate question to ask him.

And I thank the gentleman for yielding to me so that I might describe that.

The CHAIRMAN. The time has expired.

Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

We are a very blessed people. We are 1 person out of 22 in the world, but we have a fourth of all the good things in the world. I have often asked myself the question, "Why?"

It is certainly not because we have the world's best work ethic. All you have to do is look at some of the immigrants that are among us, and that will be clear.

It is not because we have the most focus on technical education. This year, India will graduate three times as many engineers as we graduate and China will graduate six times as many engineers as we graduate.

It is not because we have the most commitment to the nuclear family. Nearly half of our children are born out of wedlock.

There may be other reasons, but I think that it is largely because of our enormous commitment to civil liberties. There is no other constitution or no other bill of rights in the world that comes close to ours. I think this has created, established an environment in which creativity and entrepreneurship can flourish.

To deny these rights, I think, puts at risk that we can continue to be who we are. If we set aside these great constitutional guarantees, even for national security reasons, have we not admitted that the enemy has already won?

And most important security of all, the insurance of our civil liberties, is seriously at risk because, who next by edict might be denied these great constitutional guarantees?

Therefore, I was very dismayed by our Gitmo statement that, one, since the detainees were unlawful combatants, they should not be afforded the protections of the Geneva Conventions—I don't know how they thought to get around Geneva IV—and, two, since they were not on U.S. soil, the constitutional protections did not apply.

One might logically conclude from these statements that we intended to treat these detainees in ways precluded by the Geneva Conventions and our Constitution. The constitutional issues seem very clear to me. If they were under our control, no matter where they were physically, our Constitution applied.

Even if I agree that unlawful combatants should not be afforded Geneva Convention protection, how can I know that they are unlawful combatants minus a court trial that found them so? My declaring them so doesn't make it so. Does not the simple declaration that a detainee is an unlawful combatant violate our treasured presumption of innocence?

If we affirm our right to do this, even for national security reasons, have we not put at risk the rights of all of us, because by simple edict, in some future emergency, any of our constitutional protections could be set aside.

Where have I gone wrong in my thinking?

Mr. KLINGLER. That is a question to me, is it? I agree with most of what you said. I think that national security should not trump constitutional rights.

I think, though, that what is at issue is what the scope of those constitutional rights are. I don't think—and I don't think that the courts' precedents support the conclusion that simply because a person is under the control of the U.S. military or even at Guanta-

namo outside of the United States proper, that the full range of constitutional rights apply.

I would direct you to *Verdugo-Urquidez* and the case decided there, some of the insular cases. So the issue isn't balancing or setting aside constitutional rights, but ensuring that there is a clear understanding of what those are and that there isn't an assumption that, simply because the suspension clause has been held to apply to Guantanamo, that the full range of constitutional rights does so.

I don't think that is what the Supreme Court said. I don't think that is how you can fairly read the decision.

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

The CHAIRMAN. Thank you.

Loretta Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman. And thank you, gentlemen, for being before us. I know some of you have been before us before.

You know, I think we find ourselves in this position because it really was the job of the Congress to provide for a structure for the military commissions. And we just didn't do it. We allowed the Administration to do it. I believe they did a bad job of it.

I know that I had legislation in a bill drawn many years before we ever got to the Military Commissions Act and asked both the chairman and the ranking member at that time to give us a hearing on it and, unfortunately, didn't happen.

After three court rulings, including Supreme Court rulings with *Hamdan,* all of a sudden we realized it was our job, Article I, Section 8, to do this. And we put forward an MCA, one which I voted against, by the way, in particular because of the habeas issue.

So here we come back again with the same issue. In fact, I had some legislation, a revised bill, H.R. 2543, which we have been revising with this latest court case to address some of the problems created by the MCA.

And Justice Kennedy, in his majority opinion, invites us, us, the Congress, to find innovative solutions. That is on page 67 of the opinion. And he also states that certain accommodations can be made to reduce the burden of habeas proceedings that are placed on the military without impermissibly diluting protections of the writ. And that is also on page 67.

So I think we do need to address this. And at the same time, I believe that we must give due deference to military and intelligence considerations in defining the terms and the procedures that will govern the writ going forward.

You all were just asked—and with the exception of the first gentleman, who was wanted to know more circumstantial issues—you all agreed that the writ does not extend to Afghanistan, for example.

So if the Administration closes Gitmo and moves the detainees to a detainee facility in Afghanistan, detention under our U.S. Army, for example, would they then be beyond the writ of habeas? Can the Administration avoid the ruling, this recent ruling, simply by moving the detainees back to Afghanistan, where many of them were captured?

And I want to say that this is a very important, pertinent question, because there are many, including Members of this Congress, who continue for the call to close Gitmo.

And I have always felt that closing Gitmo would mean the transfer of these detainees back to Afghanistan, where they would have less access to the media, because it is a combat zone, less access to this Congress, as the overseer to some of this, again, because it is a combat zone, less access to the International Red Cross and others.

So would these prisoners also be deprived of habeas if they were moved back to Afghanistan? That is my question for all of you.

Mr. OLESKEY. Let me take the first crack at that, Congresswoman. The court now has jurisdiction over—the habeas courts have jurisdiction over everyone in Guantanamo, as far as I know.

I don't think that the courts would permit the Executive unilaterally to move people within its jurisdiction on pending habeas cases to Afghanistan or anywhere with the intent of ousting the jurisdiction of the courts. And I don't believe that the Executive would do that, understanding and knowing that these cases are pending.

I think Secretary Gates has made many important statements about his views about Guantanamo. There is nothing in what he says that leads me to believe that he would be a party to any such action.

So while it is a theoretical possibility, I don't think the Administration would do it. It would set up a conflict with the courts that would be very damaging. And I think, if it was attempted, that the courts would act to prevent it.

Mr. KATYAL. Let me begin by thanking you for your historic leadership on these issues. I wish that Congress had listened to you many years ago. We would have had trials underway and a system that would have been stable. And, instead, we find ourselves six and a half years later without a trial taking place.

With respect to closing Guantanamo, I don't think the reason to close Guantanamo is really just about human rights of the detainees. It is about America's self-interest. As Secretary Rice and Secretary Gates have said, Guantanamo is a foreign policy disaster. And so I think the reasons for closing it are not as much about the detainees but about us.

I think if the detainees who are currently there are moved outside to an area outside of court control, I do think that the federal courts may have something to say about it, with respect to those current detainees.

Ms. SANCHEZ. What about the future of somebody in action, caught in the same way, and now held in the prison in Afghanistan, controlled by the U.S. military, even though there are Afghan laws, those necessarily wouldn't apply to our facility holding somebody who is a combatant supposedly against us?

Mr. KATYAL. Precisely correct, that is—and I think that is happening now, that is, there aren't many detainees being brought to Guantanamo. And the reason Guantanamo exists, the reason we used it in 2001 wasn't because the military liked the weather. It was because the Bush Administration had a legal fiction that they

could bring people there and have them outside of the control of the United States courts.

Now the Supreme Court has emphatically rejected that idea, so Guantanamo has outlived its usefulness, in terms of being an escape from federal court processes.

The CHAIRMAN. The gentlelady's time has expired. The monitor is not working, but time is up.

Ms. SANCHEZ. I love being called on that after waiting for two hours. Thank you, Mr. Chairman.

The CHAIRMAN. You bet.

Five minutes, Mr. Murphy.

Mr. MURPHY. Thank you, Mr. Chairman. And I thank the panel for being here today.

I would start by saying, Colonel Davis, thank you for your service to our country. And I think it is very appropriate that today, in your opening testimony, you cited the prosecutor for the World War II saboteurs who said that—he said this in 2001 in his op-ed, as you mentioned—that how we prosecute al Qaeda members will say just as much about us as it will say about those al Qaeda members.

The petitioners in the *Boumediene* case simply asked the court to make a ruling on exactly who the Administration can indefinitely hold as an unlawful enemy combatant, pursuant to the 2001 Authorization for Use of Military Force. The court, however, has been silent on that issue.

In subsequent cases after the *Boumediene*, they make their way through the courts, such as the *al-Murri* case and the *Parhat* case. It is becoming increasingly clear to this Congress, and myself specifically, that we will have to re-examine this question in the near future.

Mr. Oleskey, as counsel in the *Boumediene* case, let me ask you. In your opinion, does the 2001 AUMF allow the President to detain in perpetuity someone who has little to no tangential connection to al Qaeda and who is not engaged in any belligerent acts against the United States? And a follow up: Does the Constitution give the President this authority?

Mr. OLESKEY. I think that the Supreme Court hasn't spoken definitively to the second point, so we don't know what they will say, but it would be my view that the implication of *Boumediene* is that the Constitution does not give the President the authority to indefinitely detain someone suspected or accused of terrorist activity.

The Constitution and our statutory scheme say there is a criminal justice system. And if there is terrorist activity that is not—that disqualifies you from POW status, then you indict the person. And we have had many examples of successful indictments and prosecutions.

So I think that that is where we are headed on the second question. And your first question, again, was——

Mr. MURPHY. Well, one, does the Constitution give the President the authority to do so? And then——

Mr. OLESKEY. I think the better view is that you in the Congress intended to give the President limited authority to go after people directly involved in the atrocity of September 11th.

Instead, I think what the cases show is the Administration used that language to pick up people all over the world on a variety of bases, many of them people who appear to be innocent of any wrongdoing at all, others of whom may have had some activity with radical groups that had nothing to do with September 11th.

The great strength of the habeas process that we are now at last embarked upon is it should sort out who those people are and if they have a connection to September 11th. And that is within the authorization. Then they presumably will continue to be held and some of those people, as we have been discussing, would be the subject of military commissions, where they may be found guilty or may not.

The rest ought to be found—if they are not connected to September 11th, then not within that resolution—to be ordered released, subject to the Executive's right to negotiate their return to some place that is safe for them and for us.

Mr. MURPHY. Yes. And I think that, as the panel understands up here and as the members understand, obviously, this is a new case all coming out. We are looking at—as today is July the 30th, we have had two significant cases, obviously, the *Parhat* case, where we are talking about the 17 Chinese, and then *al-Murri* case, where we are talking about the citizen of Qatar who was a U.S. resident.

So to follow up on my first question, if the *Parhat* decision and the *al-Murri* decisions, especially considering the opinion of Judge Wilkinson, who I think we would all agree is a conservative, but dissented in this case, and very well-respected, especially considering his opinion of Judge Wilkinson, if that is any guide, the Administration's broad definition of who can be indefinitely detained under the AUMF is going to be struck down as either unconstitutional or, more likely, in my opinion, outside the authorization of the AUMF.

If that is the case, it is possible that many detainees held at Gitmo and those held at other U.S. military facilities around the world are going to be released unless the courts and the Congress of the United States come up with a new legal framework for deciding who will be detained.

So, Mr. Oleskey, if the court holds that the Administration is acting outside the scope of the AUMF, how do you see a path forward for this Congress to work in a bipartisan manner to reach a new legal and constitutionally valid framework that ensures that we are detaining those who are the most culpable and pose the greatest risk, while not, as Judge Wilkinson I think astutely noted, breaching this country's most fundamental values?

If you could comment, I would appreciate it.

Mr. OLESKEY. I think that is a fair point. I remember that back when these cases were working their way up, Judge Green in the district court asked the deputy solicitor general, "Suppose a little, old lady in Switzerland is asked to send money to an orphanage in Afghanistan. She doesn't know it is an al Qaeda front, but American intelligence does. Do you say the AUMF, Mr. Deputy, allows her to be seized in Switzerland by the American military, taken to Guantanamo, and held indefinitely?"

And the answer was, "Yes, that is the government's position."

So I agree with the premise of your question, Congressman. The definition has been treated by the Administration as hugely overbroad and misused.

In terms of what happens, I think I disagree with Mr. Katyal on the special courts that he has been advocating. I think the criminal justice system is perfectly competent to deal with people who committed crimes against the United States.

That the crimes are unconnected with 9/11 doesn't make them any less crimes, if they are within the scope of our federal criminal statues, such as the bombing of the USS *Cole,* the Khobar Towers bombings in Saudi Arabia, the first bombing of the U.S. World Trade Center. Those are all examples of how our criminal laws can deal with and have dealt effectively with people who have committed legitimate terrorist actions.

Whether there is any role for Congress to play, I think, is a matter that I would at least like to see you wait on while some of these habeas cases go forward and we see what the facts are and what the judges do. After that, as Mr. Katyal and others have suggested here today, there may be a role for Congress to weigh in deliberately, as your question suggests, with a thoughtful approach to redefinition.

I don't think that would be useful now, because we have a process that at long last is underway, in which facts are going to be found very soon by experienced federal judges.

Mr. MURPHY. Thank you, sir.

Would anyone else on the panel like to comment? Colonel.

Colonel DAVIS. Oh, I think if you try to treat these as ordinary criminal cases, it is a naive approach. These are not—these guys didn't rob the corner liquor store. I think there is a war component to this.

I was not a fan of—there are a number of folks that have pitched the national security courts in some form or another. Initially——

Mr. MURPHY. You can continue to answer. I just can't ask anything else.

The CHAIRMAN. Go ahead and answer the question.

Colonel DAVIS. Okay. Initially, I was not a huge fan of it. I still think the Military Commissions Act was a pretty good piece of legislation that, if it was implemented properly, could render fair trials.

I am beginning to come around to the national security court concept. What I would like to see—I think there is a war component to terrorism; it is not your ordinary Title 18 type of crime—would be a national security court that combines both military and federal judges and takes the best aspects of the Military Commissions Act, the CIPA procedures, and federal and military law.

Because I think what—you know, we keep talking about Guantanamo, and that is the immediate, you know, issue in front of us, but I think this is a longer term issue. And whatever the solution is needs to address the Guantanamo problem, plus terrorism, you know, over a longer perspective.

And, again, I think Guantanamo is grossly mischaracterized. I mean, I used to be a bail bondsman, so I have seen a lot of jails. It is a pretty decent place, but it has become such a blight on the

country that perhaps it is worth closing it just to—or try to erase that stain.

Mr. MURPHY. Thank you, gentlemen.

Thank you, Mr. Chairman.

The CHAIRMAN. Yes, thank the gentleman.

You will note the monitor is working again.

Mr. MURPHY. Yes, sir.

The CHAIRMAN. Mr. Cummings.

Mr. CUMMINGS. I would direct this to all of you or whoever wants to answer. First of all, I think it is very important that—and I know you all share this—that we safeguard our Constitution and the rights under that Constitution. I think this is our watch and we have a duty to do then.

Boumediene suggested that habeas corpus might not be constitutionally required if there were suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

As such, do you believe that the comprehensive protective laws governing prisoners of war under the Third Geneva Convention, which the United States has decided is inapplicable to members or affiliates of al Qaeda or the Taliban, but which would be applicable in almost any conceivable future armed conflict against another nation-state, should be applied to detainees, particularly those suspected of being affiliated with al Qaeda or the Taliban?

If you do believe that such obligations should be afforded to these individuals, what dangers exist in the United States failing to ensure that these detainees' rights are protected as POWs?

How can we ensure as a Nation that we are balancing our priority of protecting our Nation from any prospective act of terrorism, something that we must do, while ensuring that current detainees, even those that may be allegedly associated with terrorist organizations, are provided with the protections that they are deemed to have under the international humanitarian law and customary law?

Mr. OLESKEY. I would say, if the Administration had adhered to the Geneva Conventions, we wouldn't have had these Supreme Court cases and we wouldn't be having this hearing today. We would have a very different kind of situation.

As I said earlier, if there are people who have committed violations of international law and American law, there are recognized procedures to follow.

The military commissions are being criticized here by lots of us for not providing adequate protection, but the same people on the panel and in the Congress who are criticizing that process are recognizing, as your question does, that we need some way to protect the United States against terrorists and ensure that they don't commit crimes again.

So whether it is an enhanced military commission, whether it is a special national security court, there is nothing inconsistent with those approaches to effectively criminalizing terrorist behavior in a different way, in a different process, and still treating people who are not put before those proceedings as POWs in accordance with international law.

So I take the premise of your question to be that we can both protect the country and respect our international obligations in a way that makes us, again, a beacon for the world in these areas and not the embarrassment we have become because of Guantanamo. And I agree with the premise.

Mr. CUMMINGS. Well, going back to something that Mr. Davis wrote in his testimony—and he talked about how criminals we are punishing sort of after the fact, and these detainees are sort of before the fact, we are trying to prevent.

And, you know, I guess that does present a very different kind of set of circumstances when you are trying to prevent something from happening, as opposed to saying you did something and now we are going to punish you.

And I am just trying to figure out, where did that concept come from, that prevent concept?

Mr. OLESKEY. Well, in the law of war, it comes from the notion that an enemy soldier can be lawfully held during the duration of the conflict so that he cannot return to the battlefield.

But what the Administration has said is that the whole world is a battlefield, not just Afghanistan or Iraq, and therefore anybody picked up who can be claimed to be a member of some radical group or terrorist group, or that knows somebody who is, or to provide some support, however innocently to that group, can be held as if they were a POW for the duration of the war on terror, which, as Justice O'Connor said back in 2004, could be for the rest of your life.

So that preventive function that comes out of the law of war doesn't apply as the Administration has applied it. And that is why we have had these cases.

Mr. CUMMINGS. Thank you very much.

The CHAIRMAN. I thank the gentleman.

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

And, gentlemen, thanks for being with us and for spending as much time as you have. And, of course, this is very timely that you are with us.

But we have got this problem. You have got—the habeas right has been extended by the Supreme Court decision. And you have the prospects now of habeas being applied for—and presumably before many, many federal courts by many folks who are presently detained.

And the question is, is it appropriate for us at this point to have a direction, to put together some guidelines? I noticed—I think it is—the D.C. Circuit said, if Congress is going to do this, now is the time, because it looks like we are going to have the need for directions. I am paraphrasing, but that is essentially their statement.

You know, if you look at the—if you are a court that has been petitioned for habeas, and let us say you have a guy who says, "You know, I was picked up on a sweep in a firefight in an Afghan village, and I was apprehended because I had an AK or I had some ammo, and the reason I had that is because I am part of an ad hoc security service," or, "I am out protecting the flock of sheep that this particular village maintains. And I got picked up wrongly."

In a way, the farmer in the field argument that has been made a lot of times at Guantanamo—in fact, we have released a number of people at Guantanamo, as the colonel knows. A few of them went back and picked up arms against us, so we made a mistake in that case. We were too lenient and made a mistake of judgment.

But my point is, that is thrust in the lap of a federal court. Now, here is a court in the United States. And the habeas—and they ask—they hold a little prayer meeting with their staff and their judge and say, "How do we conduct this? What is the extent of our review? Do we try to get villagers from this small village in Afghanistan? Do we try to pull back members of the military who are in that particular squad from the 10th Mountain Division that made this sweep?"

It looks to me like it is going to be a very, very—without a prescription for how far they look, and what they do, and whether or not they have essentially a trial on the merits, it looks to me like you are going to have 101 different recipes by different courts as they try to figure out what we want them to do, in terms of a habeas review.

So what are your thoughts on this? How do you—do you think there is a danger of having—going off in 50 different directions if we don't have a prescription, or a recipe, or a set of directions as to how the court proceeds on this or how the courts proceed on this?

Mr. KATYAL. Let me begin by saying I don't think that there is some immediate crisis. We are only a month or so after the Supreme Court's *Boumediene* decision. I think we should let that process play out, as Mr. Oleskey says, with experienced federal judges. And that will then inform what this body does.

I am very worried about the number of misperceptions that have happened in this debate thus far in the past month. I mean, Representative Hunter, you know more about this issue that almost anyone, and yet you opened the hearing today by saying—and I think I am getting this quote exactly right—"The right to habeas corpus is something no American soldier enjoys."

But, of course, since 1890 in the *In re Grimley* decision, the Supreme Court has extended habeas corpus rights to American soldiers.

Mr. HUNTER. No, no, not as a POW.

Mr. KATYAL. American soldiers have habeas corpus rights. They can't be POWs because they are, after all, our own soldiers.

Mr. HUNTER. No, but I am talking about an American soldier who is a POW held in another country. And presumably I would think that would apply to POWs who are in other militaries. We don't have—when we had our German camps of soldiers in this country, did we allow them to have habeas?

Mr. KATYAL. If you are talking about other soldiers—I am sorry, I thought your statement——

Mr. HUNTER. I am talking about—yes.

Mr. KATYAL [continuing]. I thought you had said a couple of times that American soldiers did not have habeas corpus rights, and American soldiers——

Mr. HUNTER. That is exactly what I meant. An American soldier held as a POW doesn't have that right—obviously, it would be ex-

tended by another country, nor do we, to my knowledge, extend that right to other soldiers when they are a POW of our country.

In other words, a POW, whether you say he is a German POW, an Italian POW, an American POW, does not have that right. And yet people who are essentially soldiers in this war against terror now have, according to this five-to-four decision, have a habeas right. So we have extended a right which hasn't extended to combatants in a war, okay?

Mr. KATYAL. Sir, in the *Ex Parte Kiernan* decision in World War II, the Supreme Court extended the writ of habeas corpus both to Americans and to enemies, Nazi saboteurs. So it has been around for a while.

Mr. HUNTER. Those were not soldiers.

Mr. KATYAL. They were enemy—unlawful enemy combatants.

Mr. HUNTER. They were not soldiers, were they?

Mr. KATYAL. They were——

Mr. HUNTER. And so the point that I made was absolutely accurate. And that is part of—and I am not trying to beat you down, but that is the problem we have here. You have a soldier—let us say he is in Saddam Hussein's army—and he shoots at Americans with his AK–47. He has a certain bundle of rights, but a very limited bundle of rights, when he is captured.

That same person now decides he is going to be a terrorist, and he sheds the uniform, and he does something against American troops, and he ends up in Guantanamo, he now has a very different bundle of rights, indeed, one that we are defining right now with this list of rights that people have under the DCA act.

So my point is, in ways—it is interesting that in ways we have expanded the rights for people who are killing Americans in battlefields and who are engaging in what heretofore in some cases was a war that was undertaken by people in uniform.

And that is why I think—and that is why I brought up the point—and the colonel buttressed this point—when we had Members of Congress who said, "Let us give a UCMJ right," that is why we brought up the fact that, in fact, that did, indeed, encompass certain things like Miranda that would now have to be attached to that person's bundle of rights.

So my question is, you are a federal judge. You have extended a habeas right to a person who says, "Hey, I was caught up in this sweep in this remote village." Aren't you going to have a real difficulty? Because much of whether or not that person was here is now being lawfully held turns on the facts, and the facts are whether or not he was, in fact, protecting the sheep with his AK–47, protecting the herd, and he was caught up in a sweep, he was a farmer in a field, and he was not purposefully attacking American forces as the rest of the people were.

That is going to depend on the facts. And the ability of that court to retrieve those facts from a battlefield situation, which dissipated years ago, I think is going to be very difficult as a practical matter. Don't you agree with that, that that is going to be tough to do?

Mr. KATYAL. Courts can always appoint special masters. They have that existing power to go—and so they could have a military apparatus do the first cut of that. My fundamental point is this——

Mr. HUNTER. Okay, but now let me—I want you to answer this question, though. You can appoint all the masters you want, but how do you, in a real sense, ascertain what the facts were three years ago in a remote village in Afghanistan as to whether or not this guy really had a rifle or not?

Mr. KATYAL. And that is what——

Mr. HUNTER. Or had a rifle that he was using against Americans?

Mr. KATYAL. And Representative——

Mr. HUNTER. That is my question.

Mr. KATYAL. And that is what we warned about three years ago and five years ago. Let us have a system in place that is the Geneva Conventions to do that initial sorting. We didn't do that. And so now we find ourselves in a mess.

Mr. HUNTER. But you haven't answered the practical question. We are at where we are, and you are now going to have habeas proceedings. How will a federal court today some place in the United States be able to reach back and retrieve facts so that they can give this defendant a fair hearing on whether or not he was picked up in a sweep and, in fact, was not part of a body of illegal combatants?

Mr. KATYAL. We have experienced federal judges with investigative tools and the power to use special masters. Let us let that system play out and see what happens, instead of just cutting them off at the get-go and saying, "You are incapable of doing this."

Mr. HUNTER. Well, I think—I am not saying we have to tell them they are incapable, but once again you have used the statement "special masters" and they have certain powers. In a practical sense, it is going to be difficult, I think, to do that and give the guy a fair shot at—if he wants to have essentially a little trial on the facts as to whether or not he was illegally picked up. You are going to have to be able to reach back and get people who have long since dissipated from the battlefield scene.

And let me ask the other gentlemen what they think about that. Do you think that is going to be practical to be able to have without guidelines to have all these federal courts trying to come up with what they think is a fair habeas proceeding? Or do you think we should let it go and see if they can do it?

Colonel DAVIS. Sir, I think the court in *Boumediene* I think reluctantly got into the fray. I mean, I think, as they say, had there been a viable, meaningful process in place to determine, you know, who is the sheep-herder from who is the terrorist, you know, who really is the enemy, had there been a meaningful process in place, I don't think the court would have intervened.

But we are stuck now with, you know, the court inserting itself into this process. So I think, you know, had we a year ago fixed the CSRT process to make it a meaningful review, we might not be sitting here today.

Mr. HUNTER. I know. But we are here today, Colonel.

Colonel DAVIS. Right.

Mr. HUNTER. So what do we do?

Colonel DAVIS. Well, again, I think we have got to look at—number one, you know, the immediate issue is Gitmo and what do we do with the 265 guys sitting at Gitmo? The solution has to be big-

ger than that, as what do we do with the next group that comes along behind that? So, you know, Gitmo is the immediate problem, but this really requires a long-term solution. There needs to be a robust, meaningful process to sort out the enemy from the——

Mr. HUNTER. But, see, in the end, what you are going to have is basically battlefield reports, which are very sketchy. They are not detailed.

Mr. Klingler, do you have any comments? Do you think this is going to be doable by the federal courts?

Mr. KLINGLER. I think the courts have already asked for some help in this. The questions that they have already posed indicate that they are tremendously difficult issues in front of them.

The pleadings that have been filed already indicate tremendous divergence in whether we are going to have something approaching a full-blown trial or something that is very streamlined and efficient.

I do think that there is a path through this. I think it needs legislative help. I think it is the congressional imprimatur on standards of deferring to the government and the military's determinations, once they put forth a substantial degree of evidence and a streamlining of the process, to avoid the questions that you are—and the difficulties that you are pointing to.

Mr. OLESKEY. I would say, Representative, that the problem has been so far that all the issues that we have confronted have been abstract legal principles. Does habeas extend? Where does it extend? Now we are getting down to where the rubber meets the road, which is what trial judges do. They sort out the facts.

I acknowledge the premise of your question. There will be some cases where the facts are difficult. The Supreme Court already said in 2004 that perhaps you would have to have something called a declaration in that case which would summarize the evidence, subject to limited cross-examination of the person making the declaration.

But that is what courts do. And the notion that we can give you enough wisdom here to figure out a template for 275 cases to resolve the disgrace that Guantanamo has become, correctly or not, I think is far-fetched.

Let that process go on. Let the facts get sorted out. Judges can handle these issues, as Professor Katyal said. If out of that mix the whole system still cries out for a legislative fix, then I think you should take another look at it, yes.

Mr. HUNTER. You don't think there is a problem with having all these different federal courts without us laying out a template for how you do this? You don't think there is a problem with these courts going off in a lot of different directions?

We have all agreed that the evidence in a lot of cases will be very, very skimpy, because it is coming—it is not coming from a crime scene. It is coming from a battlefield. And so if you have a court that says—what if you have a court that says, "You know, I can't give this guy a fair trial because I can't find anybody in that village, we can't retrieve any of them, we can't ascertain who was in that Marine unit or where they are, so we think we have got to let him go," is that a possibility?

Mr. OLESKEY. Well, as you pointed out, and as we all acknowledge, more people have been released from Guantanamo by Executive decision without any input from any habeas lawyers or courts than the men who are still there.

But to your central premise, I think I disagree. There is only one federal court hearing these cases by design. That is the United States District Court in Washington, D.C., right down the street. There is only one circuit that will hear these habeas appeals, the D.C. circuit, which has already weighed in under the DTA and the habeas, so——

Mr. HUNTER. So you think they will come up with a fairly—with a good structure?

Mr. OLESKEY. I think they will come up with a thoughtful approach that will, since it is being run through only two judges, command respect and conformity by the other judges.

And if they are wrong, there will be an appeal. And at that point, when it appears there is still a dispute about some basic legal principle, as opposed to the facts about whether a man was a sheepherder or a rifleman, then you may decide to get involved, yes. But I think now is not that time.

Mr. HUNTER. Okay. Thank you very much, Mr. Chairman.

Gentlemen, thank you for your time today.

The CHAIRMAN. Gentlemen, thank you. We have three votes that have just been called for. And we have no further questions for you.

However, we must tell you we appreciate your expertise and your testimony today. It has been very, very helpful. And we hope to see you again. Thank you.

[Whereupon, at 12:39 p.m., the committee was adjourned.]

A P P E N D I X

JULY 30, 2008

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 30, 2008

TESTIMONY OF STEPHEN H. OLESKEY
OF WILMER CUTLER PICKERING HALE AND DORR LLP,
COUNSEL FOR THE GUANTANAMO PRISONERS
IN *BOUMEDIENE V. BUSH*

The Supreme Court's *Boumediene v. Bush* Decision

and Habeas Proceedings for Guantanamo Prisoners

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

JULY 30, 2008

Introduction

Thank you Chairman Skelton, Ranking Member Hunter, and Members of the House Armed Services Committee for inviting me to speak with you today on this vitally important issue. All counsel to Guantanamo prisoners are grateful for the time, energy and thought that this Committee is devoting to the issues presented by the imprisonment of our clients, who have now been held at Guantanamo Bay for more than six 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 served as Massachusetts Deputy Attorney General and Chief of that office's Public Protection Bureau. My practice generally focuses on complex civil litigation.

My experience in the critical matter before this Committee arises from my role as co-lead counsel and pro bono advocate for six Guantanamo prisoners in the period since July 2004, following the decisions of the United States Supreme Court in the *Rasul* and *Hamdi* cases. Our clients' appeal, *Boumediene v. Bush*, was decided by the U.S. Supreme Court on June 12, 2008.[1]

In October of 2001, our clients, all Algerians by birth, were working and living with their wives and children in Bosnia and Herzegovina—an American ally. None was politically active, and none had any record of terrorist-related activities or associations. Five of the six men worked for Muslim-affiliated charitable organizations involved in the U.S.-led reconstruction of Bosnia after the war.

In the immediate aftermath of 9/11, as United States government facilities overseas were put on high alert to identify potential follow-on attacks, Islamic-affiliated charitable organizations with Middle Eastern ties came under close scrutiny. In early October of 2001, the United States Embassy in Sarajevo contacted Bosnian police with a rumor that people in Bosnia were plotting an attack on the Embassy and demanded that Bosnian police arrest our clients and others. Since the United States provided no evidence to support its allegations, Bosnian authorities resisted. However, the U.S. Chargé d'Affaires Christopher Hoh threatened to close the United States Embassy and withdraw all U.S. forces and support for the peace process unless Bosnian authorities arrested our clients, and the Bosnians capitulated.

In the three-month international investigation that ensued, not a single piece of evidence linking our clients to this or any other terrorist activity was uncovered, and in January of 2002 the Bosnian Supreme Court ordered our clients' release. That same day, amid rumors that our clients would either be forcibly deported to Algeria or handed over to the United States to be sent to a new U.S. prison at Guantanamo Bay, Cuba, the Human Rights Chamber Court of Bosnia and Herzegovina (which had been established at the U.S. sponsored Dayton Peace Accords as the final authority on human rights in Bosnia) issued an order requiring the Bosnian government to take all necessary steps to prevent our clients from being taken out of the country. Nevertheless, as our clients were about to leave the Central Jail in Sarajevo, they were seized illegally and turned over to the U.S. military. In a harrowing 30-hour trip in which they were stripped naked, subjected to invasive medical exams, short shackled by their hands and wrists, blinded and

[1] *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

deafened by sensory deprivation helmets, and verbally and physically abused, the men were flown to the just-opened Camp Delta facility at the U.S. Naval Base at Guantanamo Bay, where they have been held since January 20, 2002. Our clients have now been imprisoned for six and a half years without charge, much less trial, and without being shown any evidence against them.

These six and a half years at Guantanamo have seen our client Mustafa Ait Idir pepper sprayed and beaten, his shackled fingers twisted until they broke, his face lowered into a toilet bowl and pounded to the point of paralysis and permanent nerve damage – all from gratuitous attacks by rogue guards at Guantanamo. They have seen our client Saber Lahmar's muscles atrophy and his psychological well-being decline precipitously during the two years he has spent confined to an 8' x 6' concrete cell in near complete isolation, cut off from human contact, physical activity, and all natural light. And they have seen our client Lakhdar Boumediene—now entering the eighteenth month of his hunger strike protesting against the injustices he has suffered at Guantanamo—painfully force-fed twice every day through a 43-inch tube that is excruciatingly inserted into his nostril and down into his stomach.

Our clients have been separated from their families for nearly seven years. Saber Lahmar, Hadj Boudella, and Mustafa Ait Idir each have children whom they have never met. Hadj Boudella was absent during the illness and eventual death of his daughter Sajmaa, who died of a heart defect in early 2006. Mr. Boudella learned of her death from me during a visit.

I am here today to speak about the legal process involving these six men and about 200 others still held at Guantanamo. The government has never produced any reliable evidence that our clients ever had anything to do with Al Qaeda. It has never produced any evidence that any of these men had ever taken up arms against the United States or participated in any form in any violent action against the United States. And it has never produced any evidence that any of these men is implicated in any way with the horrible events of 9/11 or with the ensuing war in Afghanistan, much less with the war in Iraq which began well after they had been confined in Guantanamo.

On June 12, 2008, in *Boumediene v. Bush*, the United States Supreme Court finally gave these men a voice. First denied legal representation and then denied access to the courts, our clients endured a more than six-year legal saga that resulted in one of the most important Supreme Court decisions of our generation. I was asked to come here today to talk about this decision and what it means both for these men and for our system of government.

On a fundamental level, *Boumediene* is about the limits of executive authority to imprison. It is about rejecting, in Justice Kennedy's words, the notion that the President has "the power to switch the Constitution on and off at will."[2] For nearly seven years this Administration had sought to create a law-free zone, hiding behind the War on Terror and the pretense of Cuban legal sovereignty over Guantanamo Bay to justify seizing hundreds of people around the world and indefinitely imprisoning them at Guantanamo. On June 12, the Supreme Court reaffirmed its role in our tripartite system of Government and gave these men the opportunity to have their habeas challenges heard in court before an Article III federal judge.

[2] *Boumediene*, 128 S. Ct. at 2258.

It should give us pause that *Boumediene* was a controversial or even a difficult decision, for what the Court has ordered is in fact quite modest. All that the Supreme Court has guaranteed is that the Government must provide credible evidence justifying why it can lawfully seize someone in a foreign country, involuntarily fly him halfway around the world, indefinitely detain him in a prison that it controls, and subject him to harsh interrogation techniques designed to break down his psychological defenses and render him helpless and compliant. The Court did not say that the President could not detain these people indefinitely; nor that they could not be brought to Guantanamo; nor that they could not be interrogated. In essence, all the Court said was that when the President does these things, these men have the right to go to court at some reasonable time and ask a federal judge to determine if further detention is justified.

On another level, the *Boumediene* decision did more than merely grant these six men their long overdue day in court. *Boumediene* also revived a principle all but dormant in American politics and law since Sept. 11, 2001: that peace and liberty are not mutually exclusive; that security is not necessarily borne of curtailed rights and increased police and military presence in our daily lives; and that, as the Court wrote, "[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[3]

Yet this principle is once again threatened as the Administration seeks to frustrate and undo the gains achieved in *Boumediene*. Under the pretense that the Supreme Court did not provide sufficient guidance for federal district courts to hear and decide these cases, the Administration now urges Congress to pass legislation that removes the decision-making process from the federal courts and for the third time following a Supreme Court decision attempts to limit the contours of a review process for Guantanamo prisoners.

The arguments that federal district courts are unfit to resolve these disputes is disingenuous and unfounded. In the few short weeks since the Supreme Court issued its opinion on June 12, federal district courts have already proved themselves capable of resolving these matters promptly, fairly, and justly, without compromising national security interests. Cases are proceeding expeditiously, with the promise of resolution of many, if not all, cases within the calendar year. Any Congressional intervention at this point would provide confusion instead of clarity and would subject these men to further undue delay in finally receiving their day in court.

I. BACKGROUND TO THE DECISION

Boumediene needs to be understood in conjunction with several other decisions in which the Supreme Court and lower federal courts have rejected the Executive's post-9/11 effort to arrogate increasingly more power for itself at the expense of the two other branches and of the American people.

In 2001, shortly after the September 11th attacks, the Afghan Northern Alliance captured Yaser Hamdi, an American citizen, on the battlefield in Afghanistan and turned him over to U.S. authorities. Three years later, when Mr. Hamdi's case reached the United States Supreme Court, the Court found that if the President decides to imprison a citizen as a supposed "enemy

[3] *Boumediene*, 128 S. Ct. at 2277.

combatant," he must provide the prisoner with a meaningful opportunity to contest his confinement.

Around the same time that Mr. Hamdi was arrested, men captured in various locations around the world by the United States or its allies were brought to a newly constituted prison camp at Guantanamo Bay. The Administration initially contended that these men retained no constitutional rights and could have no access to American courts because sovereignty over Guantanamo resided exclusively in Cuba. On the same day Mr. Hamdi's case was decided, the Supreme Court issued an opinion in *Rasul v. Bush* rejecting the Government's arguments and recognizing both that prisoners at Guantanamo had a right to legal counsel and that they had a statutory right to bring habeas actions in federal court to challenge the constitutionality of their confinement.

Lawyers from around the country immediately volunteered to represent the prisoners at Guantanamo and began filing suit in the District of Columbia District Court, arguing that their confinement was unauthorized by law. Some cases came before Judge Joyce Hens Green, who in January 2005 found that the habeas petitions stated valid claims of unlawful confinement and that their habeas actions should proceed to trial. Others, including our clients, had their cases heard by Judge Richard Leon, who granted the Government's motion to dismiss in January of 2005, holding that Guantanamo prisoners had no constitutional rights and, moreover, that Congress' Authorization for the Use of Military Force Resolution of September 18, 2001 authorized the President to take such actions.

While appeals were underway, the Administration sought alternative avenues to frustrate the relief sought in the lawsuits by asking Congress to bar the federal courts from hearing habeas applications from Guantanamo prisoners. Congress responded with the Detainee Treatment Act of 2005; and, when the Supreme Court held that the Act did not apply to already-filed cases, Congress passed the Military Commissions Act of 2006 which clarified and expanded the habeas stripping of the Detainee Treatment Act. The DTA and MCA, as these statutes are commonly known, barred prisoners from voicing their complaints in federal court through the age-old procedure of habeas corpus, a procedure that has been central to the Anglo-American legal system since the Magna Carta. Instead, they set up a limited review procedure in the U.S. Court of Appeals for the D.C. Circuit, which was given the right to make only a limited and circumscribed review of the decisions of Combatant Status Review Tribunals which had been held in Guantanamo in the Fall of 2004.

The Combatant Status Review Tribunal, or CSRT, bears little resemblance to a court. Indeed, it bears little resemblance to any agency tribunal or adjudicative body formed under law. It is not a creature of statute; Congress has never authorized the formation of a single CSRT. Instead, the CSRT was created by Deputy Secretary of Defense, Paul Wolfowitz, by a memo in July 2004. The CSRT was designed to give the appearance of process without fairness or any meaningful protection. Prisoners taken before a CSRT are forbidden from being represented by lawyers – even *pro bono* counsel at no cost to the government. They are not permitted to see any of the classified evidence against them. Any evidence the Government presents is presumed genuine and accurate. Hearsay is admissible and, indeed, is the norm; I am not aware of any case in which the Government called a live witness before a CSRT. Prisoners, for their own part, can only present witnesses that the Government finds to be "reasonably available" in Guantanamo,

which in the past has excluded people whom counsel subsequently located with a simple phone call. It is astonishing that, under those conditions, these CSRTs actually rendered decisions in favor of some prisoners, finding that they were not "enemy combatants" even on the skewed, one-sided record the Government presented. In some of those cases, however, the Government simply convened a different Combatant Status Review Tribunal that was pressured to render the decision the Government wanted.

The DTA and MCA replaced habeas corpus fact finding hearings before a federal District Court judge with a very limited review of the CSRT proceeding. Under the DTA and MCA, the D.C. Circuit was to determine whether the CSRT decision was valid. But the D.C. Circuit procedure did not allow the prisoner to present evidence of his own, including evidence that counsel found through subsequent investigations. And the DTA and MCA did not allow the D.C. Circuit to order a petitioner's release or transfer; according to the Department of Justice's arguments, all that the court could do was remand the case for a new CSRT to hear the Government's secret evidence again.

II. *BOUMEDIENE V. BUSH*, 128 S. Ct. 2229 (2008)

After our clients' habeas cases were dismissed in January 2005, we promptly appealed to the D.C. Circuit, which held 2-1 in 2007 that the MCA had stripped all federal courts of jurisdiction to consider habeas corpus applications and that the Suspension Clause of the Constitution, which forbids the suspension of habeas corpus except in the case of rebellion or invasion, did not apply to our clients since they were aliens imprisoned outside of the United States. Since the D.C. Circuit found that our clients lacked any right to habeas review, the Circuit did not consider whether the DTA review procedure was an adequate substitute for the habeas corpus rights enshrined in the Constitution.

The Supreme Court initially declined to hear our clients' case in early 2007. However, only a few months later, in June 2007, the Court made the almost unprecedented decision to hear their appeal after all. The two principle issues facing the Court were: first, whether our clients, as aliens held in a place where the United States Government maintained effective control but lacked technical sovereignty, were entitled to the right to habeas corpus; and, second, whether the D.C. Circuit review of the CSRT procedures established by the Administration in the summer of 2004 was an adequate substitute for the right of habeas corpus.

The core of the Supreme Court's decision was that Guantanamo prisoners have a constitutional right to bring habeas actions in federal court to challenge their confinement, and that the DTA review of CSRTs was not an adequate substitute for that right. The court therefore held that the Congressional attempt to strip habeas corpus in the MCA, without an adequate replacement, was unconstitutional. This is the first time in U.S. history that the Court has struck down an Act of Congress under the Suspension Clause of the Constitution, Article I, Clause 9.

One of the principal factors underlying the Court's decision was that the Administration had brought prisoners to Guantanamo precisely to avoid federal judicial oversight. In our system of checks and balances, the Court plays a essential role in guarding against executive overreaching – a role that would be eviscerated were this or any Executive free to create holding spaces outside the U.S. where it could warehouse aliens indefinitely without concern for any judicial

oversight. The Court therefore rejected the Administration's sweeping claim that non-citizens imprisoned in territories located outside of our Nation's borders necessarily have no constitutional rights.

The Court found separation of powers principles particularly important in the context of the Constitutional guarantee of habeas corpus, which the Court described as a "vital instrument" for securing our freedoms from unlawful restraint by our Government.[4] Justice Kennedy, for the majority, noted that the Framers considered that right of such central importance they made it one of the few guaranteed rights in a Constitution that initially had no Bill of Rights.

The Supreme Court rejected the Administration's formalistic argument that the reach of habeas is determined by notions of technical sovereignty. Recognizing that aliens held abroad would not necessarily be entitled to every single constitutional right enjoyed by those within the United States, the Court sketched out a pragmatic framework to determine when it is necessary to recognize a particular constitutional right outside sovereign U.S. territory. Drawing a distinction between *de jure* and *de facto* sovereignty, the Court set out a series of factors to determine how much constitutional protection aliens held abroad are entitled to when bringing a habeas corpus action. Courts are instructed to look to, among other factors, the obstacles inherent in resolving the prisoner's entitlement to the writ, the nature of the sites of apprehension and detention, and the adequacy of the process for determining the status of the prisoner as an unlawful or enemy combatant. Given the nature of United States control over Guantanamo and the fact that the prisoners there lack any forum to effectively challenge their confinement, the Court found that the Guantanamo prisoners had a constitutional right to challenge their confinement by filing and pursuing habeas corpus in federal court.

After recognizing a right to habeas for the men held in Guantanamo, the Court confronted the question of whether the alternative procedures that the Department of Defense had established in 2004 – the Combatant Status Review Tribunals and their limited, congressionally-restricted review under the DTA – were an adequate substitute for habeas. Since the lower courts had never decided this question, the Court could have remanded the case to the D.C. Circuit to make a determination as to the adequacy of the substitute review procedure. However, given the importance of this matter and the fact that our clients (and hundreds of others) had already spent nearly six and a half years in detention, the Supreme Court elected to address this question itself.

In contrast to previous congressional substitutes for habeas, which the Court considered to have been instituted to streamline habeas actions and make habeas proceedings more efficient, here the Court concluded that Congress' explicit objective was to circumscribe habeas review. The DTA and MCA barred the Court of Appeals from inquiring into the legality of the detentions, limited the review to whether the standards set up by the Secretary of Defense had been complied with, and effectively disallowed the prisoner from presenting exculpatory evidence. Given these infirmities, the Court found the risk of error in CSRT proceedings – proceedings which could effectively result in lifetime confinement for the prisoners – to be "too significant to ignore."

[4] *Boumediene*, 128 S. Ct. at 2244.

Although the Court did not delineate exactly what process would be required, it required at a minimum that prisoners have a meaningful opportunity to contest the legality of their confinement and that the habeas court have (1) the ability to correct errors, (2) the authority to assess the sufficiency of the evidence, (3) the authority to admit and consider relevant exculpatory evidence not introduced in the earlier proceeding, and (4) the power to order conditional release.

The Supreme Court remanded the case to the Court of Appeals with instructions to remand to the Federal District Court in Washington where prompt hearings should be held.

The Dissents

The Court's 5-4 decision produced two dissents, one penned by Chief Justice Roberts and the other by Justice Scalia. The two fundamental points of disagreement separating the majority and the dissents were the reach of the Constitution outside the U.S. and the degree of deference owed by the Supreme Court to the Executive and Legislative Branches.

Justice Scalia argued that aliens imprisoned outside of the United States enjoy no constitutional protection whatsoever. He was not troubled that the Administration chose to bring prisoners to Guantanamo for the precise purpose of avoiding judicial oversight, because he found this action entirely consistent with the role of the Executive in conducting national security actions abroad. Further, finding no historical precedent for granting habeas actions to aliens held outside of the United States, Justice Scalia argued that the Court should defer to Congress and the President, whom he considered more competent to act in such matters.

Chief Justice Roberts' dissents stemmed from similar concerns. Like Justice Scalia, Chief Justice Roberts viewed the majority decision as an attempt by the judicial branch to wrest control over the detention of aliens from the President and Congress. Also like Justice Scalia, Chief Justice Roberts did not believe that aliens imprisoned at Guantanamo enjoyed sufficient constitutional protection to warrant access to the federal courts. Even granting that they enjoyed some constitutional protection, Chief Justice Roberts concluded that the procedural safeguards instituted by the Government were "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[5] Since he concluded that none of the petitioners had yet availed themselves of the review in the D.C. Circuit that the DTA provided for, he was unwilling to find the review procedure inadequate.

Two of Chief Justice Roberts' critiques rested on factual misunderstanding. First, it is not correct to assert that many prisoners had failed to seek DTA review in the D.C. Circuit. For example, every single one of our clients has filed petitions in the D.C. Circuit challenging their confinement, even while pressing their habeas appeal. Their DTA reviews had not proceeded, however, because the D.C. Circuit had not taken any action on them. Indeed, they continue to await action to this day.

Chief Justice Roberts also contended that Guantanamo prisoners enjoy more procedural protection than any combatants in United States history. He based this assertion in large part upon the stated understanding that, before the CSRT, our clients were given "personal

[5] *Boumediene*, 128 S. Ct. at 2279 (Roberts, C.J., dissenting).

representatives" – not lawyers, but military officers who were required to testify against the prisoners if asked. Chief Justice Roberts wrote that this "personal representative" was allowed to see some classified evidence and summarize it for the prisoner, unlike any other enemy combatant in history. But this statement was not correct. The personal representative, by regulation, is not an advocate for the prisoner. And while the *personal representative* is permitted to see some classified information, he or she is expressly forbidden by DOD requirements from revealing any classified information to the prisoner.

Chief Justice Roberts also asserted that the Court should not have decided that Guantanamo prisoners have a right to habeas without first deciding exactly what constitutional rights prisoners held abroad are entitled to. Since the scope of habeas protection is flexible and depends in this instance on the underlying constitutional interest, the Chief Justice contended that only by deciding what due process rights prisoners possessed could the Court determine what level of habeas protection was necessary to vindicate those rights.

This argument ignores the fact that habeas is not simply a positive right held by those whom the government imprisons. Habeas is, as the majority opinion makes clear, a fundamental restraint on governmental overreaching. That is, the degree of procedural protection owed a prisoner is determined not merely by the rights available to that prisoner, but also by the constitutional restraints placed on the government to protect against arbitrary indefinite imprisonment. This is why the test announced by the Court focuses on practical impediments to issuing the writ, such as the obstacles inherent in resolving the prisoner's entitlement to the writ, the nature of the sites of apprehension and detention, and the adequacy of the process for determining the status of the prisoner as an unlawful or enemy combatant, rather than focusing on the constitutional rights of the prisoner.

Finally, focusing again not on what was decided, but rather on what was left undecided, Chief Justice Roberts argued that the Court's failure to set out a procedure for habeas actions to proceed would impede, rather than facilitate resolution of these cases. Both Chief Justice Roberts and Justice Scalia argued that courts were particularly unfit to balance the national security interests required to determine the scope of habeas procedures for Guantanamo prisoners.

III. HABEAS PROCEEDINGS

The dissenters' arguments that the district courts are particularly unfit to determine the procedural boundaries of habeas review were immediately taken up by high-ranking Administration officials, who have argued that Congress should again step into the Guantanamo habeas picture and enact legislation for the third time.

Yet, as the six weeks since the *Boumediene* decision have shown, the dissenters' and the Administration's mistrust of the courts' capabilities is unwarranted. Immediately following the *Boumediene* decision, counsel for Guantanamo prisoners took up the habeas actions that had been dismissed or stayed in 2005. In just a few short weeks, the district judges in charge of these cases have taken concrete steps to put in place functional, just, and expedient procedures for moving them forward. In contrast to the uncertainty and delay that Chief Justice Roberts foretold, it seems clear that if not interrupted by future legislation, these cases will be resolved

promptly by experienced judges using time tested habeas procedures and without any undue intrusion or interference in our nation's security interests.

A number of habeas cases, including those of the six Bosnian men we represent, are pending before District Judge Richard J. Leon. Judge Leon has publicly stated that the 12 cases before him, which involve 35 prisoners, will be resolved by the end of 2008. Former Chief Justice Thomas Hogan has also moved swiftly to fast track the remainder of the habeas cases before him for resolution of pre trial issues.

To accommodate his ambitious schedule while still permitting sufficient time for all parties to develop and voice their positions, Judge Leon has stated that he will make some rulings from the bench instead of writing opinions "tied up with bows and ribbons." The schedule he has set dedicates the first two months to "identifying the problems and finding ways to solve the problems" inherent in a habeas proceeding. He has said that all his habeas cases will be placed on an "accelerated briefing and hearing schedule" so that they can be resolved promptly before year's end and the inevitable loss of government focus that accompanies a change of administrations.

Status reports were filed by lawyers on both sides on July 18. These reports included a statement of issues common to all cases to facilitate any possible consolidation of common issues. On July 23 and 24, meetings were held with attorneys from each side, during which Judge Leon and the attorneys began to work toward resolution of various procedural issues, including access to classified information.

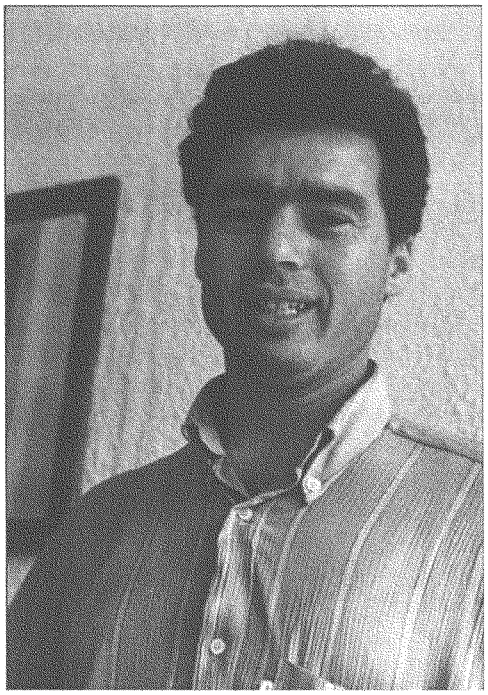
The remaining habeas cases are moving equally quickly before Judge Hogan, where the vast majority of other petitions have been consolidated to resolve all common issues. Within a week of the *Boumediene* decision, Judge Hogan held a conference with lawyers from the Department of Justice and counsel for the prisoners to develop a procedural structure for their habeas cases. Those parties are in the process of filing joint briefs to resolve many of the key issues that Administration officials have suggested are obstacles to prompt hearing and resolution of these habeas actions, including the scope of discovery, the standard for the admission of evidence, the standard governing hearsay, the application of the prisoners' rights to confront adverse witnesses and to compel witnesses to testify, the relevant standards of proof and the burdens of production.

Conclusion

Our clients and other Guantanamo prisoners' cases are now in front of Article III federal judges well qualified to assess and resolve the issues a habeas corpus challenge presents without compromising any national security interests. These issues should be resolved quickly and the cases will proceed to trial. After almost seven years of waiting, our clients will finally receive a meaningful determination of whether there are sufficient credible facts to justify their indefinite imprisonment. They will at long last have the opportunity to demonstrate that the Government's actions are groundless – a critical right that our Constitution wisely enshrines and protects. There is no sound reason for Congress to interfere in this process at this time and thereby delay habeas trials that are already far too long deferred and delayed.

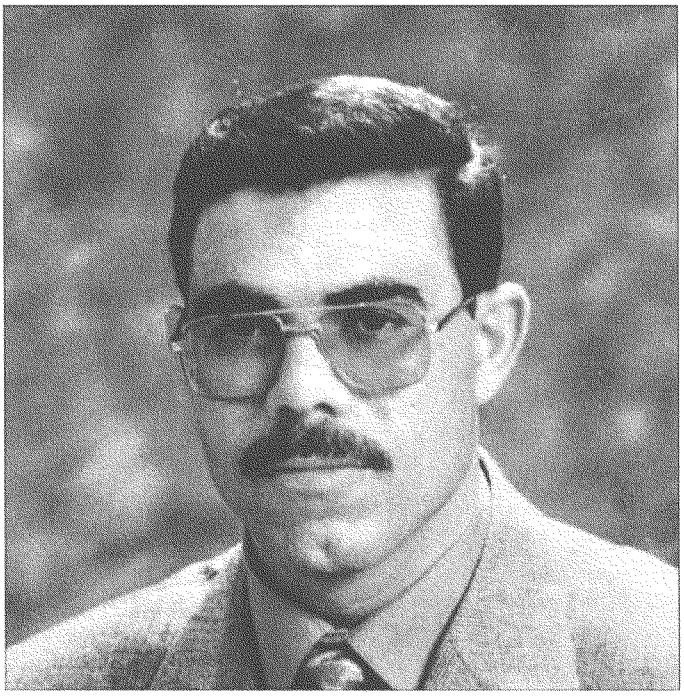
Appendix A: Photograph of Mustafa Ait Idir

Mustafa Aid Idir



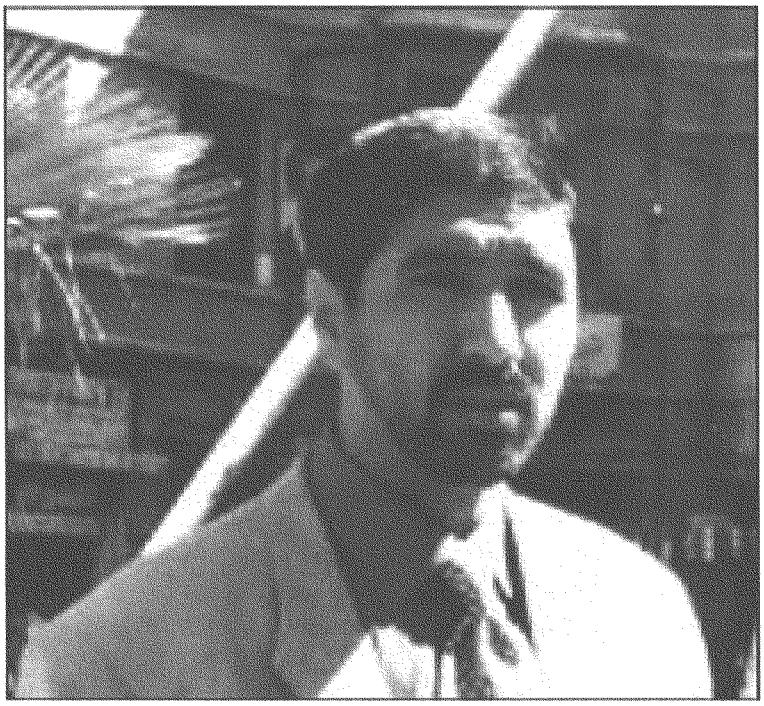
Appendix B: Photograph of Belkacem Bensayah

Belkacem Bensayah



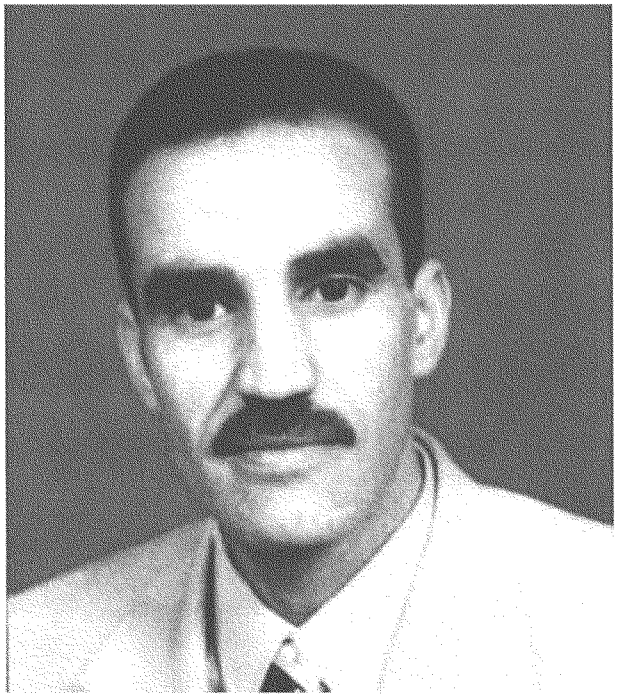
Appendix C: Photograph of Hadj Boudella

Hadj Boudella



Appendix D: Photograph of Lakhdar Boumediene

Lakhdar Boumediene



Appendix E: Photograph of Saber Lahmar

Saber Lahmar

Appendix F: Photograph of Mohamed Nechla

Mohamed Nechla

Appendix G: Photograph of Transport to Guantanamo

Appendix H: Photograph of Transport to Guantanamo

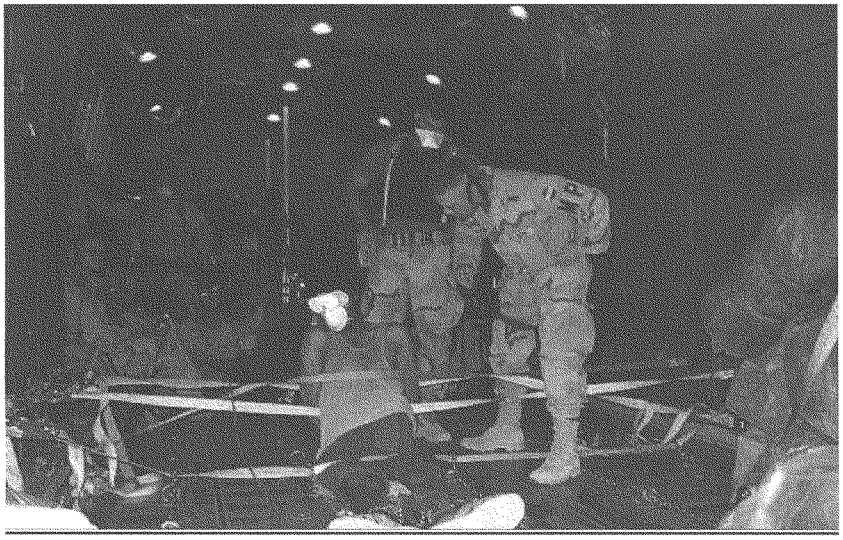
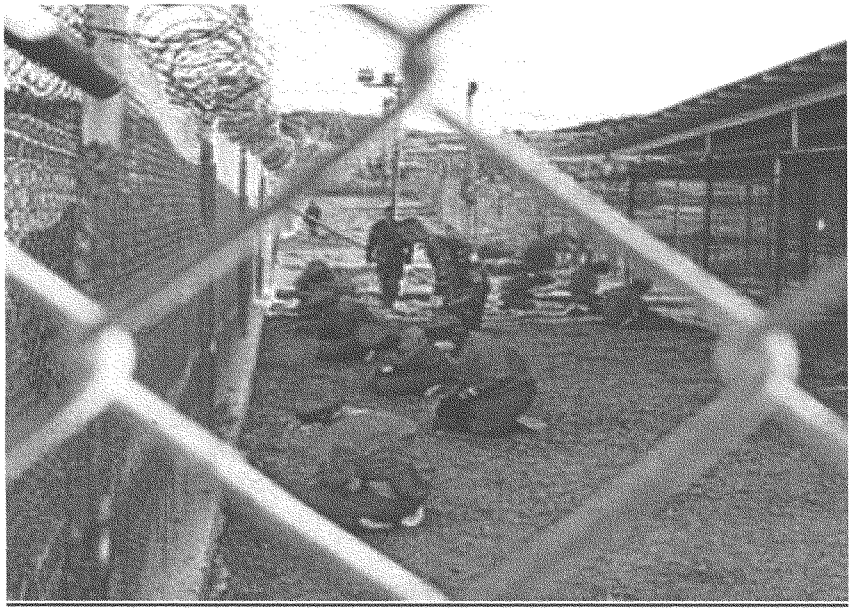


Exhibit I: Photograph of Camp X-Ray



Testimony of

Neal Katyal
Paul & Patricia Saunders Professor of National Security Law
Georgetown University Law Center

Before the
House Armed Services Committee
July 30, 2008

Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba

INTRODUCTION

Thank you Chairman Skelton, Representative Hunter, and members of the House Armed Services Committee for inviting me to speak to you today. I appreciate the time and attention that your Committee is devoting to the legal and human rights crisis surrounding the detainees at Guantánamo Bay.

On November 28, 2001, I testified before the Senate Judiciary Committee about the President's then two-week-old plan to try suspected terrorists before *ad hoc* military commissions. I warned the Committee that our Constitution precluded the President from unilaterally establishing military tribunals and that the structural provisions employed by our Founders required these tribunals to be set up by Congress. On June 29, 2006, the Supreme Court agreed in a case I argued, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The *Hamdan* decision invalidated the makeshift tribunal scheme devised by presidential fiat alone.

Indeed, every time the Supreme Court has ruled on the merits regarding the Executive Branch's procedures for detainees, it has found them lacking, forcing Congress and the Executive back to the drawing board at great expense to the nation in terms of money, time, and the trust of the American people. The latest event occurred last month, when the Supreme Court struck down a key part of the Military Commissions Act of 2006 ("MCA") in *Boumediene v. Bush*.

The basic question I am here to answer today is: What changed after *Boumediene v. Bush*? The simple answer is: Everything. The Supreme Court's decision in *Boumediene* profoundly affects the detainees currently held at Guantanamo Bay and the Military Commission system established to try many of them for war crimes. The case marked the fourth time in as many years that the Supreme Court rejected the government's attempts to defend its Guantanamo Bay policy. A clear pattern has emerged. Each subsequent decision has further chipped away at the foundation of that policy. Despite the familiar result, *Boumediene* nevertheless was unique, as it was the first Guantanamo-related case the Court heard after Congress passed the MCA. The Court invalidated part of that law as unconstitutional, in the process emphasizing that the Constitution applies to Guantanamo Bay. As a result, it is now clear that detainees held at Guantanamo Bay have a constitutionally-protected right to have an Article III court review the legality of their detention in a habeas corpus action. The practical implications of the case do not end there. The Court's holding in *Bouemediene* did more than invalidate a single section of the MCA; it stripped away the veneer to expose the eroding foundation of the military commission system.

In this testimony, I will make four points: (1) the *Boumediene* decision has called into question the foundational assumption on which the MCA is based, that the Constitution and treaties of the United States do not protect detainees at Guantanamo Bay; (2) the MCA unconstitutionally discriminates against noncitizens; (3) Congress, after careful deliberation, should take up legislation to follow *Boumediene* and balance national security and civil liberties concerns; and (4) legislation should make clear that the military commission process is no substitute for the Great Writ of habeas corpus.

The Constitution Now Applies to Guantanamo Bay

The MCA was enacted as a direct response to the Supreme Court's decision in *Hamdan v. Rumsfeld*.[1] The Court in that case held that the

[1] *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006) ("Hamdan is to face a military commission newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court [in the earlier *Hamdan v. Rumsfeld* decision, available at 126 S. Ct. 2749 (2006)]").

President did not have the authority to try detainees by military commission without specific Congressional authorization, and that the system established by the President violated the requirements of the Geneva Conventions. The main goal of the MCA was to establish military commissions at Guantanamo in which the Government could try detainees charged with war crimes. It is evident that the MCA reflected two fundamental beliefs about the rule of law and Guantanamo: (1) that the Constitution did not apply there; and (2) that international treaties had no force there. *Boumediene* eviscerated the first belief and the second is bound to suffer the same fate.

In the myriad cases challenging its detention methods, the Government consistently argued that fundamental provisions of the U.S. Constitution did not apply in Guantanamo because the U.S. lacked *de jure* sovereignty there. Accordingly, the Government's view was that the Constitution did not constrain its detention policy. This was a troubling assertion, but such a view was not limited to the Executive branch; the prevailing view by Congress' MCA supporters was the same.[2]

In *Boumediene*, the Supreme Court flatly rejected a formalistic approach to determining the Constitution's reach, and instead approached the question functionally. "Guantanamo . . . is no transient possession. *In every practical sense*, Guantanamo is not abroad; it is within the constant jurisdiction of the United States." 128 S. Ct. at 2261 (citations omitted) (emphasis added). The Suspension Clause explicitly limits suspension of the writ of habeas corpus to times of "rebellion or invasion."[3] Given the historical importance of habeas corpus as a linchpin of liberty, the Court asked whether it was "impractical or anomalous" for this Constitutional

---

[2] *See, e.g.*, Hamdan v. Rumsfeld: *Establishing a Constitutional Process: Before the S. Comm. on the Judiciary*, 109th Cong. 36 (statement of Sen. Sessions) (July 2006) ("But all the provisions that are engrafted in the United States Code, State law, and Federal constitutional privileges are not required in military commissions. They never have been.") (on file with the S. Comm. on the Judiciary); 152 CONG. REC. S10243, 10273 (daily ed. Sept. 27, 2006) (statement of Sen. Cornyn) (stating that Guantanamo Bay detainees do not have constitutional rights); 152 CONG. REC. S10243, 10263 (daily ed. Sept. 27, 2006) (remarks of Sen. Warner & Sen. Levin); *Legal Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants: Hearing Before the S. Comm. on Armed Services*, 110th Cong. 94 (2007) (testimony of Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, Department of Defense) ("If we talk about, now, moving [military commissions] to the United States, I think then you bump up against the legal aspect, and that is, are we going to have the full panoply of constitutional protections for those individuals, by virtue of their presence on U.S. soil?").

[3] U.S. Const. art. I, § 9, cl. 2.

protection to extend beyond the nation's traditional borders.[4] Deciding that it was neither, the Court concluded that Section 7 of the MCA, which attempted to strip federal courts of habeas jurisdiction, was therefore unconstitutional. Judicial enforcement of the Suspension Clause in an area where the U.S. had complete jurisdiction and control, which was not in an active theater of war, and where there was no threat of friction with a host government was neither "impractical" nor "anomalous."[5] "[N]o law other than the laws of the United States applies at the naval station." 128 S. Ct. at 2251. "The United States has maintained complete and uninterrupted control of the bay for over 100 years." *Id.* at 2258.

The Court's logic and analysis regarding habeas corpus and detention under the MCA apply with equal force to the military commissions also established by the MCA. The structure and procedures of these commissions clearly transgress structural limits on the powers of the U.S. government and violate fundamental constitutional guarantees. In invalidating part of the MCA, the *Boumediene* Court was unequivocal. It reminded Congress that: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[6] In short, *Boumediene* confirmed what we already knew: Congress cannot switch the Constitution on and off as it pleases. "Our basic charter cannot be contracted away like this."[7] To paraphrase Chief Justice Marshall in *Marbury v. Madison*, it is emphatically the duty and province of the Courts to say what the law is. To hold otherwise—to let the political branches decide where and when the Constitution applies to catch the prevailing winds of the hour—would undermine foundational principles of separation of powers that define our system of government.

It is incorrect to believe that this principle applies only to the Suspension Clause. After all, habeas corpus exists to protect "the rights of the detained by a means consistent with the essential design of the Constitution."[8] *Boumediene*'s right to habeas corpus would be meaningless if there were no substantive rights to protect. Given the myriad

[4] *Boumediene*, 128 S. Ct. at 2255.
[5] *Id.* at 2261.
[6] *Id.* at 2259 (quotation omitted).
[7] *Id.*
[8] *Id.* at 2247.

constitutional defects inherent in the military commissions established under the MCA, Congress should consider itself on notice that the entirety of that system now rests on a crumbling foundation. In light of the serious national security concerns at stake, Congress should be proactive and act carefully rather than let the current system fall apart, piece-by-piece. It is worth bearing in mind that letting the system fall apart will have a number of other terrible consequences, including possibly having convictions reversed and individuals unable to be retried.

The second invalid assumption of the MCA was that the treaties of the United States, most notably the Geneva Conventions, have no effect at Guantanamo. It is frequently said that treaties are agreements between nations, and that courts have no business enforcing a treaty's guarantees. This is true in some circumstances, but generally speaking, the Supremacy Clause mandates that "treaties" are part of "the supreme law of the land."[9] Moreover, the Supreme Court already demonstrated in *Hamdan v. Rumsfeld* that it would invalidate a military commission system that violated the laws of war and the Geneva Conventions.[10] Yet the existing system under the MCA is fatally deficient. It not only violates the Constitution, but also various treaties of the U.S., including Common Article 3 of the Geneva Conventions, which guarantees a set of minimum rights for all combatants.

In multiple places, the MCA seeks to limit the ability to invoke the Geneva Conventions as a "source of rights."[11] This appears to be a statement of Congress's belief that the Geneva Conventions provide no independently enforceable rights, or do not create a private right of action in certain situations. Such an assertion is constitutionally dubious. Principles of separation of powers prevent Congress from enacting a statute that requires federal courts to exercise their jurisdiction "in a manner repugnant to the text, structure, and traditions of Article III."[12] A quintessential example of such an invalid statute is one that "prescribe[s] rules of decision to the Judicial Department."[13] The MCA does not diminish or alter the United States' obligations under the Geneva Conventions. Instead, it

[9] U.S. Const. art. VI.
[10] 126 S. Ct. 2749 (2006).
[11] *See* MCA Section 3 (specifically 10 U.S.C. § 948b(g)) and MCA Section 5.
[12] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995).
[13] *United States v. Klein*, 80 U.S. 128, 136 (1872).

reinforces their applicability to the military commissions it created.[14] To the extent the MCA seeks to prevent federal courts from considering federal law in certain situations, it creates exactly this serious constitutional problem. More specifically, "Congress may limit the jurisdiction of the courts, but it cannot give them jurisdiction and instruct them to decide the case without regard to applicable federal law."[15]

Boumediene's holding that detainees at Guantanamo have a right to habeas corpus further undermines this second assumption. Courts historically have granted habeas relief for treaty violations, even when a treaty does not itself confer individually enforceable rights.[16] In such cases, the treaty itself does not create the right of action or remedy for its violation—habeas does. Despite assertions to the contrary in the statute itself, military commissions under the MCA do not comport with the Geneva Conventions.[17] Accordingly, a court easily could find that trial by such a military commission is unlawful, just as the Supreme Court did two years ago in *Hamdan*. If that happened, Congress would be forced to go back to the drawing board and rethink its system for dealing with detainees at Guantanamo.

The Military Commissions Act Is Unconstitutional

The only way to solve the multiple problems created by the MCA is to repeal the entire law and pass one consistent with this nation's Constitution and principles. As it stands, the MCA discriminates against people on the basis of alienage, a violation of Equal Protection principles that are deeply ingrained in both legal doctrine and our American narrative. And in further contravention of the basic guarantees of a free society, the

[14] Section 3 of the MCA (10 U.S.C. § 948b(f)) states that a military commission established under the MCA satisfies the requirements of Common Article 3, reaffirming the relevance and applicability of the Geneva Conventions in this context.

[15] Carlos M. Vazquez, *The Military Commissions Act, The Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l L. 73, 86 (2007).

[16] *See, e.g., United States v. Rauscher*, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536 (1884).

[17] These arguments are analyzed in detail in two briefs filed in the United States District Court for the District of Columbia. See Petitioner's Reply Brief in Support of Motion for a Preliminary Injunction, *Hamdan v. Gates*, available at http://www.scotusblog.com/wp/wp-content/uploads/2008/07/hamdan-reply-on-inj-7-16-08.pdf; Amicus Brief of United Kingdom and European Union Parliamentarians, *Hamdan v. Gates*, available at http://www.scotusblog.com/wp/wp-content/uploads/2008/07/parliamentarians-brief-hamdan-7-08.pdf.

law burdens the fundamental right of access to the courts. The commissions sanctioned by the MCA also flout international law and dispense with many of the procedures fundamental to the fair administration of justice, including the prohibition on hearsay evidence. To solve these infirmities, Congress should repeal the MCA and pass a law, such as the Restoring the Constitution Act, that uses an existing, constitutionally-sound system of courts or courts-martial to deal with the Guantánamo detainees.

There are many constitutional problems with the MCA (to mention just a few of the most glaring ones, it violates the *Ex Post Facto* Clause, Suspension Clause, Define & Punish Clause, Bill of Attainder Clause, and Due Process Clause). For the sake of brevity, I will focus on just one: Equal Protection. The Equal Protection components of the Fifth and Fourteenth Amendments preclude both the restriction of fundamental rights and, independently, government discrimination against a protected class unless the law in question passes strict scrutiny review. The MCA targets both a fundamental right and a protected class, and as such it simply cannot survive the stringent constitutional standard. The statute purports to restrict the right of equal access to the courts, one of the most fundamental of rights under our legal system. Worse still, the line that divides those who do and do not receive full habeas review under the MCA is based on a patently unconstitutional distinction—alienage. The onus is on this Congress and this Committee to recognize that we can no longer tolerate this unconstitutional deviation from longstanding American law in the current war on terror.

The commissions set up by the MCA, like President Bush's first attempt to set up a system of military commissions, appear to be the first ones in American history designed to apply only to foreigners. The United States first employed military commissions in the Mexican-American war, where "a majority of the persons tried . . . were American citizens."[18] The tribunals in the Civil War naturally applied to citizens as well. And in *Ex parte Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen as well as for others who were indisputably German nationals, prompting the Supreme Court to hold:

[18] David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2030 (2005).

"Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[19]

Those who drafted the Equal Protection Clause knew all too well that discrimination against non-citizens must be constitutionally prohibited. The Clause's text itself reflects this principle; unlike other parts of the Section, which provide privileges and immunities to "citizens," the drafters intentionally extended equal protection to all "persons."[20] Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen."[21] This language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: "Congress shall have power to . . . secure to all citizens . . . the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property."[22] The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?"[23]

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country understands all too well that the kind of hatred and evil that leads to the massacre of innocent civilians is born both at home and abroad. And

---

[19] *Ex Parte* Quirin, 317 U.S. 1, 37 (1942).

[20] U.S. CONST. amend. XIV, § 1; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 388-89 (2005) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (same).

[21] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449 (1857). *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 170-72 (1998) (tracing the historical origins of the Equal Protection Clause and its use of the word "persons" to *Dred Scott*); *id.* at 217-18 n.* (stating that the Equal Protection Clause is "paradigmatically" concerned with "nonvoting aliens").

[22] AMAR, *supra*, at 173 (quoting a draft of the Fourteenth Amendment).

[23] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). Similarly, Senator Howard stated that the Amendment was necessary to "disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." *Id.* at 2766.

nothing in the MCA, nor the DTA or the Military Order that preceded it, suggests that military commissions are more necessary for aliens than for citizens suspected of terrorist activities. Indeed, both the Executive and Congress appear to believe that citizens and non-citizens pose an equal threat in the War on Terror. Since the attacks of September 11th, the Executive has argued for presidential authority to detain and prosecute U.S. citizens. And in *Hamdi v. Rumsfeld*, the Supreme Court agreed that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.' . . . [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict."[24] Likewise, this body did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force Resolution, which provided the President with the authority to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."[25]

The threat of terrorism knows no nationality; rather, it is a global plague, and its perpetrators must be brought to justice no matter what their country of origin. Terrorism does not discriminate in choosing its disciples and neither should we in punishing those who employ this perfidious and cowardly tactic. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out their despicable bidding. Former Attorney General Gonzales stated that "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[26] Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the

---

[24] 504 U.S. 507, 519 (2004).

[25] 115 Stat. 224, note following 50 U.S.C. §1541.

[26] Alberto Gonzales, U.S. Attorney General, Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006), transcript available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html; *see also Foiled Dirty-Bomb Plot Reveals Chilling New Threats*, USA TODAY, June 11, 2002, at 10A (reporting that when announcing Jose Padilla's arrest in 2002 for suspicion of planning a dirty bomb attack on U.S. soil, Attorney General John Ashcroft described Padilla's American citizenship as attractive to al Qaeda because Padilla could move freely and easily within the United States); Jessica Stern, Op-Ed., *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15 (expressing concern that al Qaeda is aiming to recruit American citizens for domestic terror attacks).

disparate procedures for suspected terrorist detainees on the basis of citizenship simply make no sense.

Further, in the wake of international disdain for and suspicion of the military tribunals authorized by President Bush in his Military Order, our country is already under global scrutiny for its disparate treatment of non-U.S. citizens. A letter signed by dozens of former diplomats that was sent to you attests that it is critical to remove this credibility gap: "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."[27] This asymmetry will not go unnoticed.

We must be careful not to further the perception that, in matters of justice, the American government adopts special rules that single out foreigners for disfavor. If American citizens get a "Cadillac" version of justice, and everyone else gets a "beat-up Chevy," the result will be fewer extraditions, more international condemnation, and increased enmity towards America worldwide.

The Military Commissions Cannot Substitute for the Great Writ

To the extent this Congress considers legislation related to the detainees, a core purpose of any Bill should be to clarify that criminal prosecution before a military commission cannot be a substitute for, or barrier to, a timely federal habeas hearing. This would seem to be an unremarkable and obvious point—military commission prosecutions and habeas review of detentions serve two vastly different purposes. But the Bush Administration has indicated that it may view criminally charging the detainees before military commissions as a vehicle to escape the Supreme Court's recent decision in *Boumediene* that the Constitution requires the detainees be granted proper and timely habeas hearings. Although only a fraction of the Guantanamo detainees have been criminally charged at this point, if the Administration's theory were successful, it could charge a great number of the detainees in an effort to forestall, or foreclose altogether, their rights to habeas hearings.

[27] Letter from William D. Rogers et al. to Members of Congress, Sept. 25, 2006.

To avoid this sort of run-around, any legislation should clarify that whether or not a detainee is prosecuted by a military commission has no bearing on his right to a timely and meaningful habeas hearing to challenge the legality of his ongoing Executive detention. In the rest of this Section of my testimony I will first explain the legal background behind this particular issue and explain why a military commission cannot and should not be a habeas replacement.

Military commissions allow for the prosecution and sentencing of individuals who are unlawful enemy combatants and have committed war crimes. Habeas hearings allow an individual who is detained to challenge the President's authority to detain him, and the legality of the ongoing detention. Although prosecution by military commission and review of the legality of executive detention are entirely different proceedings which serve wholly different functions, the Bush Administration has indicated that it views prosecution before a military commission as a substitute to a habeas hearing.[28]

To begin, there is no doubt that individuals detained at Guantanamo Bay all have the same right to habeas corpus, whether or not they are to be tried by military commission. The Administration itself conceded this point, at an earlier stage of the litigation involving Mr. Hamdan, when it stated to the Supreme Court that: "If th[e] Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for habeas corpus to challenge their detention notwithstanding the MCA, there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission."[29]

Under longstanding Supreme Court doctrine, as reaffirmed in *Boumediene*, unless Congress formally suspends the writ, it can only remove

---

[28] *See, e.g.*, Gov't Br. in Opp'n to Pet's Motion for Preliminary Injunction at 20 (July 14, 2008), *Hamdan v. Gates*, No. 04-CV-1519-JR (D.D.C.) (asserting that habeas review into Hamdan's designation as an enemy combatant is not necessary because the commissions themselves, "in conjunction with review by [the D.C. Circuit], certainly comprise a sufficient habeas substitute. . . .").

[29] Br. in Opp'n to Cert., *Hamdan v. Gates*, No. 07-15, at 12; *see also id.* at 10 ("[t]he jurisdictional provision of the MCA makes no distinction between aliens detained as enemy combatants and those who are also subject to trial by military commission, see MCA § 7(a), 120 Stat. 2636, and petitioner provides no reason why any decision of this Court in *Boumediene* and *Al Odah* would not apply to him.").

jurisdiction over habeas petitions from federal courts if it provides an adequate alternative or substitute process.[30] The Supreme Court held in *Boumediene* that a CSRT conducted by the military, and the limited review provided by the DTA, are not adequate alternatives to the writ of habeas corpus guaranteed in Article I, Section 9 of the Constitution.[31]

There are at least five reasons why trial by a military commission is no substitute for a detainee's right to a timely habeas hearing to challenge his ongoing Executive detention.

First, and most significantly, any habeas hearing to challenge the legality of a detention must have, as a possible outcome, the detainee's ultimate release from unlawful detention. This is the very purpose of the writ of habeas corpus. But the military commission process does not contemplate or permit this result. Even if a military commission proceeding results in an acquittal,[32] or a conviction is ultimately overturned, the detainee's captivity continues.[33] There is simply no mechanism in a military commission or the D.C. Circuit review of a commission that is prescribed by the MCA to end unlawful Executive detention.

Second, military commissions and habeas hearings serve entirely different purposes. The purpose of the constitutional habeas hearing recognized in *Boumediene* is to determine whether the President has authority to hold an individual as an enemy combatant. The purpose of a military commission is to criminally prosecute an individual for violating the laws of war. One foundational aspect of the laws of war is that certain people are entitled to prisoner of war (POW) or combatant immunity, and so cannot be criminally prosecuted for their participation in hostilities. Thus,

---

[30] *See Boumediene*, 128 S. Ct. at 2262 (questioning "whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus" and finding the substitute to be inadequate).

[31] *See Boumediene*, 128 S. Ct. at 2274 ("[T]he DTA review process is, on its face, an inadequate substitute for habeas corpus.").

[32] I would note, also, the statement of my distinguished co-panelist today, the former Chief Prosecutor of the Military Commissions, Col. Mo Davis. *See* Josh White, *From Chief Prosecutor To Critic at Guantanamo*, WASH. POST, Apr. 29, 2008, at A1 (quoting former Chief Prosecutor Col. Morris Davis recalling the Defense Department General Counsel stating "'We've been holding these guys for years. How can we explain acquittals? We have to have convictions.'").

[33] *See* Jeffrey Toobin, *Camp Justice; Everyone Wants to Close Guantanamo, but What Will Happen to the Detainees?*, NEW YORKER, Apr. 14, 2008, at 32.

one of the few defenses available to a defendant before a military commission is to argue that he is a lawful combatant and so cannot be tried. But, requiring a defendant in a military commission to argue that he is a lawful combatant entitled to POW status would force him to argue directly against his interests in a habeas hearing, where the detainee would wish to argue he is not a combatant at all. In sum, because a military commission is engaged in a fundamentally different inquiry than a habeas court, a commission will not hear the proper arguments to evaluate the legality of a defendant's detention. By design, the commission cannot possibly substitute for the habeas hearing.

Third, the procedures used by a military commission may be inconsistent with the Supreme Court's guidance in *Boumediene* on the requisite elements of a proper habeas hearing. For example, the commission permits the admission into evidence of testimony extracted by coercion.[34] So too, hearsay is readily admissible in commission proceedings, gravely undermining the right of confrontation.[35] In addition, the commission has already ruled that the sharply curtailed right against self-incrimination afforded to defendants under the MCA "is at odds with the balance of American jurisprudence."[36] And as I said earlier, military commission defendants are stripped of any right to invoke the Geneva Conventions, which are crucial in determining whether an individual may be detained as an enemy combatant.[37] These are just some of the reasons why a military commission proceeding lacks the proper procedures for a habeas hearing. It is for these reasons, moreover, that a military commission's own jurisdictional decision about whether a detainee is a so-called "unlawful enemy combatant" is likewise insufficient as a habeas substitute.

Fourth, the D.C. Circuit review of the final judgment of a military commission that is provided by the MCA is far more restricted than the review of CSRTs provided by the DTA—which the Supreme Court in *Boumediene* has already found an inadequate habeas substitute.[38] Most significantly, unlike the DTA-provided review of CSRTs, the MCA does not

---

[34] *See* 10 U.S.C. § 948r.
[35] *See* 10 U.S.C. § 949a(b)(2)(E).
[36] *See* Ruling on Motion to Suppress (D-030) at 3, *United States v. Hamdan*.
[37] *See* 10 U.S.C. § 948b(g).
[38] *See Boumediene*, 128 S. Ct. at 2263–69.

permit any review of the factual findings and determinations of the military commission. When reviewing a military commission, "the Court of Appeals may act only with respect to matters of law."[39] By contrast, the DTA requires judicial review of facts for challenges to CSRTs.[40] So, too, the MCA has a more restrictive provision than the DTA for the D.C. Circuit to look to the "Constitution and the laws of the United States."[41] Given that the Supreme Court has already found the DTA federal review provisions to be inadequate, it goes without saying that these inferior provisions in the MCA cannot suffice as a habeas substitute.

Fifth, as the Supreme Court reaffirmed in *Boumediene*, the writ of habeas corpus commands timely access to a hearing to review the factual and legal basis of the ongoing Executive detention. Many of the detainees have already been held in captivity at Guantanamo Bay and denied a habeas hearing for nearly seven years.[42] Given that the delay up to this point already conflicts with the core concept of habeas, a further delay to await the conclusion of military commission trials and review would be deeply problematic. Indeed, the military commissions have already demonstrated that they are incapable of a speedy trial, and the MCA places no time limit on when a military commission judgment must be finalized, raising the specter that they could be drawn out indefinitely to prevent detainees from ever getting a day in court. The near certainty of lengthy additional delay is thus another reason not to view military commission proceedings as a habeas substitute.

For these reasons, a criminal trial before a military commission should not be considered to serve as a substitute to a detainee's right to challenge the legality of his detention in a federal habeas proceeding. Given the Bush Administration's indication that it may view military commissions as a

---

[39] 10 U.S.C. § 950g(b).

[40] See DTA § 1005(e)(2)(C)(i) (with respect to CSRTs the D.C. Circuit must ensure "that the conclusion of the Tribunal be supported by a preponderance of the evidence").

[41] *Compare* the MCA provision on this point, 10 U.S.C. § 950g(c), *with* the DTA provision, DTA § 1005(e)(3)(D), 119 Stat. at 2743.

[42] *See Boumediene*, 128 S. Ct. at 2263 ("[T]he fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional."); *see also id.* at 2275 (that waiting for the D.C. Circuit to address the sufficiency of DTA review "would be to require additional months, if not years, of delay").

habeas substitute, Congress should consider explicitly making this point clear in any legislation.

Next Steps: A National Security Court?

Moving forward, perhaps the most important line in last month's *Boumediene* opinion belonged to Chief Justice Roberts' dissent: After the Supreme Court in 2004 gave Guantanamo detainees the right to habeas corpus, "Congress responded 18 months later . . . [and] cannot be faulted for taking that time to consider how best to accommodate both the detainees' interests and the need to keep the American people safe." 128 S. Ct. at 2282 n.1.

Some are ignoring the Chief's wise words and calling immediately for legislation to create a national security court as a response to the *Boumediene* decision. I support a security court. But the litany of policy questions that surround it are far too massive to be tackled in the next few months, right before a presidential election. Rushing ahead is a huge mistake that will weaken American security.

The current system of detention is totally broken. The current Administration has been asserting an open-ended power to detain people forever with little or no serious process. The result of its system not only has been that the truly innocent could potentially be detained forever, but also that the seriously guilty could call themselves mere shepherds and escape the consequences of criminal conviction. The Supreme Court wisely shut that system down. Now, what is needed is a serious plan to prosecute everyone we can in regular courts, and a separate system to deal with the small handful of cases in which patently dangerous people cannot be tried.

That's where a national security court could come in—a system that would be staffed by federal judges, with experienced counsel on both sides, in which the government would have an ability to temporarily detain a dangerous individual. It might only come into being after a criminal trial has failed. Or it might be limited in other ways—from a numerical cap on the number of detainees in the system to innovative ideas such as forcing the government to give an escalating amount of money in foreign aid to the country of origin of each detainee for every additional month of detention.

Every aspect of the system is up for grabs—from the rules of evidence to the length of an initial detention period and what an appeals system would look like. The point here is simply that there are literally hundreds of different models from which to choose.

And yet each of those models will differ from our traditional system of justice. Americans take pride in our criminal trial system—and our system works best when we convict terrorists in our court system. We showcase the rule of law—and contrast it with the despicable world of the enemy, who lacks respect for our way of life and our values. If we are to modify our system, even in the slightest of ways, we should do so cautiously, with appreciation for the risks involved.

The very worst time to contemplate such changes is a few months before a major election (and particularly when both presidential candidates have announced that they will change policy and close Guantanamo). A rush to judgment produces sloganeering without a sustainable product. Consider what happened before the last election: The Supreme Court struck down President Bush's Guantanamo trial system and Geneva Convention policies in June of 2006, and the Congress fast-tracked new legislation to try to overturn the Supreme Court three months later in the form of the MCA. Members of Congress on both sides of the aisle warned that this legislation was unconstitutional and would be struck down by the courts. But the Administration did not listen. And so here we are again, nearly seven years after the horrible 9-11 attacks with only half of a single trial completed at Guantanamo Bay, and that very law, the MCA, already struck down in part by the Supreme Court.

We need a better plan than simply looking tough if we want to demonstrate to our courts and the world that we are serious about terrorism. This country desperately needs, and deserves, a serious inquiry, perhaps catalyzed by a bipartisan national commission, to examine whether a national security court is necessary and, if so, what it should look like.

We have spent far too many years with intemperate solutions that have gotten us nowhere. Many warned the Administration that it needed a plan for the day after the Supreme Court's highly predictable decision to restore basic rights to the Guantanamo detainees—but it stubbornly clung to

notions of executive power that the Supreme Court in *Boumediene* eviscerated. If we rush into a national security court, we will need another plan for the next predictable "day after."

Conclusion

In light of the rampant constitutional and treaty-based defects that infect the entire military commission system established by the MCA, I am grateful for the attention that this Committee, and the Congress as a whole, is expending on this matter. I am pleased to answer any questions that you might have.

Statement of Richard Klingler [1]

before

The House Committee on Armed Services

on

Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba: Non-Governmental Perspective.

July 30, 2008

Chairman Skelton, Ranking Member Hunter, and members of the Committee, I appreciate the opportunity to present my thoughts on the important issues raised by the U.S. Supreme Court's recent decision in *Boumediene v. Bush*. While I have written court briefs on detainee issues as a private sector attorney and have observed related cases as a government lawyer, I address you today in my personal capacity regarding the prospective implications of that decision.

Boumediene presents very significant issues that only legislation can address effectively. Federal courts have traditionally deferred very considerably to the Executive Branch and to the Congress on matters involving military operations or foreign affairs. Killing or capturing the enemy, and preventing its attacks on us, are core military functions, and detention of persons the military has found to be enemy combatants is a central and legitimate component of the war on terrorists – as the Supreme Court has elsewhere found. The military, as directed by the President in accord with applicable legislation, should be responsible for those determinations.

Boumediene abandons that tradition of deference. The extensive, overlapping judicial proceedings that must follow threaten an unprecedented degree of judicial policy formulation in matters affecting the military's operations and the defense of the nation. At the same time, *Boumediene* provided almost no guidance to lower courts regarding the processes to be used, the detainees' substantive rights, or the protections that must be afforded to the military's interests and the nation's security interests.

The resulting problem is straightforward. In their new, undefined role overseeing military functions, civilian judges are likely to draw too directly on processes and analysis developed to protect U.S. citizens in established criminal proceedings. They are unlikely to appreciate the consequences of their decisions on the formulation of national security policy or

---

[1] Richard Klingler is a partner in the Washington, D.C. office of Sidley Austin LLP, which he initially joined in 1990 following service as a law clerk to Justice Sandra Day O'Connor. He has served in the White House Counsel's Office and as a lawyer on the staff of the National Security Council. He has been an Adjunct Fellow at the American Enterprise Institute, addressing counter-terrorism issues, and a Guest Scholar at the Brookings Institution, addressing constitutional and regulatory issues. He received law degrees from Stanford Law School and Oxford University, which he attended as a Rhodes Scholar.

the conduct of military operations. The detainees are not U.S. citizens; they are not criminal defendants; and traditional proceedings rarely implicate national security concerns.

Some portray the issue as simply ensuring that the military holds people at Guantanamo who actually threaten Americans. The issue is far broader and more complex. The *Boumediene* decision is not limited by its terms to Guantanamo and has implications far beyond, including for Iraq and Afghanistan. The resulting judicial proceedings will allow judges to review the military's evidence, but also to decide when and how the military is empowered to detain enemy combatants and how the military must conduct its processes to support the judiciary's review. They create open-ended litigation that will allow detainees, their lawyers, and related advocacy groups to seek to challenge military policy and to constrain basic military counter-terror capabilities. Particular issues extend to how to resolve multiple, overlapping judicial processes, how to protect sensitive military and intelligence information, and how to ensure that military resources aren't diverted from core tasks. And, in the end, judges may make decisions for reasons having nothing to do with the evidence of threat or may themselves make mistakes -- leading to the release of persons who do in fact seek to kill American soldiers, civilians, and their allies.

These circumstances provide a compelling case for Congress to reassert the political branches' control over policy formulation in this area. Legislation would create certainty and reduce the risks that litigation poses to military operations and national security interests. The Executive Branch and the Chief Judge of the affected court have requested action. More broadly, Congress has the opportunity to reaffirm the principles underlying the military's actions against terrorists, including detentions, and to place on sounder footing the daily actions undertaken in the field by our military and intelligence officers.

The Judicial Tradition of Deference Regarding Military Policy and Operations

Boumediene marks a sharp departure from the long-standing judicial tradition of not enmeshing courts in the oversight of military and diplomatic matters. For those matters, the federal courts have traditionally deferred to the Executive and Congress – especially when both act in tandem.

Two cases from the most recent Supreme Court Term illustrate the principles underlying that tradition that extends to the early nineteenth century. In *Munaf v. Geren*, the Court considered barring U.S. military forces in Iraq from transferring U.S. citizens from their custody to Iraqi officials who sought to prosecute them for violating Iraqi law. The Court unanimously held that "prudential concerns" prevented it from interfering with the Executive Branch's operations even though the Court had habeas jurisdiction over the matter.

It did so based on the core principles underlying the tradition of deference. "[T]hose issues arise in the context of ongoing military operations," and the "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[2] Issuing the order would also raise "concerns about unwarranted judicial intrusion into

[2] *Munaf v. Geren*, No. 06-1666, *slip op.* 11 (June 12, 2008) (internal quotations omitted throughout).

the Executive's ability to conduct military operations abroad."[3] Instead, the Constitution "requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[4] As for claims that judicial intervention was required to prevent the Iraqi government from torturing the U.S. citizens, "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."[5]

Similarly, the Court in *Medellin v. Texas* drew on this tradition in addressing whether, as a result of treaties entered by the United States, a decision of the International Court of Justice had the force of domestic law and thus pre-empted inconsistent provisions of state law – either directly or through a Presidential memorandum. The Court held that it did not. It reasoned that these and other non-self-executing treaties are not part of domestic law – not for enforcement in U.S. courts, not for pre-emption, and not for Article II's requirement that the President "take care that the laws be faithfully executed." Such treaties include the U.N. Charter and many of the humanitarian law treaties that underpin litigation against counter-terrorism and related U.S. policies.

Excluding such treaties from domestic law rested squarely on the tradition of deference. Relying on cases dating to 1829, the Court defined its role by reference to Congress' and the President's determinations. Courts could address treaty terms where Congress and the President clearly indicated that domestic law encompassed a treaty, but "[t]he point of a non-self-executing treaty is that it addresses itself to the political, *not* the judicial department … ."[6] Such "international obligations" between sovereign states were "the proper subject of political and diplomatic negotiations,"[7] and judicial action risked impairing "the ability of the political branches to determine whether and how to comply with [them]."[8]

Boumediene **and the Litigation of Military Policy and Operations**

In *Boumediene*, a bare majority of the Court sharply abandoned this tradition. It struck down, as contrary to the Constitution's Suspension Clause, a provision of the Military Commissions Act ("MCA") that limited federal judicial review of the military's determinations that certain foreign nationals should be detained in Guantanamo because they threatened U.S. forces and citizens in an ongoing military conflict. The majority held that habeas courts' review of the military's determinations, in addition to the narrower review that Congress provided via a federal Court of Appeals, was needed to "safeguard liberty" through the "separation of powers."

This unprecedented overturning of military policy was not, however, compelled by any clear basis in law – and was instead an exercise in judicial policymaking. The majority's opinion candidly acknowledged its scant legal underpinnings. Canvassing the history of the habeas writ until 1789, the majority found no case where an English or colonial court "granted habeas relief

---

[3] *Id.* 22.
[4] *Id.* 22-23.
[5] *Id.* 23.
[6] *Medellin v. Texas*, No. 06-984, *slip op.* 20 (March 25, 2008).
[7] *Id.* 24.
[8] *Id.* 15.

to an enemy alien detained abroad,"[9] or in circumstances that supported extending jurisdiction to Guantanamo.[10] Nor did it find that any later cases lent direct support, beyond suggesting that a flexible test may determine the writ's scope.

The Court did, however, find a case that had already addressed just this issue of non-citizens held by the military beyond the nation's territory – and found no habeas jurisdiction. In *Johnson v. Eisentrager*, the Court denied habeas relief to alien detainees held in post-War, occupied Germany because the detainees "at no relevant time were within the territory over which the United States is sovereign" and had been and remained "beyond the territorial jurisdiction of any court of the United States."[11] The *Boumediene* majority provided no persuasive basis for distinguishing this case.

Instead, the majority justified its decision with policy determinations. It candidly asserted the benefits of the judiciary's intervention on behalf of foreigners who the military believed threatened Americans. In focusing on the detainees' status, the majority second-guessed the military's determination of the threat posed to U.S. soldiers, civilians, and allies.[12] And, the majority simply found not "credible" the Government's claims that "the military mission at Guantanamo would be compromised."[13] A habeas court's erroneous release of a detainee who may go on to kill U.S. soldiers, civilians, and allies – as detainees erroneously released by the military have – might credibly be thought contrary to the central "military mission" at issue.

The Scope and Implications of the *Boumediene* Decision

So what issues does the *Boumediene* decision present? Seven separate areas of difficulty are immediately apparent, all contributing the potential for increased judicial policymaking over military policy and operations and for harm to national security interests.

1. Beyond Guantanamo. Perhaps most important, the majority's reasoning is not limited to Guantanamo. It could conceivably apply to Iraq, Afghanistan and elsewhere. The *Boumediene* majority made up a new, open-ended test with "at least" three factors to determine whether habeas jurisdiction applies.[14] These include (i) the petitioners' "citizenship and status," (ii) where the apprehension and detention took place; and (iii) "practical obstacles" that applying habeas jurisdiction may present.[15]

The majority decision found that these conditions for habeas jurisdiction were met at Guantanamo but did not clearly limit the decision to Guantanamo. Nor is the decision necessarily limited to long-term detention. I believe the decision is best read as limited to Guantanamo, but the factors are so flexible that a non-deferential judge could readily find a way to extend the court's jurisdiction far afield. Detainees and their lawyers have already asserted

[9] *Boumediene v. Bush*, No. 06-1195, *slip op.* 21-22 (June 12, 2008).
[10] *Id.* 16.
[11] 339 U.S. 763, 778 (1950).
[12] *Boumediene*, slip op. 37-38.
[13] *Id.* 39.
[14] *Id.* 36.
[15] *Id.* 36-37.

that U.S. courts should use their habeas powers to review the detention of foreigners held in Afghanistan.

2. Multiple federal court proceedings. The decision provides detainees with up to three paths to federal court while providing little guidance regarding the relation between those different proceedings. Under the Detainee Treatment Act, federal courts were already assessing the military's determinations made through the combatant status review tribunals. Even under the *Boumediene* majority's reasoning, this process very closely resembles the review habeas courts must now provide. The government has asked the relevant federal court to suspend the DTA process pending the resolution of habeas petitions, and some of the detainees' lawyers seek to have that federal court intervention continue. For them, two bites at the apple is better than one.

Separately, habeas review may well be available in addition to federal court review of any military commission sentences imposed on detainees, despite the MCA's provisions to the contrary. That is, just as criminal defendants convicted in the state court system or the federal court system often attempt to use habeas review to overturn their sentences, detainees' lawyers may well seek to use habeas proceedings to challenge military commission sentences – even though the MCA provides a separate and exclusive process for direct federal court review of those convictions and sentences. More significantly, detainees' lawyers have already sought to use habeas proceedings to halt the military commission trials. For the moment, they have been unsuccessful.

3. Multiple judges. Apart from the different paths to federal court, detainees' lawyers can seek habeas review from different federal judges. There is no specialized court and no necessary consolidation of cases before a single judge. Because very considerable uncertainty surrounds the substance and procedure for the new habeas petition reviews, different judges are likely to apply different standards to similar cases. Detainees' lawyers have an obvious incentive to shop for sympathetic judges. Because most habeas petitions are currently or are likely to be filed with judges in the District Court for the District of Columbia, this difficulty is one that the courts are already struggling with, and they may have some success in reducing the scale of the problem by addressing certain issues common to multiple petitions. But even this measure, if successful, would not provide uniformity across particular proceedings.

4. Procedural uncertainty. The *Boumediene* majority barely addressed the procedural burdens that the government must satisfy in habeas proceedings. As Chief Justice Roberts pointed out, the majority could not even bring itself to opine on the central issue before it of what process was due to the detainees. Depending on the scope of deference that individual trial court judges apply, these procedural standards may be appropriately deferential to the military and intelligence interests at stake, or they may be quite high. Implicitly, the majority appeared to require certain procedural protections that the federal courts' reviews of CSRT determinations do not necessarily provide. At the same time, the Court has repeatedly indicated that Congress has substantial latitude to alter the standard habeas proceedings to accommodate the government's distinct interests in holding enemy combatants. Even so, detainees' lawyers have since claimed that they are entitled to nearly trial-like procedures, including extensive rights to discovery,

witnesses, and to test the government's evidence, and substantial burdens of proof and production imposed on the government.

5. Substantive Uncertainty. *Boumediene* provided no guidance to lower courts regarding detainees' substantive rights, and how the habeas process must be crafted to accommodate whatever those rights might be. In *Hamdi v. Rumsfeld*,[16] the detained American citizen possessed the full range of Constitutional rights, yet even so the Court contemplated a very truncated habeas proceeding. That is not so for foreign citizens with no significant connection to the United States prior to their detention. Such foreigners are not entitled to many of the Constitution's protections. *Boumediene*'s finding that Guantanamo satisfied the multi-factor habeas jurisdiction test for purposes of the Suspension Clause did not amount to a conclusion that those detainees were held on U.S. "territory" or otherwise are entitled to the Constitutional protections of U.S. citizens. The majority confirmed that "our opinion does not address the content of the law that governs petitioners' detention."[17] Even so, the habeas proceedings (like the military commission trials) provide detainees' lawyers with the ability to assert a range of constitutional claims. Detainees' lawyers have asserted claims based on the Ex Post Facto Clause, equal protection principles, the Fifth Amendment, the Bill of Attainder Clause, and international law. While there are strong bases to reject these claims, certain classes of judges may well wish to make new law in this area.

6. Release and Error. A habeas petition seeks release from custody. A federal judge may well find that the military has not proved its case to the judge's satisfaction. When a detainee is ordered released in those circumstances, what conclusion can we draw? It would be foolhardy to conclude that the released detainee is harmless, that the military was wrong on the merits, or that the released detainee would not seek to kill American soldiers, civilians, and allies.

Even when release is ordered, the military may still be right. The military can legitimately consider evidence that may not be admissible in court. It may have evaluated the evidence differently, and with greater expertise. It may have required a lower standard of proof. It may have applied a different test of what constitutes a threat to the nation. The judge may find for the detainee on a range of novel legal grounds that have nothing to do with the danger the detainee poses to Americans. Or, the judge may simply err. For judges that use a baseline developed in U.S. criminal proceedings or for judges who do not accept that we are engaged in a war against terrorists, their disagreement with the military may have little bearing on whether the military had erred in its assessment of the detainee. Release may free the innocent, but also may re-arm the malicious. The military itself has itself erroneously released detainees who have gone on to fight against our soldiers and our allies. Habeas proceedings only increases the risk of erroneous release. While some have objected to the language Justice Scalia used in dissent in *Boumediene* to express this idea, his underlying point was clearly correct and remained unrebutted by the majority.

7. Classified Information. Detainee habeas proceedings are likely to implicate very sensitive military and intelligence information if they are not carefully constrained. In the traditional criminal law context, the Classified Information Procedures Act ("CIPA") provides a

[16] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[17] *Boumediene*, slip op. 69.

very unwieldy mechanism for protecting classified information when the government prosecutes defendants with full Constitutional rights. Here, where the detainees themselves are bringing suit and do not possess the Fifth and Sixth Amendment rights that limit CIPA's protections for classified information, classified information can receive considerably more protection. In detainee proceedings to date, this issue has generally been handled through ad hoc protective orders, but the government has asserted that the amount of classified information at issue and the breadth of potential disclosure have been extraordinary. Indeed, as parallel proceedings under FoIA show, obtaining sensitive military and intelligence information is often an objective of advocacy groups that participate in detainee cases. At a minimum, the potential to secure and use sensitive information provides detainees' counsel with considerable leverage.

Litigation Context. Having judges shape policy is unfortunate in the normal course, and having them shape military policy amid legal uncertainty is especially dangerous. *Boumediene* has created just the legal vacuum that may be ideal for lawyers with novel theories but far from ideal for creating the legal certainty and operational flexibility required for our military.

All litigators, including the detainees' excellent lawyers, excel at exploiting procedural and substantive uncertainties and at exploiting the related absence of restraint on judges who may be sympathetic to them or hostile to the government. The uncertainties surrounding detention threaten to create litigation difficulties similar to those surrounding death penalty cases, particularly in the 1980s and 1990s. There, a dedicated group of expert litigators and law firms, often ideologically opposed to any imposition of the death penalty, conducted decades of litigation designed to limit and delay the imposition of the death penalty. While this representation reflects a very valuable legal tradition and often noble service, it came at significant cost to the administration of justice. As a result, Congress legislated to increase certainty and reduce the scope for litigation.

The costs of advocacy litigation addressing military affairs may be considerably higher. Many of the participants in detainee litigation expressly seek to advance a conception of international law and military policy that, if accepted and incorporated into our legal system, would considerably constrain the U.S. military's actions against terrorists and in other contexts. Using U.S. court filings to advance multilateral, "soft power" sources of constraint on U.S. military power is entirely lawful and within the conventions of judicial processes. Open-ended legal proceedings may not, however, be the best way for the United States to formulate military policy now that the courts have dealt themselves into that business. Constraining habeas and other proceedings through clearer rules that advance the government's legitimate interests and reject the broader arguments advanced by various advocates will reduce the scope for judicial policymaking over military affairs.

The Need for Legislation

Some, including some in Congress, have responded to *Boumediene* by stating that the judiciary can work out the military policy issues created by the Court's rejection of Congress' statutory scheme. The many, significant difficulties outlined above should suffice to establish that legislation is required. The Administration's own request, made personally through the

Attorney General, provides further basis to legislate. If more were needed, there are additional considerations:

The judiciary itself has requested assistance from Congress. The judges of the United States District Court for the District of Columbia are the trial judges who must grapple most directly with the habeas petitions filed by detainees held at Guantanamo and in Iraq and Afghanistan. Already, that court has held initial hearings and set a briefing schedule to begin to address some of the issues common to at least the Guantanamo petitions. At the same time, the Chief Judge of that court, the Hon. Royce Lamberth, recently stated: "Guidance from Congress on these difficult subjects is, of course, always welcome" and "such guidance sooner, rather than later, would certainly be most helpful."[18]

In addition, the interests at stake are too significant to await the resolution of lengthy and often conflicting judicial proceedings. Proceedings may directly involve (i) disclosure of sensitive military and intelligence information; (ii) investigators, witnesses, and lawyers diverted from important military tasks to supporting the new civilian proceedings; (iii) costly and risky security measures involved in the transport of detainees or witnesses; (iv) the creation of burdensome evidentiary requirements; and (v) the usual burdens and costs of extensive, intensive litigation. As the Attorney General half-joked, the alternative to legislation may be devoting military resources to a "CSI Kandahar."

More significantly, many, many years of litigation creates uncertainty for our counter-terror policy. These proceedings inherently involve the formulation and implementation of military policy affecting ongoing operations and resources. In these circumstances, legal certainty and operational flexibility are at a premium for our military forces. Ongoing litigation is the antithesis of both.

Finally, the Constitution vests responsibility for these military policy matters in the Congress and the Executive Branch, not the judiciary. Apart from *Boumediene*, as discussed above, even the Court generally recognizes that principle. Legislation is the only way to constrain and direct the judiciary's role and to repair the harms caused by *Boumediene*. And especially for those who argue that Congress should serve a more robust role in the development of policy in the war on terror: now is your chance.

Legislative Considerations

Several principles or approaches might usefully guide the crafting and review of specific legislative proposals. These considerations seek to constrain and direct the judiciary's policymaking role in military affairs, accommodate legitimate government objectives, and reduce the uncertainty that litigation creates for military operations and policy.

First, legislation should reject any equivalence between the procedural and substantive rights afforded to U.S. persons and those afforded to foreign citizens with no substantial ties to the United States. While detainees' lawyers argue that the entire military commission system is

[18] *"Press Release: Chief Judge Lamberth Responds to Attorney General Mukasey's Remarks Regarding Guantanamo Habeas Proceedings,"* United States District Court for the District of Columbia (July 21, 2008).

flawed and violates equal protection principles because it is limited to non-U.S. persons, this argument has it backward. The Constitution itself affords U.S. citizens and persons with ties to the U.S. greater rights and provides the government with legitimate and even compelling reasons to distinguish between U.S. citizens and foreign nationals with no ties to this country – much less foreign nationals who our military has concluded would harm Americans and their allies. We are at war with foreign forces, fully supporting Congress' distinctions based on ties to the U.S. Nothing in *Boumediene* is to the contrary.

Second, legislation should distinguish sharply between the habeas rights afforded to criminal defendants and those afforded to persons held by the military as enemy combatants. *Hamdi* and *Boumediene* itself indicate that the criminal processes should not be applied directly into this context, and that special care must be taken to accommodate legitimate military interests. Even so, in the absence of legislation many judges will reach for familiar tools and approach the issue from an entrenched perspective.

Third, Congress has the power to craft legislation according to the balance of interests that serves the United States, independent of claims of what customary international law or open-ended treaty provisions supposedly require. Detainees' lawyers have claimed, for example, that Geneva Conventions Common Article 3 invalidates the military commission trials. This is wrong on the merits, and in any event the Supreme Court has clearly established that federal statutes supersede earlier-entered treaty obligations.[19] More broadly, the Court has recently confirmed that Congress and the President, through legislation, determine which treaty or other international obligations have the force of domestic law, and they have done so clearly with respect to Common Article 3 and the military commissions process.[20] Congress may, of course, elect to take account of international obligations while retaining very substantial discretion to define the contours of them.

Fourth, legislation should reduce the opportunities for detainees to secure multiple or overlapping remedies from federal courts. *Boumediene* found that the DTA's process of military and federal court review of detainees' status was not an adequate substitute for habeas proceedings, but did not invalidate that review process. The result: two parallel proceedings, both converging principally at the D.C. Circuit and then the Supreme Court, address largely overlapping issues. This permits detainees to have two mechanisms to present their cases, and requires the government to defend its policies and disclose information in two settings, but the DTA process remains on the books. While the courts may hold the DTA proceedings in abeyance, they may not, and legislation could usefully eliminate or rationalize this duplicative review.

Separately, the habeas proceedings intersect awkwardly with the military commission trial proceedings – both through the detainees' claims that the trials should not proceed until habeas claims are heard and the potential availability of some undetermined scope of habeas review after the trials conclude. Legislation could reaffirm and clarify that the trials can proceed, subject perhaps to only the most limited habeas review thereafter.

---

[19] *See Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).
[20] *See Medellin v. Texas*, No. 06-984, slip op. (March 25, 2008).

Fifth, legislation should reduce the burdens on the military in habeas proceedings and the scope for judicial second-guessing of military policy. At a minimum, legislation should ensure that detainees receive no greater protections than the Supreme Court had previously indicated were appropriate for U.S. citizen detainees: thus, there should be a presumption in favor of the evidence set forth in the government's return and no bar on the use of hearsay evidence.[21] A habeas proceeding is not a trial in the ordinary course and should not remotely resemble one in this context. Adopting procedural rules to fit the circumstances must also address concerns regarding protection of classified information, not holding the military to evidentiary requirements applicable to criminal proceedings, security and personnel risks related to production of witnesses, and other risks to the military's wartime operations.

Hamdi v. Rumsfeld, confirms that it is appropriate to limit habeas proceedings "to alleviate [the] uncommon potential to burden the Executive at a time of ongoing military conflict" and to simply ensure that detainees "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions."[22] The government interprets this framework as establishing a limited obligation to produce exculpatory evidence, a presumption in favor of the government's evidence, very limited discovery, limited hearings, and extensive use of hearsay testimony. *Hamdi* concerned a U.S. citizen held as an enemy combatant. The Court upheld the military's power to detain *Hamdi* and, in a plurality decision that is binding as a result of Justice Thomas's separate opinion, indicated that a habeas court's review should reflect appropriate deference to the military's determination. The Guantanamo detainees are not U.S. citizens and have no ties to the United States, and should at a minimum be afforded no greater procedural protections than U.S. citizens.

Sixth, legislation should seek to confirm that habeas proceedings should not apply equally to detainees held beyond Guantanamo. The Court has made clear that legislation will not itself settle the bounds of habeas jurisdiction. Even so, legislation could usefully confirm a sense of Congress that foreign detainees held overseas, beyond Guantanamo, are not subject to habeas jurisdiction, or at a minimum should be subject to the same "prudential" considerations that led the Court in *Munaf v. Geren* to decline to exercise that jurisdiction at the request of a U.S. citizen held in Iraq. Legislation could also provide, in the event that the courts disregarded those conclusions, even more stringent presumptions in favor of the government's return and greater restrictions on the discovery and evidence that might be available to such detainees held far afield.

Finally, Congress should reaffirm that the nation is engaged in a war against terrorists and that the military is authorized to detain members of particular terrorist groups that seek to harm American soldiers, citizens, and allies. The nub of many of the judicial disputes is simply that some members of the judiciary and the bar do not believe that we are truly at war against a terrorist threat or that war powers are appropriately deployed to detain those who would undertake acts of terror against this nation. Or, they believe that we once were at war and time has degraded the threats we face to those that can and should be managed through the criminal process. They will seek not only to have courts review the factual basis for holding particular detainees but also set rigorous limits on the military's detention powers. If members of Congress

[21] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (plurality opinion).
[22] *Id.* at 533.

truly agree with these views, they should repeal the 2001 Authorization for Use of Military Force, decline to fund important aspects of the military's ongoing counter-terror efforts, and spare our military the risks it today undertakes.

If Congress does not seek to restrict the military's counter-terrorism efforts, however, reaffirming and clarifying the bounds of the AUMF would update that authorization in light of our increased knowledge of the foes we face. It would remind the courts of the commitment of two co-ordinate branches to using all appropriate means to confront pressing threats to our national security. Doing so may even serve to shift the courts from their current course of military policymaking and return them to a centuries old tradition of deferring to the "political branches" in matters of military and foreign affairs.

House Armed Services Committee

Hearing on the Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba

July 30, 2008

PREPARED STATEMENT OF MORRIS D. DAVIS

Former Chief Prosecutor, Office of Military Commissions

I. Introduction

Chairman Skelton, Representative Hunter, Members of the Committee, I am Morris Davis. I have served for nearly twenty-five years as an active duty judge advocate in the United States Air Force. I am on terminal leave pending my retirement on October 1, 2008. I am licensed to practice law in North Carolina and before the United States Supreme Court, the Court of Appeals for the Armed Forces and the Air Force Court of Criminal Appeals. I served as the Chief Prosecutor for the Office of Military Commissions, from September 2005 until October 5, 2007, when the request I submitted a day earlier to resign from my post was accepted.

Mister Chairman, thank you for the opportunity to address the Committee on this important topic and provide some of my personal insights.[1] I devoted more than two years of my life to the military commissions and spent every day working inside that system. I know the process, the people, and the place quite well. I hope what I have to offer is helpful in the development of a credible way forward in this important endeavor.

Until my final day as chief prosecutor, I was one of the military commission's most forceful advocates. I vigorously defended the detention facility at Guantanamo Bay and the military commissions in talks around the country, in an op-ed published in the New York Times in June 2007 and in an article published in the Yale Law Journal Pocket Part on August 13, 2007, just fifty-two days before I resigned.[2] I pledged to serve as the Chief Prosecutor for as long as I believed we were committed to conducting full, fair and open trials. On October 4, 2007, I concluded full, fair and open trials were unlikely, and I asked to resign my post. I quickly went from being one of the most avid supporters of military commissions to one of its leading critics. In testimony I provided in two cases at Guantanamo Bay in recent weeks, to media interviews aired over the past several months, to op-ed pieces I wrote for the Los Angeles Times last December and the New York

---

[1] Opinions expressed herein are my personal opinions and do not represent the views of the Department of Defense or the Department of the Air Force.

[2] Davis, Morris D., *The Guantanamo I Know*, op-ed, N.Y. TIMES, Jun. 26, 2007, http://www.nytimes.com/2007/06/26/opinion/26davis.html
Davis, Morris D., *In Defense of Guantanamo Bay*, 117 YALE L.J. POCKET PART 21 (2007), http://yalelawjournal.org/images/pdfs/579.pdf

Times last February, I explained how I saw the military commissions compromised.[3] I am proud of our military justice system, but in my view the military commissions as currently constituted are neither military nor justice.

Lloyd Cutler died in 2005 after a long and distinguished legal career. Among many remarkable accomplishments, he served as White House Counsel to Presidents Carter and Clinton, and he co-founded one of the worlds' largest and most prestigious law firms. Early in his career, back in 1942, he served as the youngest lawyer on the team that prosecuted the eight Nazi saboteurs that led to the Supreme Court decision in *Ex Parte Quirin*.[4] In December 2001, nearly sixty years after the trial of the Nazis and a little more than a month after President Bush authorized the detention and prosecution of unlawful enemy combatants, Mr. Cutler published an article in the Wall Street Journal based on his experiences in similar circumstances during World War II.[5] In it he encouraged allowing the accused access to the federal courts, discouraged secret proceedings to the maximum extent possible, and recommended each accused receive competent and conflict-free representation by his counsel of choice. He said the world needed to see that justice was in fact being done and, in a real sense, the trials would be as much about the American legal system as they would be about al Qaida. If Mr. Cutler was here today I doubt he would be proud of what the past eighty months say about our legal system.

II. Preliminary Comments

My experience is in the military commissions, so the bulk of this statement addresses that aspect of Guantanamo Bay rather than the broader issue of detainee treatment in general. Before turning in detail to the military commissions, there are several preliminary points to consider in the overall discussion.

First, the aims of national security/intelligence are not the same as law enforcement/criminal prosecution. The former has a prospective focus to prevent harm in the future while the latter is retrospective and punishes those who inflicted harm in the past. There is clearly a strong national interest in conducting both of these missions effectively, but they are separate and distinct missions. Guantanamo Bay presents a unique challenge in that its primary focus from the start was intelligence – to collect information that might prevent the next 9/11 – and criminal prosecution was at best a third or fourth tier consideration. In many respects trying to adapt information collected as intelligence into evidence suitable for use in an American system of justice is like trying to fit a square peg into a round hole. That distinction is important, particularly when some urge that Guantanamo Bay cases, or future cases like them, are ordinary

---

[3] Morris D. Davis, op-ed, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story; Morris D. Davis, op-ed, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, at WK12, http://www.nytimes.com/2008/02/17/opinion/17davis.html.

[4] 317 U.S. 1 (1942).

[5] Lloyd Cutler, *Lessons on Tribunal—From 1942* , WALL ST. J., Dec. 31, 2001, at A9. Mr. Cutler died in May 2005 at the age of 87. Adam Bernstein, *Lloyd Cutler, 1917-2005: Consummate Lawyer Played an Array of Roles*, WASH. POST, May 9, 2005, at A1.

criminal cases suitable for trial in our domestic criminal courts under ordinary criminal laws and procedures. The cases often cited – Moussaoui, Padilla, Lindh, Reid, and Ressam, for example – were principally law enforcement cases from the start.[6] Cases that began in an intelligence collection mode are not comparable to those developed under a law enforcement model, and the value of intelligence in the battle against terrorism may warrant special considerations.[7] It is also important to consider where to draw the line on how far we go to induce someone to talk. There may be a single line that applies to intelligence and law enforcement, but I believe there are at least two lines, and the bar is set the highest at the criminal trial level.

Second, contrary to popular notion, not all detainees are the same. There are, in my view, three categories of detainees currently at Guantanamo Bay: (1) those we believe violated the laws of war and should be held accountable, (2) those we believe present a continuing threat to us and our allies, and warrant continued detention but not prosecution, and (3) those we would like to release or transfer to responsible nations. It is the second group, what I would call general detainees, to which *Boumediene* is most relevant as they face the prospect of indefinite detention without an opportunity for a day in court. Our obligations vary among the groupings, but we must have fair and credible processes in place for each. I argued unsuccessfully that we should segregate, preferably at separate sites, those we intend to prosecute for war crimes from those we only intend to detain during hostilities. Doing so, I thought, would mitigate the problem caused by the public's perception that all detainees are exactly the same and must be afforded the same rights and privileges.

It is important to remember that a person can be a detainee and not be a war criminal, and vice versa. What I take from the *Boumediene* decision is that we must have some meaningful process in place that ensures those we detain, regardless of whether we believe they are war criminals and subject to prosecution, are held for legitimate reasons, and if the Executive Branch is not up to the task the Courts will intervene.[8] I, as it appears a majority of the Supreme Court did at an earlier point, believed the Combatant Status Review Tribunals (CSRT) provided meaningful review. Information surfaced in the spring of 2007 that cast doubt on just how fair and robust that process really was. I, along with some others, suggested revamping the CSRT rules to address the concern apparent in the Supreme Court's decision to reconsider and grant review in *Boumediene* as well as the disconnect in the CSRT and Military Commissions Act jurisdictional

---

[6] Judge John Coughenour presided over the trial of Ahmed Ressam, commonly known as the Millennium Bomber. Judge Coughenour advocates the use of existing federal courts rather than the creation of specialized courts for terrorism cases. *See* John C. Coughenour, op-ed, *The Right Place to Try Terrorism Cases*, WASH. POST, Jul. 27, 2008, at B7.

[7] *See* Editorial, *Workable Terrorism Trials*, WASH. POST, Jul. 27, 2008, at B6.

[8] The military judge in the case of *United States v. Salim Hamdan*, Navy Captain Keith Allred, in a ruling that suppressed some of the statements obtained from Hamdan under excessive coercion, said: "Although the Supreme Court ultimately held that the *Boumediene* petitioners could claim the Writ of Habeas Corpus, the Court may not have found the Privilege available had … there been suitable alternative processes in place for determining the petitioners' status." Allred ruling, page 9, available at: http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf.

language.[9] Others intent on vindicating the CSRT process already in place prevailed, and now we confront the aftermath more than a year later, which I believe was avoidable.

Finally, with respect to the Supreme Court's decision in *Boumediene v. Bush*,[10] my personal opinion is it was wrongly decided, but I recognize that it is the Supreme Court's opinion, not my own, that controls. I do not believe foreign terrorists and their associates, whose only connection to the Constitution is a desire to destroy it, and who are held outside the United States by the armed forces during an armed conflict have constitutional rights, although they do have rights under Common Article 3 of the Geneva Conventions. When the nation's founders said "We the People of the United States" enter into the unique covenant that is the Constitution to secures its benefits to "ourselves and our Posterity," I do not believe they intended for its benefits to extend to the other side of the world to foreigners who participated in or supported a terrorist attack calculated to cripple the nation they founded. Nonetheless, if the result of the *Boumediene* decision is the question of how we deal with detainees finally gets the thoughtful consideration it has long deserved, then my optimism in the result outweighs my misgivings with the rationale.

III. Restoring the Commitment to Full, Fair, and Open Trials

I have doubts over whether it is possible nearly seven years after the start to restore credibility to anything called a military commission. Much like "Guantanamo Bay," the words alone generate negative images that may now be too deeply ingrained to ever attain legitimacy in the eyes of the world. Some – including Professor Amos Guiora from the University of Utah, Ben Wittes from the Brookings Institution, Professor Jack Goldsmith from Harvard, and my esteemed co-panelist Professor Neal Katyal from Georgetown – have proposed a national security court in varying forms. I was opposed at first, but I am warming up to the concept, particularly if it combines the talents of both federal and military practitioners and is based on the best features of the Military Commissions Act, the Classified Information Procedures Act, and military and federal criminal laws and procedures. That is, I believe, a far better approach than the naive view that these are really ordinary cases that can be easily transferred into the federal or courts-martial systems.

For purposes of this discussion, I assume it may be possible to restore credibility to the military commissions rather than pursuing other alternatives. In that regard, I generally stand by my comments in the Yale article and the June 2007 New York Times op-ed. Where I now have concerns is with respect to some aspects of how military commissions are currently administered, as discussed in more detail below. There are two indisputable points, from my perspective, to keep in mind from the start in the debate

---

[9] The CSRT regulation requires a determination of whether the detainee is an enemy combatant. The Military Commissions Act extends jurisdiction over those who are unlawful enemy combatants. The absence of the word "unlawful" from the CSRT findings led the military judges in the Hamdan and Khadr military commissions to dismiss charges for lack of jurisdiction. William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, Jun. 5, 2007, at A1. Charges were later reinstated.
[10] 553 U.S. ___ (2008).

over military commissions. First, there are some genuinely bad men at Guantanamo Bay who deserve to be held accountable for their past conduct. Second, the men and women I worked with on a daily basis – the Prosecution Task Force consisting of attorneys, paralegals, investigators, intelligence analysts, and support personnel from all of the military services, the Department of Justice, the Federal Bureau of Investigation, the Central Intelligence Agency, and other federal agencies – were without exception dedicated public servants who exhibited professionalism and integrity under very demanding circumstances. I have the utmost respect for them. They were not then, nor are they now, the problem.

I believe the Military Commissions Act of 2006 (MCA) provides a framework for full, fair, and open trials. When it was enacted almost two years ago, I believed it was a commendable piece of legislation and that is still my belief. The issues that led to my resignation stem from what happened after enactment of the MCA and how some, in my opinion, manipulated its implementation in an effort to influence outcomes. If someone empowered to do something – whether that is the President, the Secretary of Defense, or Congress – correct four main deficiencies, assuming it is not too late to restore credibility to military commissions, then I believe we could conduct proceedings that fulfill the commitment to full, fair, and open trials. The four points are: One, put the military back into military commissions and take the politics out; Two, ensure the independence of each component in the military commission process; Three, make openness and transparency of the proceedings an imperative, and; Four, expressly reject the use of evidence obtained by undue coercion.

(a) Put the Military In Military Commissions and Take the Politics Out

The President issued an order on November 13, 2001, authorizing military commissions.[11] Eighty months later, only one trial is done, and it was the result of a generous plea bargain that ensured the accused would return to his native Australia and be a free man before New Year's Eve. Some political appointees have tried to maintain a death-grip on the process and they have run it into the ground: If these truly are military commissions and an extension of the current war effort, and not a subterfuge for watered-down federal district courts as some critics contend, then this is a military mission for the uniformed military services.

In September 2006, as the House and the Senate worked on language for what eventually became the Military Commissions Act of 2006, I met with Senator Lindsey Graham, Senator John McCain, and some of their staff members. I told them that in the days since the President announced the transfer of Khalid Sheikh Mohammed and the other high value detainees from the custody of the Central Intelligence Agency to the custody of the Department of Defense, a lot of people had taken a sudden interest in military commissions and my duties as the Chief Prosecutor in particular. This included individuals from the Department of Defense as well as other federal agencies. Some were attorneys and some were not, but all had opinions on how the cases should be

[11] President's Military Order of Nov. 13, 2001 (available at: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html).

prosecuted, including opinions on trial preparation and strategy. I told Senator Graham and Senator McCain that I was concerned the military was going to be marginalized in the military commissions – kept around to present a military veneer over the Department of Justice so this appeared to be encompassed within the war effort, but stripped of any meaningful authority – unless Congress mandated that the person in charge of the prosecution and the person in charge of the defense were uniformed judge advocates. Language was added in Section 948k of the MCA that appeared to ensure military control of the prosecution and the defense.

Whether it is the treatment of detainees, appropriate techniques for intelligence gathering interrogations, or fair procedures for determining the guilt or innocence of detainees accused of war crimes, the record shows the group that consistently stood up for principles – advocating without much success that as Americans we should do the right thing – is The Judge Advocates General of the Army, Navy and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps.[12] During Congressional hearings on the Military Commissions Act it was clear that the Pentagon's civilian leadership, most notable its most senior civilian attorney Jim Haynes, at best trivialized and at worst completed ignored the advice of the military attorneys who wear the uniforms of the Soldiers, Sailors, Airmen and Marines who are, as we say in the Air Force, out where the rubber meets the ramp. Perhaps it is not surprising, then, that we end up with policies condoning simulated drowning, forced nudity, and exposure to heat and cold; processes that seek to minimize due process in the extreme; and study groups chartered to find ways to circumvent our international obligations.

A meeting was held late in the afternoon on September 28, 2006, in the office of Deputy Secretary of Defense Gordon England to talk about Guantanamo Bay detainee issues, particularly plans for the high value detainees recently transferred to Guantanamo Bay from CIA custody. In addition to me, the attendees included Mr. England, Undersecretary of Defense for Intelligence Steve Cambone, General Counsel Jim Haynes, Secretary of the Army Pete Geren, and twelve to fifteen others. Several remarks during this meeting, which lasted perhaps an hour, illustrated to me the disregard the civilian political appointees have for uniformed service members and how politics are at the center of decision-making. The midterm elections on November 7, 2006, were less than six weeks away. Mr. England said to the group to think about which of the detainees could be charged, what they could be charged with, and when they could be charged, because there could be "strategic political value" in charging some of them soon. Dr. Cambone offered that the Department of Justice needed to get significantly involved in the military commissions because they are "the pros" and have the expertise that is absent in the Department of Defense. During a discussion on finding a new convening authority to replace Major General John Altenburg who was due to leave soon

[12] See, e.g., Mark Mazzetti and Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sep. 16, 2006, at A1 (describing how the senior military lawyers "repeatedly sparred behind the scenes with Mr. Haynes, the top civilian lawyer in the Defense Department" over issues on detention, interrogation and prosecution of detainees) and Josh White, *Military Studying Raising Military Lawyers' Rank*, Dec. 21, 2005, at A29 (panel mandated by Congress recommended elevating The Judge Advocates General to three-stars to give them more authority, noting clashes between the uniformed lawyers and the political appointees serving as the Pentagon's general counsels). The rank increase was recently approved.

to return to private practice, Dr. Cambone said it should be a civilian of noteworthy standing, a person he suggested should be "a dollar a year guy."[13] As a uniformed attorney and the person who, at least on paper, was supposed to be responsible for prosecutorial decision-making, the tone of this meeting showed there was little confidence in me or other attorneys in uniform, and with the benefit of hindsight it was a harbinger of the next twelve months leading up to my resignation.

On January 9, 2007, the day Jim Haynes' nomination for a seat on the Fourth Circuit Court of Appeals was withdrawn, I received a telephone call from Mr. Haynes. He asked how soon I could charge the Australian detainee David Hicks. The telephone call was unusual for three reasons. First, it came the day after senior Department of Defense and Department of Justice officials met with representatives of the Australian government to discuss David Hicks. Second, until that moment Mr. Haynes had taken a hands-off approach with respect to my office. The few times we had talked in the previous sixteen months we discussed matters in general and not the particulars of any single case. Third, on January 9, 2007, we had no Manual for Military Commissions, no Regulation for Trial by Military Commission, no Convening Authority, and no trial judges. His inquiry was akin to asking a federal prosecutor how soon he can charge someone in the absence of a federal criminal code, federal rules of evidence, and federal judges. I explained that we could not charge anyone until the Manual for Military Commissions was published. The Manual is a substantial document that, among other things, defines the elements of each offense (i.e., the facts the prosecution must prove beyond a reasonable doubt to establish guilt). It was impossible to draft a charge when we did not know what we were required to prove to establish guilt. He asked how soon after the manual was published we would charge Hicks and if we could charge some of the other detainees in addition to Hicks. I said we would need about two weeks and that there were several other cases ready to be charged once the Manual was published. Mr. Haynes said two weeks was too long and it needed to happen sooner. I told him we would do our best, but since this was the start-up of a completely new process we would need some time to review and digest the new rules, reassess the evidence to determine how it meshes with the elements of the potential offenses, prepare charges in whatever format would be required by the Manual, and coordinate proposed charges with some other non-DoD agencies. Mr. Haynes ended the call by saying we had to get the Hicks case moving and that he would do what he could to move the Manual to completion as soon as possible.

About thirty minutes after the call from Mr. Haynes, I received a call from his Principal Deputy, Dan Dell'Orto. Mr. Dell'Orto is now the Acting General Counsel due to Mr. Haynes' resignation a few months ago. Mr. Dell'Orto said Mr. Haynes spoke with him about our conversation and he explained to Mr. Haynes that outside influence on the prosecution is prohibited. I specifically recall Mr. Dell'Orto saying "I took a wire brush to Jim and told him he can't have those kinds of conversations with you." Mr. Dell'Orto told me to disregard everything Mr. Haynes said and to do my best to get cases moving as soon as I could, but to take the time necessary to ensure it is done right. He asked if I

[13] I was not familiar with the expression "a dollar a year guy," and it took a few seconds for me to realize he meant someone who had amassed enough riches to where he would not be taking the job for the money. I also realized military officers were not "dollar a year" guys.

really thought two weeks would be enough time once we had the Manual and I told him I thought two weeks was a reasonable estimate.

The Secretary of Defense published the Manual for Military Commissions on January 18, 2007. Fourteen days later, on January 31, I received another telephone call from Jim Haynes. He said it had been two weeks since the Manual was published, so where were the charges on David Hicks? I told him that we had a draft we were vetting with our counterparts outside DoD, but we were not quite ready to sign them and serve them on Hicks. He said I promised him during our January 9 conversation that I would charge Hicks within two weeks of the Manual's publication, and that based on my assurances he made the same promises to others, and now we had no charges. I told him I was sorry, we were doing the best we could, and that in any event there was no Convening Authority to forward charges to once they were signed and served on the accused.[14] He said a new Convening Authority would be named soon, so do not let that stop us from moving forward with the charges. He asked who we planned to charge in addition to Hicks and I named four others we were considering at that point in time. Mr. Haynes was clearly annoyed and ended the call by telling me that we had to get charges done as soon as possible.

We signed charges and served them on David Hicks, Omar Khadr, and Salim Hamdan on February 2, 2007. At that time there was still no Convening Authority and no Regulation for Trial by Military Commission. The Convening Authority, Ms Susan Crawford, was appointed on February 7, five days after we charged Hicks, Khadr, and Hamdan. Ms Crawford, the most senior person in the military commission hierarchy, has a distinguished record in a number of politically appointed positions, but she had not served one day in uniform. From 2001 to 2007, the Army, Navy, Air Force and Marine Corps convened more than 50,000 courts-martial.[15] To the best of my knowledge, each of those courts was convened by a military officer, not a civilian political appointee. The Regulation for Trial by Military Commission was not published until April 27, weeks after the Hicks case ended. Some critics said the government was trying to get the train out of the station before the government finished laying the tracks. That is a fair analogy.

No one ever gave me specific reasons why it was imperative for us to charge David Hicks and others before the government finished writing the rules for military commissions, but it was widely reported in the news media the problem David Hicks was causing Australian Prime Minister John Howard in the upcoming election. We traveled to Guantanamo Bay on Saturday, March 24, 2007, intending to arraign David Hicks on Monday, March 26, a process that normally takes about an hour in the courtroom. At a press conference on Sunday, March 25, a reporter asked me if there was any talk of a plea bargain and if so what kind of sentence would I accept? I said there had been discussions between the prosecution and the defense, but there was no plea bargain and, if there was one, I considered the John Walker Lindh case a benchmark for purposes of

---

[14] Major General Altenburg stepped down as the Convening Authority in November 2006. The Secretary of Defense appointed Ms Susan Crawford as the Convening Authority on February 7, 2007.

[15] Each service reports its court-martial data to the Court of Appeals for the Armed Forces for the Court's annual report. The reports are available at: http://www.armfor.uscourts.gov/Annual.htm.

negotiations.[16] In our discussions with the defense we talked about a potential sentence in the ten to twenty year range. The defense was most interested in David Hicks returning to Australia and serving part of his sentence there. We had no objection if suitable arrangements could be made with the Australian government. On Monday morning, March 26, I received a telephone call from the Convening Authority's office informing me that the Friday night before we left for Guantanamo Bay the defense struck a deal with the Convening Authority. David Hicks would plead guilty and in return Ms Crawford agreed any sentence in excess of nine months would be suspended and Hicks would be transferred to Australia within sixty days of the date the sentence was announced. Instead of an arraignment, David Hicks entered a plea of guilty at a hearing on March 26. He was sentenced on March 30 and agreed to waive all appeals. On May 20, 2007, a Gulfstream jet landed in Adelaide, Australia, after a flight from Cuba and David Hicks walked off. He was released from the Yatala Labour Prison on December 29, 2007. A man included among a group described as the "worst of the worst" was free after serving the equivalent of a misdemeanor sentence. As Los Angeles Times reporter Carol Williams wrote: "Bringing [David Hicks'] case to the war-crimes tribunal first, and before all the procedural guidance was ready, left the impression with many legal analysts that Crawford stepped in to do [Prime Minister] Howard a favor – at the expense of the commissions' credibility."[17] Despite the effort, on November 24, 2007, John Howard lost his bid for reelection.

These are a few illustrations of how politics injected itself into the military commissions. If these truly are military commissions intended to dispense military justice, then assign the mission to the military and take politics out of the equation.[18]

(b) The Components of the Military Commissions Must Be Separate and Independent for the Process to Have Legitimacy

"The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source." The necessity for prosecutors to exercise professional legal judgment free of outside influence or coercion is recognized as a fundamental principle of a legitimate system of justice – at least it is in the war crimes court sitting in the African nation of Sierra Leone. The language in quotations comes from Article 3 of the agreement between the United Nations and the government of Sierra Leone creating a special court to punish those who committed war crimes and other atrocities during Sierra Leone's civil war.[19] Virtually identical language appears in Article 6 of the agreement between the United Nations and the government of Cambodia establishing the Extraordinary Chambers in the Courts of Cambodia to punish those who committed atrocities during the

[16] John Walker Lindh was sentenced to twenty years confinement.
[17] Carol J. Williams, *Hicks' Plea Deal Strikes Some Experts as a Sham*, L.A. TIMES, Apr. 1, 2007, at A19.
[18] Professor Stephen Saltzburg noted that the current administration is trying to move forward with the prosecutions rapidly prior to the November elections to make it more difficult for the next administration to change course. He said, "I think the desire to move forward now is to avoid this (the military commissions) being dismantled later." Jerry Markon, *Goal of the Hamdan Trial: Credibility*, Jul. 27, 2008, at A2.
[19] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002 (available at: http://www.sc-sl.org/scsl-agreement.html).

Khmer Rouge regime, as well as in the Statute for the International Criminal Tribunal for the Former Yugoslavia and the Statute for the International Criminal Tribunal for Rwanda.[20]

This fundamental principle applied in the United Nations' sanctioned war crimes courts for Sierra Leone, Cambodia, Yugoslavia, and Rwanda stands in contrast to the practice in our own military commissions. In a memorandum to me dated October 3, 2007, Deputy Secretary of Defense Gordon England mandated that the Legal Advisor to the Convening Authority (Brigadier General Thomas Hartmann) "shall directly supervise you in the performance of your duties as Chief Prosecutor." In a memorandum to Brigadier General Hartmann dated the same day, Deputy Secretary of Defense England mandated that the Deputy General Counsel (Legal Counsel – Mr. Paul Ney) "shall directly supervise you in the performance of your duties as Legal Advisor." The Deputy General Counsel (Legal Counsel) reports to the General Counsel of the Department of Defense who at the time was William J. Haynes.

During the meeting with Senators Graham and McCain in September 2006, I explained that I believed information obtained through the use of waterboarding was unreliable and not suited for use as evidence in a criminal proceeding conducted by the United States, and that I had instructed the prosecution team that we would not offer such evidence at a military commission. I expressed concern to the Senators that some outside the Office of the Chief Prosecutor had strong opinions to the contrary on waterboarding and other issues, and may attempt to influence the prosecution. The Office of the Chief Prosecutor was still recovering from an earlier incident where several junior officers thought they were being compelled to compromise their integrity, resulting in an investigation and unplanned turnover within the office. To ensure that the integrity of the prosecution team was protected, and to shield against the potential effect of outside pressure, I proposed language that Senator Graham added to Section 949b of the MCA (Unlawfully influencing action of military commission), which reads:

> "No person may attempt to coerce or, by any unauthorized means, influence—the exercise of professional judgment by trial counsel or defense counsel."

I believed this addition to the section on unlawful influence prevented those outside the Office of the Chief Prosecutor from attempted to impose their views on issues like what types of evidence the prosecution will or will not introduce at trial and what charges will be brought against particular accused. I believed this addition ensured me and my prosecutor the same prosecutorial independence recognized in the United Nations'

---

[20] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Jun. 6, 2004 (available at: http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf). "The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source." Article 16, Statute of the International Criminal Tribunal for the Former Yugoslavia, Feb. 28, 2006 (http://www.un.org/icty/legaldoc-e/index-t.htm) and Article 15, Statute of the International Criminal Tribunal for Rwanda, Oct. 13, 2006 (http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf).

sanctioned war crimes courts in Sierra Leone and Cambodia. As noted earlier, however, on October 3, 2007, when Deputy Secretary of Defense England placed the Chief Prosecutor under the direct authority of Brigadier General Hartmann, Mr. Ney, and ultimately Mr. Haynes, all individuals of superior rank and authority, and all serving outside the Office of the Chief Prosecutor, the language Senator Graham included in the MCA was rendered questionable if not worthless.[21] I submitted my resignation a few hours after I received Mr. England's memorandum.

Some argue that the level of prosecutorial independence in the United Nations sanctioned war crimes courts is unnecessary in military commissions conducted by the United States because military commissions are based upon practices recognized in the Uniform Code of Military Justice (UCMJ). This argument is flawed for two reasons. First, the leading criticism of the UCMJ is the significant role commanders and their lawyers play in the disciplinary process. We defend command involvement on the grounds that commanders are responsible for the mission readiness of their troops, and that maintaining good order and discipline is essential to mission readiness. The accused on trial in a court-martial is one of the convening authority's own troops and the trial has a direct link to the readiness of the entire organization when called upon to perform its mission. This justification, however, is totally lacking in a military commission. Ms Crawford, as the Convening Authority, is not responsible for the mission readiness of al Qaida nor does she owe any duty to Usama bin Laden to help maintain good order and discipline among his forces. Military commissions are about retribution, not readiness. Second, the level of interest in courts-martial is generally limited and when there is interest it usually is confined to a domestic audience. Military commissions are conducted before a worldwide audience. It is difficult to explain command involvement in courts-martial to a domestic audience, even to members of Congress; it is impossible to explain similar involvement in military commissions to an already skeptical international audience.

Military Commission Instruction Number 6, dated April 30, 2003, said: "The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) for the Department of Defense and then to the General Counsel of the Department of Defense."[22] Less than a year later, during the period when his confirmation for the federal appellate bench was in jeopardy, Mr. Haynes issued a new Military Commission Instruction Number 6 and removed himself from the prosecution's chain of command. The new Instruction said: "The Chief Prosecutor shall report to the Legal Advisor to the Appointing Authority and then to the Appointing Authority."[23] On April 20, 2004, the Department of Defense issued a press release saying this changed helped ensure

---

[21] This issue was litigated in an April 2008 hearing in the Hamdan case. The military judge found that through the additional language Congress expressed its intent for the prosecutors to have more protections than in the courts-martial context. This ruling is encouraging, although expressly limited to the Hamdan case. The ruling is available on the military commission web site at: http://www.defenselink.mil/news/May2008/D026.pdf.

[22] Military Commission Instruction No. 6, Apr. 30, 2003, at para. 3.A.(3) (http://www.defenselink.mil/news/Feb2006/d20060217MCI6.pdf).

[23] Military Commission Instruction No. 6, Apr. 15, 2004, at para. 3.A.(3) (http://www.defenselink.mil/news/Apr2004/d20040420ins6.pdf).

independence.[24] On October 3, 2007, Deputy Secretary of Defense Gordon England signed memoranda that reverted back to the practice abandoned in 2004 and put the prosecution back under Jim Haynes' command authority. The change implemented in 2004 and heralded as an improvement was abandoned in 2007.[25]

Additionally, the influence of the Convening Authority's staff on the Office of the Chief Prosecutor, particularly by the Legal Advisor to the Convening Authority Brigadier General Tom Hartmann, compromises the ability of the Convening Authority to be neutral and detached, and it compromises the independence of the prosecution. I testified on unlawful influence during a hearing in the Hamdan case at Guantanamo Bay in April 2008, and I described the same events discussed above.[26] In a ruling released on May 9, 2008, the military judge found my assertions were true and that Brigadier General Hartmann broke the law by violating the statutory prohibition on exerting influence or coercion on the prosecution.[27] To ensure a fair trial and to restore public confidence in the proceedings, the judge ordered Brigadier General Hartmann disqualified from further involvement in the Hamdan case.[28] Many observers waited to see how the Department of Defense would respond to the finding that the Legal Advisor broke the law, and most expected he would be relieved of his duties. Instead, in the weeks since the judge's ruling, eight more detainees were charged, charges against Khalid Sheikh Mohammed and the other 9/11 accused were referred to trial, and Brigadier General Hartmann remains on the job. Confidence in the military commissions had been on a steady decline for some time and DoD choosing to ignore that Brigadier General Hartmann broke the law perpetuates the perception that the military commissions are rigged to achieve predetermined outcomes rather than to do justice. The independence of each component is essential for the military commissions to gain credibility.

(c) Openness and Transparency Are Critical to the Legitimacy of Military Commissions

The most perfect trial in the history of mankind will be viewed with skepticism if it is conducted in secret behind closed doors. Justice Louis Brandeis was right nearly seventy-five years ago when he said, "Sunlight is said to be the best of disinfectants."

---

[24] Dept. of Defense Release No. 384-04, Apr. 20, 2004 (available at http://www.defenselink.mil/releases/release.aspx?releaseid=7277).

[25] The General Counsel of the Department of Defense wrote himself out of the Chief Prosecutor's chain of command in 2004 during the height of the criticism of his role in shaping detainee treatment policies. He was placed back into the Chief Prosecutor's chain of command in 2007 after his nomination for appointment to the federal appellate bench was withdrawn.

[26] I provided similar testimony on the same issue in the Jawad case in June. The military judge has not issued a ruling in that case.

[27] The ruling is available on the military commission web site at: http://www.defenselink.mil/news/May2008/D026.pdf.

[28] The judge also ordered the DoD General Counsel to ensure no one who testified suffered any adverse consequence for having done so. *Id.* Two weeks later, I was notified by the DoD General Counsel that I was denied the customary DoD medal awarded to officers assigned to the Office of Military Commissions because my service as chief prosecutor was not honorable. Josh White, *Colonel Says Speaking Out Cost a Medal*, WASH. POST, May 29, 2008, at A9. The Air Force recently approved a medal for my honorable service for this same period of time.

The Military Commissions Act provides for closed proceedings to protect classified information, but closed proceedings should be the exception after exhausting all reasonable alternatives. The prosecution team devoted considerable time and effort to get information declassified for use in open court. As an example, we spent more than two years on the Khadr case alone. Brigadier General Hartmann and Ms Crawford made it clear to me in conversations we had in September 2007 that moving cases to trial outweighed the value of open proceedings. They both said Congress gave us the ability to close the proceedings, so we could not afford to waste time trying to declassify evidence when it is not required by the rules.

There is inherent skepticism about the fairness of military commissions and it has been made worse by nearly seven years of bungling that produced no meaningful results. Proving these are fair proceedings at this stage will be extremely difficult even with maximum transparency. It will be absolutely impossible if the trials are held behind closed doors. Lloyd Cutler opined in December 2001 that the military commissions would be "held in the full glare of modern print and video journalism" and expressed optimism that the trials could be done in "a manner that meets all legitimate constitutional and public concerns."[29] If that is to happen we must devote whatever time and effort is required to work through the declassification process. Closed proceedings should only be considered after all reasonable efforts to keep them open are exhausted.

(d) The United States Must Reject Evidence Obtained by Undue Coercion

Placing an individual in a situation where his apparent choices are to say what his interrogators want to hear or possibly die may produce information of significant intelligence value, but it does not produce reliable information that has evidentiary value in an American system of justice. I believed waterboarding and comparable techniques were clearly over the line and I instructed the prosecutors that we would not offer such evidence at trial. Fortunately, in my view, we had sufficient evidence to establish guilt independent of anything a detainee said under excessive coercion, so it was unnecessary to even consider sinking to that level. Nonetheless, Brigadier General Hartmann challenged my authority to exclude evidence obtained by coercion, including waterboarding. In public statements he has consistently refused to rule out the use of evidence obtained by waterboarding and he said the decision is up to the military judges, not the prosecutors.[30] If we condone offering this type of evidence in our military commissions we forfeit the right to condemn others for doing likewise, and hopefully we would condemn any country that sought the death penalty against an American citizen using a confession obtained by waterboarding or similar coercive methods.

Additionally, requiring a prosecutor to offer evidence obtained by methods many consider torture and let the trial judge determine its admissibility places the prosecutor in

---

[29] *Supra* note 5.

[30] Josh White, *Evidence From Waterboarding Could Be Used in Military Trials*, WASH. POST, Dec. 12, 2007, at A4; DoD News Briefing with Brig. Gen Hartmann from the Pentagon, Feb. 11, 2008, available at: http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4142; Josh White, *Charges Are Filed in Cole Bombing*, WASH. POST, Jul. 1, 2008, at A3.

a precarious position where he or she may have to choose between violating the rules of professional conduct and disobeying a superior officer. In his ruling that disqualified Brigadier General Hartmann from participation in the Hamdan case, Judge Allred said: "While it is true that the trial judge is ultimately the gatekeeper for each item of evidence, each Prosecutor also has an ethical duty not to present evidence he considers unreliable."[31]

It really should not be a matter for the prosecutors to decide. It should be our national policy that we do not attempt to convict anyone in any American criminal trial using evidence obtained through methods like waterboarding. Not too many years ago most would have taken that as a given, but today it requires express reinforcement. As former hostage Tom Ahern said twenty-seven years ago when he was offered a chance to torture his Iranian torturer just before his release from captivity, "we don't do stuff like that."[32]

IV. Conclusion

Perhaps it is too late to restore credibility to the military commissions, but some sensible solution is required. In the wake of the recent *Boumediene* decision and with the presidential election on the horizon, now is the time to give this matter the thoughtful consideration it deserves. We need a comprehensive system that ensures detainees are held for legitimate reasons and that allows for full, fair, and open trials for the subset alleged to have committed war crimes. This is an opportunity to begin the process of restoring our standing as the world leader in human rights and adherence to the rule of law. I look forward to the chance to help facilitate that process.

---

[31] *Supra* note 8, at page 11.

[32] Morris D. Davis, op-ed, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, at WK12, http://www.nytimes.com/2008/02/17/opinion/17davis.html.

○